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FRANK R. SAMPSON ET AL., APPELLANTS, V. WILMA J. SISSEL ET AL., APPELLEES.

38 N. W. 2d 341

Filed June 29, 1949. No. 32633.

1. **Equity: Appeal and Error.** In an equity action where decree is rendered in favor of a defendant at the close of the evidence of a plaintiff every fact in evidence and every reasonable inference deducible therefrom must on appeal be resolved in favor of the plaintiff.
2. **Deeds.** By statute it is required that consideration shall be set forth in a deed of conveyance of real estate but when title is attacked on the ground of want of consideration no burden devolves upon the grantee to assume the burden of proving consideration.
3. ———. When an attack is made on a deed on the ground of lack of consideration the general rule is that the statement of consideration is prima facie evidence which may be rebutted.
4. ———. As a general rule a delivered deed passes title even if there is no consideration.
5. ———. A deed without consideration does not protect a title obtained by fraud or undue influence or a transfer in fraud of creditors.
6. ———. The possession of a deed or other instrument of conveyance by a grantee raises a presumption that the instrument was properly delivered and the burden of proof is upon him who disputes it to overcome the presumption.
7. ———. In an action to set aside an instrument on the ground of undue influence the burden is on the plaintiff to establish that the grantor was subject to such influence; that the opportunity to exercise it existed; that there was a disposition to exercise it; and that the result appears to be the effect of such influence.
8. ———. Undue influence exercised by anyone, whether he or another gains by its exercise, renders the instrument thus procured worthless.
9. ———. Before it may be said that an instrument was procured by undue influence the evidence must be sufficient to show that the grantor was capable of having his free agency destroyed and that he was capable of being constrained to depart from his own judgment and will and to follow the will of another.
10. **Evidence.** In an action to set aside an instrument on the ground of undue influence testimony of third persons as to conversations had with a deceased grantor long after the execution of the

instrument of grant relating to the grantor's proposed disposition of his estate is inadmissible as hearsay.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Beynon, Greenamyre & Hecht, and *Denney & Denney,* for appellants.

George A. Skultety, and *Van Pelt, Marti & O'Gara,* for appellees.

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

YEAGER, J.

This action as it finally came to trial was by E. A. Stark, administrator with the will annexed of the estate of Frank J. Sampson, deceased, Frank R. Sampson, and Frances Sampson, plaintiffs, appellants here, against Wilma J. Sissel, Galen Sissel, Reba Meyer, Louis Meyer, and Olive W. True, defendants, appellees here. The action was for a decree setting aside a deed and a bill of sale from Frank J. Sampson, deceased, to Wilma J. Sissel. The action was tried on a second amended petition, answer of defendants, and a reply by plaintiffs.

When the case came on for trial the defendants Reba Meyer, Louis Meyer, and Olive W. True disclaimed any interest in the action or the res thereof and moved for a dismissal as to them. The motion was sustained and the action as to them dismissed. At the conclusion of the evidence adduced by plaintiffs on motion of the remaining defendants a decree was entered dismissing the petition as to said defendants for the reason that the evidence was insufficient to sustain a cause of action. A motion for new trial was filed and overruled. From the order overruling the motion for new trial, the decree, and the order dismissing the action as to Reba Meyer, Louis Meyer, and Olive W. True the plaintiffs have appealed.

By the petition it was declared that Frank J. Sampson died on December 25, 1946, at the age of 79 years, owning

80 acres of land adjoining the city of Fairbury, Nebraska; that after his death a deed and a bill of sale, both dated September 2, 1942, were filed of record in Jefferson County, purporting to have been signed by the said Frank J. Sampson and purporting to convey the 80 acres of land and certain personal property to the defendant Wilma J. Sissel; that the deed and bill of sale were procured by fraud and undue influence of Reba Meyer, Louis Meyer, Olive W. True, and Wilma J. Sissel; that Wilma J. Sissel is the daughter of Reba Meyer and Louis Meyer and Galen Sissel is her husband; that there was no delivery of the deed; and that there was no consideration therefor.

The answer in substance alleged the execution and delivery of the deed and bill of sale and that the consideration was an oral agreement by Wilma J. Sissel that one Howard James was to have the use of the house and other buildings on the land during his life and that he was to be given 6 cows and 100 chickens or that he was to be allowed to keep such cows and chickens on the land as he had not exceeding the number mentioned. In addition to these allegations the answer contained a general denial. The allegations of the answer were by reply denied.

The assignments of error are numerous. The one of controlling importance raises the question of whether or not the court erred in decreeing a dismissal at the conclusion of the evidence of plaintiffs.

Since the decree was rendered in favor of defendants at the close of plaintiffs' evidence every fact in evidence and every inference reasonably deducible from the facts in evidence must be resolved in favor of plaintiffs. 30 C. J. S., Equity, § 506, p. 902.

It becomes necessary therefore to examine the facts and the reasonable inferences to be drawn therefrom to ascertain whether or not it can be said that the elements necessary to sustain a cause of action have been established.

There is no evidence whatever in the record pertaining to the execution of the two instruments except that which appears on their face. On their face they are regular in form and no effort was made to prove irregularity or that they were not executed by the deceased, Frank J. Sampson, and properly witnessed at the time indicated by the instruments. Also there is no evidence with regard to delivery.

The pertinent circumstances testified to were that Frank J. Sampson, in advanced years, lived alone or with Howard James on his farm and a short distance away lived Reba and Louis Meyer; that the Meyers were frequently at his place and in his company and performed for him neighborly service; that at the time the instruments purport to have been executed Wilma J. Sissel was away from the Meyer home and had no direct contact with Frank J. Sampson; that Frank J. Sampson had some kind of a business transaction or transactions with Reba Meyer and Louis Meyer which after the date of the deed and bill of sale culminated in a lawsuit which was not tried but was settled; that at all times up to the date of his death Frank J. Sampson to the extent that he was able operated the farm and his interests thereon as his own; that Wilma J. Sissel neither exercised nor attempted to exercise any control over the farm or the personal property mentioned in the bill of sale until after the death of Frank J. Sampson; that Frank J. Sampson was on terms of cordiality with Frank R. Sampson, a nephew, and Frances Sampson, a sister-in-law, and that he looked to and obtained from them needed care and kind attention in the last days of his life; and that on January 3, 1945, Frank J. Sampson made a will by the terms of which he gave his entire estate to Reuben Sampson, Howard James, and Frank R. Sampson. The face of the will indicates that it was made January 3, 1934, but this is clearly erroneous.

On the question of susceptibility to influence the following appears in the testimony of Frances Sampson:

"Q What can you say, Mrs. Sampson, as to whether or not he was a man that would be influenced by others? * * * A I hardly know how to say it. He would pretend, but when it came to a showdown he used his own judgment, of course. * * * Q Was he mentally alert? A Yes, he always knew. Q He always knew? A While he was there with me. Q Up to the very day of his death you feel he was mentally competent, do you? A Yes, I do. Q And, as you say, he may have tried to please people from time to time, but when it came to a showdown he knew what he wanted and stuck to it? A He did things the way he thought." Nora S. Wade said: "Q Now as you observed Mr. Sampson, your cousin, did you have occasion to observe any occasions in which he appeared to be influenced by other people in his actions? A He was always influenced by his mother; as long as his mother lived he did just about as his mother ordered him to do. Q And would you say he was a man that was subject to influence by other people? * * * A Yes sir. * * * Q And he was always mentally alert, wasn't he? Do you understand my question? A No sir. Q He always knew what he was doing, didn't he? A Well, I suppose he did." Frank R. Sampson said: "Q Now what was, during this period of time that you observed him, what did you observe as to his disposition, especially with reference to being subject to influence by the suggestions of others? A Well, I would say he was feeble and that he could be influenced."

On the question of consideration the only evidence offered by plaintiffs was the following from a deposition given by Wilma J. Sissel which was received as an admission or admissions against interest: "Q. Mrs. Sissel, did you pay any money to Frank J. Sampson for the deed and bill of sale to his land and property? A. No. * * * Q. Did you render any services or perform any work for Frank J. Sampson in exchange for this deed and bill of sale? A. What do you mean by 'services,' neighborly things or— * * * Q. Well, work or labor. A

Labor, no. * * * Q Now, did you ever at any time enter into any written agreement whereby you agreed to do anything for Howard James? A. No. * * * Q. Did you ever have any conversations or correspondence with Frank J. Sampson wherein you agreed to do anything for Howard James? A. No. * * * Q. What is your birth date? A. December 29, 1921. * * * Q. You are the daughter of Reba and Louis Meyer, is that correct? A. Yes, sir."

This summary fairly reflects, we think, all of the evidence bearing directly or inferentially upon the question of whether or not the deed and bill of sale were procured by fraud and undue influence, the question of whether or not there was delivery, and the question of whether or not they were without consideration.

The statutes of Nebraska require that consideration shall be set forth in a deed of conveyance of real estate. § 76-214, R. S. 1943. There is no corresponding requirement either of statute or decision which, when title is attacked by action to set aside the deed, exacts that the grantee shall assume the burden of proving consideration. The case of Miller v. Crosson, 131 Neb. 88, 267 N. W. 145, might indicate otherwise but when the opinion is examined in its relation to the section referred to in the opinion, which is now section 36-408, R. S. 1943, it becomes clear that the statement has no reference to deeds but only to contracts and agreements.

The general rule, when an attack is made on the ground of lack of consideration and the question of consideration becomes a matter of importance, is that the statement of the consideration in a deed is prima facie evidence but that it may be rebutted. Patrick v. Leach, 2 F. 120, 1 McCrary 250.

A further rule is that a delivered deed passes title even if there is no consideration. Conway v. Rock, 139 Iowa 162, 117 N. W. 273; Stauffer v. Milner, 207 Iowa 776, 223 N. W. 686; Bowen v. Willard, 203 Minn. 289, 281 N. W. 256. Of course this rule does not protect a title so

obtained by fraud or undue influence of the grantee nor does it protect against such a transfer by the grantor in fraud of creditors. In 26 C. J. S., Deeds, § 16, p. 189, it is said: "By far the more universal rule, however is that, as between the parties, their heirs or privies, a deed is good without consideration, in the absence of some wrongful act on the part of the grantee, such as fraud, or undue influence, this conclusion being based by some authorities on the ground that it evidences an executed gift or contract, and by others on the ground that the statutes governing conveyances give the deed the effect of a common-law feoffment."

This jurisdiction recognizes the right of an owner of property to convey his estate without consideration, or in other words to make a gift of it inter vivos. Newell v. Pierce, 131 Neb. 844, 270 N. W. 469; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183. While the opinion in Smith v. Black, *supra,* speaks of consideration in connection with the disposition of property the facts as disclosed by that opinion show that the disposition there made was a gift inter vivos and that the question of consideration was not involved. Kellner v. Whaley, *supra,* does not have in it any question of consideration but it illustrates the rule that the conveyance of an estate without consideration or as a gift may be valid.

Plaintiffs however urge that this is so only if possession is also delivered; that in the absence of the delivery of possession along with the instrument purporting to pass title such instrument is testamentary.

We have found no decision in this jurisdiction so holding as respects real estate. The case of Ladman v. Farmers & Merchants Bank, 130 Neb. 460, 265 N. W. 252, does so hold with regard to personal property. In the opinion in that case, by quotation from 12 R. C. L., Gifts, § 10, p. 932, it was said: "To make a valid and effective gift inter vivos there must be an intention to transfer title to the property, as well as a delivery by the

donor and an acceptance by the donee. * * * To have the effect of a valid gift, therefore, the transfer of possession and title must be absolute and go into immediate effect, so far as the donor can make it so by intent and delivery, and must be so complete that if he again resumes control over it without the consent of the donee he becomes liable as a trespasser."

Significantly, we think, in First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496, in defining the elements necessary to constitute a gift of personal property it was said: "To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of the donee he becomes liable as a trespasser." Ladman v. Farmers & Merchants Bank, *supra,* is cited. It will be observed that in this definition no mention is made of delivery of possession. Further in the opinion it is said: "This court, in connection with the placing of title to real estate by one spouse in the other, has laid down the rule that, where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. * * * No reason is apparent why the same rule should not apply in case of transfer of personal property."

By this later statement, if not by the former, it is made clear that as between husband and wife the doctrine of Ladman v. Farmers & Merchants Bank, *supra,* with regard to the necessity of delivery of possession along with title to personal property was rejected. It is made clear that if title has been caused to pass by the donor and is beyond recall the gift is complete and valid. It will be observed that in the case of Ladman v. Farmers & Merchants Bank, *supra,* the court was dealing not with a completed gift but with an effort to enforce an executory transaction.

Whether this is a case which should be considered on

the theory of a pretended gift inter vivos or as one requiring a consideration to make the instruments effective for the purpose of conveying title is not easy of determination. We think however that since by answer the defendants joined issue on the matter of consideration the trial court considered it on that theory and that we should accordingly so do.

On this theory there has been a total failure of proof by the plaintiffs. There is nothing of probative value to rebut the presumption flowing from the prima facie evidence contained in the instruments that they were based on a valuable consideration. On this proposition the plaintiffs were satisfied to rest on evidence alone that Wilma J. Sissel gave no money to Frank J. Sampson and performed no labor for him. This evidence is no more than a negative in part of the recited consideration contained in the instruments.

The district court correctly held that there was a failure of proof that the instruments were without consideration.

There was no evidence whatever with regard to delivery except that the instruments were recorded the day after the death of Frank J. Sampson. Who it was that filed them for record is not shown but we infer as did the plaintiffs that they had been in the possession of Wilma J. Sissel or someone for her and were filed by her or on her behalf.

The situation therefore must be controlled by the rule that possession of a deed or other instrument of conveyance by a grantee raises a presumption that the instrument was properly delivered and the burden of proof is upon him who disputes it. Kellner v. Whaley, *supra*. Accordingly it must be said that the district court did not err in decreeing that there was a failure of proof with regard to the contention that there was no delivery of the instruments.

On the question of undue influence the elements necessary to be established in order to accomplish this end

are: That the grantor was subject to such influence; that the opportunity to exercise it existed; that there was a disposition to exercise it; and that the result appears to be the effect of such influence. Gidley v. Gidley, 130 Neb. 419, 265 N. W. 245; Smith v. Black, *supra;* In re Estate of Farr, 150 Neb. 615, 35 N. W. 2d 489. The parties are in accord on the proposition that this rule is applicable.

A search of the record, the essentials of which it is thought are fairly reflected in the summary of evidence set out herein, has been made to ascertain if there was evidence or reasonable inference from evidence prima facie to support and sustain the elements named. The search shows sufficiently only evidence of opportunity and that only by Reba Meyer and Louis Meyer but not by the grantee.

It is a matter of no grave importance that undue influence was exerted by others than the beneficiary, if undue influence was shown; in the light of the pronouncements of this court. In Gidley v. Gidley, *supra,* the following was quoted with approval from Carroll v. Hause, 48 N. J. Eq. 269, 22 A. 191, 27 Am. S. R. 469: "Undue influence exercised by any one, whether he or another gains by its exercise, renders the will or other instrument thus procured worthless." This was again approved in Woodring v. Siebold, 136 Neb. 647, 287 N. W. 75.

In the evidence appears the statements of witnesses that Frank J. Sampson was subject to influence. There is however no direct evidence or statement of circumstance or circumstances from which a reasonable inference could be drawn that he could be influenced to depart from his own will and follow the will of another or others.

In order to say that plaintiffs have sustained their burden as to this element there must be found in the record prima facie evidence that Frank J. Sampson was capable of having his free agency destroyed and that he was

capable of being constrained to depart from his own judgment and to depart from his own will and follow the will of another. Gidley v. Gidley, *supra;* 31 C. J., Influence, p. 1183. There is no such evidence in the record.

Is there evidence of a disposition to exercise undue influence? The answer must be in the negative.

There is no evidence directly bearing on this question and no evidence of circumstances from which any reasonable inference of disposition to unduly influence could flow. This element involves activity or overt act on the part of the person benefited or the one or ones responsible for bringing about the benefit. Clearly in the absence of direct evidence of overt act or of evidence of circumstances from which overt act could be reasonably inferred this element is incapable of being sustained. There is a total absence of such evidence in the record.

The remaining element, that is that the result appears to be the effect of undue influence, requires no consideration if there is nothing of an overt character to which it can attach. As already pointed out there is nothing in the evidence of such character.

Certain objections to the introduction of evidence on the trial were sustained. In the particular instances offers were made. The rulings in these respects have been assigned as error. We conclude that the rulings were not prejudicial to the defendants. The evidence thus offered related to conversations of Frank J. Sampson with third persons long after the date of the instruments in question with regard to his intended disposition of his estate. In the first place they were inadmissible as hearsay. Shold v. Van Treeck, 88 Neb. 80, 128 N. W. 1134; Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500; Muff v. Brainard, 150 Neb. 650, 35 N. W. 2d 597.

In the second place they were not in proof or demonstration of procurement of the instruments by undue influence.

It becomes unnecessary to consider the question of

whether or not the court erred in dismissing the action against the defendants Reba Meyer, Louis Meyer, and Olive W. True, at the time it was dismissed, rather than to have waited until after the conclusion of the evidence for plaintiffs. It is clear that the evidence was the same as if they had been allowed to remain as party defendants. The evidence was clearly insufficient to sustain a cause of action against them.

In the light of the view taken of the matters discussed herein the remaining assignments of error do not require consideration.

The decree of the district court is affirmed.

AFFIRMED.

WILLIAM A. ROSE, AS ADMINISTRATOR OF THE ESTATE OF MARGARET MEYER, DECEASED, APPELLANT, V. MINNIE KAHLER, APPELLEE.

38 N. W. 2d 391

Filed June 29, 1949. No. 32646.

1. **Witnesses.** The testimony of a witness as to a transaction or conversation had by him with a person since deceased is inadmissible in any civil action or proceeding in the result of which such witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless and until the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation.
2. **Evidence.** Audits or statements of account prepared for use at the trial are not ordinarily admissible, but the trial court may, in the exercise of its judicial discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation, which has been properly admitted.
3. **Appeal and Error.** In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted.

4. **Trial.** Agreements of counsel in regard to the trial of a cause are not absolute, although in writing, and are not to be treated as contracts to be enforced under all circumstances, and they may be set aside by the court in the exercise of a sound judicial discretion for the promotion of justice.
5. **Executors and Administrators.** The true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound in any event to perform in the due course of administration.
6. ———. Although an executor de son tort cannot by his own wrongful act acquire any benefit, yet he is protected in all his acts not for his own benefit which a rightful representative might do.
7. ———. An executor de son tort is liable to the lawful representative or a creditor, either in an action at law for conversion, or in equity for an accounting, for all the assets of the estate he received, except such as were used in payment of such demands as he affirmatively shows were just claims against the estate, and such payments for the use and benefit of distributees as would have been made in due course of administration.
8. **Descent and Distribution.** Section 8-167, R. S. 1943, was not only legislatively intended to be for protection of banks, but also fixes the property rights of the payees named in joint and survivorship deposits, as provided therein, and upon the death of one payee, the survivor takes the whole legal title unless a contrary intent affirmatively appears from the terms of the deposit.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

W. J. Moss and *Melvin Moss,* for appellant.

Denney & Denney, for appellee.

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

CHAPPELL, J.

The administrator of the estate of Margaret Meyer, deceased, brought this action in equity for an accounting and to recover personal assets of the estate of which defendant had allegedly taken possession prior to the appointment of the administrator, and thereafter refused to deliver to plaintiff. Temporary injunction was

granted as prayed, restraining defendant from disposing of any such assets pendente lite.

Defendant answered, denying generally, and alleging that any money of deceased deposited in banks was in a joint and survivorship account, of which defendant was survivor; that the household goods of deceased were sold or given away prior to her death, except a few articles which were divided and sold thereafter with consent of the heirs; that there were no claims allowed against the estate; that the assets were used by defendant to pay debts of deceased or appropriately distributed by defendant to the heirs before appointment of an administrator; and that defendant had nothing in her possession belonging to the estate of which plaintiff was entitled to possession. Plaintiff's reply was in the nature of a general denial.

After hearing upon the merits, the trial court entered its decree, finding generally for defendant, dissolving the temporary injunction, and dismissing plaintiff's action. Motion for new trial was overruled, and plaintiff appealed. The brief assigned some 19 alleged errors, which, summarized, were in effect that: (1) The trial court erred in the admission of certain evidence; and (2) that the judgment was contrary to law and not sustained by the evidence. We conclude that the assignments should not be sustained.

With regard to the first assignment, plaintiff contended that the trial court, over appropriate objections, erroneously permitted witnesses for defendant, having a direct legal interest in the result of the action, to testify with regard to certain transactions and conversations with deceased during her lifetime in violation of section 25-1202, R. S. 1943.

In that regard, plaintiff, as representative, first introduced a witness, who testified generally and specifically with regard to such transactions and conversations, thus affirmatively bringing the situation squarely within the exception specifically provided in the statute.

In construing that section it was held in Mills v. Mills, 130 Neb. 881, 266 N. W. 759: "The testimony of a witness as to a transaction or conversation had by him with a person since deceased is inadmissible in any civil action or proceeding in the result of which such witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless and until the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation." In the light thereof, plaintiff's contention has no merit.

Plaintiff also contended that, over appropriate objections, the trial court erred in admitting certain statements of account. The record discloses that such instruments were, generally speaking, simply abstracts, tabulations, or summations of previous stipulations, evidence, and instruments, such as bank deposits, cancelled checks, and bank ledger sheets, all of which evidence was properly admitted by the trial court. The applicable rule is that audits or statements of account prepared for use at the trial are not ordinarily admissible, but the trial court may, in the exercise of its judicial discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation which has been properly admitted. See, Jones on Evidence, Pocket Edition, § 206, p. 254; 32 C. J. S., Evidence, § 698, p. 592; 22 C. J., Evidence, § 1094, p. 896; Buckley v. State, 131 Neb. 752, 269 N. W. 892.

In any event, plaintiff's contention is controlled by the rule that: "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." Coffin v. Maitland, 146 Neb. 477, 20 N. W. 2d 310. See, also, In re

Estate of Grblny, 147 Neb. 117, 22 N. W. 2d 488; Western Smelting & Refining Co. v. First Nat. Bank, 150 Neb. 477, 35 N. W. 2d 116.

Decision upon the merits rests primarily upon evidence about which there is but little dispute, as it relates to material issues. At the outset we call attention to certain basic facts as a foundation for further discussion. Margaret Meyer died May 30, 1945. The administrator was not appointed until May 7, 1946. On September 9, 1946, the last day for filing claims, the attorney for Stena Feine, a daughter, filed a claim in her behalf against the estate for an alleged balance of $500 allegedly due upon a contract with deceased, hereinafter discussed. Concededly, it was the only claim ever filed against the estate. Objections thereto were filed, and the claim was never allowed. Neither did plaintiff's petition affirmatively allege that there were any unpaid debts or claims against the estate. An order barring claims was entered September 10, 1946.

On March 31, 1947, counsel for plaintiff made a written demand upon defendant to turn over assets of the estate to the administrator. On April 14, 1947, this action was filed, and the temporary injunction granted. Trial on the merits began on September 29, 1948, and on September 30, 1948, plaintiff rested. Defendant then moved to dismiss for the reason, among others, that plaintiff had failed to prove that defendant had in her possession any property or money belonging to deceased on May 30, 1945, and that the record affirmatively showed that any money on hand at that time was in joint and survivorship bank accounts with "Margaret Meyer or Minnie Kahler," defendant herein, of which accounts she was the survivor.

Defendant's motion was overruled, and, at suggestion of the court, it was then agreed that from the evidence thus adduced by plaintiff, it could be found that there was due plaintiff from defendant, including interest, the sum of $396.22, exclusive of the bank accounts, and

that the question of their ownership would be reserved for further consideration by the court.

For the purpose of saving time, if possible, counsel for defendant then asked permission to argue the law relating to the bank accounts, with the privilege of adducing evidence in defendant's behalf with relation to her equities, should the decision thereon be against her. Thereupon, the court on its own motion, permitted defendant to enter a conditional rest, leaving for further disposition the question of whether or not it would necessarily be withdrawn by defendant for the purpose of adducing evidence in her defense. Contrary to plaintiff's contention, it was never stipulated that the court should ultimately enter any judgment whatever against defendant for any amount unless defendant thereafter failed to withdraw her conditional rest and adduce evidence. The record is replete with rulings of the trial court which sustain that conclusion.

In that regard, on October 19, 1948, after giving consideration to contentions of the parties with relation to the bank accounts, the trial court sent a memorandum to the lawyers simply finding in effect that under the law and the evidence thus far adduced only by plaintiff, the balance in the bank accounts would be the property of Margaret Meyer at the date of her death, thus passing title to the representative. In the light of the record theretofore made, such memorandum was never intended to be, and never was in fact a judgment on the merits. It was never filed or entered upon the records by the court in any manner as a final adjudication upon the merits, but was simply a memorandum informing counsel in effect that upon the record as then existent, defendant was not entitled to dismissal, but that plaintiff would be entitled to a judgment if defendant failed to withdraw her conditional rest and adduce evidence to sustain her defense.

In that connection, on November 15, 1948, in open court defendant asked leave to withdraw her conditional

rest theretofore entered by the court, and requested that she be "allowed to proceed with evidence in defense of this action." Plaintiff's sole objection thereto then made was that the district court had no jurisdiction to adjudicate whether or not defendant had made a distribution of money and property prior to appointment of the administrator which were in her possession at the death of Margaret Meyer or which came into her possession thereafter but prior to appointment of the administrator.

Plaintiff's objections thereto, and his motion to require defendant to state the issues upon which she expected to adduce evidence were overruled, and defendant's request was granted. On November 26, 1948, evidence was adduced in defendant's behalf, whereupon she rested, and plaintiff offered no rebuttal evidence. In that situation, the conditional stipulation heretofore discussed was in fact no longer existent or controlling. In other words, the effect of the court's ruling was to set aside the stipulation, which it had a right to do under the circumstances in the exercise of a sound judicial discretion for the promotion of justice. See, Keens v. Robertson, 46 Neb. 837, 65 N. W. 897; In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829.

Turning to the record, we find that there was competent evidence therein to sustain the following: Gerd P. Meyer, husband of Margaret Meyer and father of defendant and several other children, died in 1935. At that time he was the owner of valuable real property, and left a will which was probated after the death of his wife, Margaret Meyer. The assets of his estate were incidentally involved in this action only to clarify defendant's accounting for the assets in the estate of Margaret Meyer.

While the father was still living, on March 18, 1935, a written agreement was entered into between Stena Feine, and the father and mother, whereby, for a consideration of $25 a month she agreed to live with her

aging parents, perform the general household duties, and care for them during their lifetime. Also, on December 17, 1936, after the father's death, the mother executed and delivered to Stena Feine an absolute power of attorney over her money and property. Such money as the mother then had and such as was thereafter received by her during Stena Feine's tenure under the contract was, by agreement, authoritatively deposited in joint and survivorship bank accounts in the name of "Margaret Meyer or Stena Feine." The mother was competent mentally at all times, but was physically incapacitated by heart trouble which made it difficult for her to perform her household duties and transact her business affairs. Therefore, under authority heretofore set forth, Stena Feine performed the duties and looked after such matters with the mother's knowledge and consent until April 10, 1945, when she herself became disabled and no longer able to do so.

At or about that time the mother, without dispute, paid her $3,000, and the agreement aforesaid was dissolved by mutual consent, as specifically provided therein. Stena Feine, defendant, and the mother were all present at that time, and at the request of Stena Feine, because she was physically unable to write, defendant wrote across the face of the contract, "Paid in full March 1945" and Stena Feine herself drew lines through the signatures appearing on the contract. Whether or not a settlement in full was then in fact actually made is not controlling here, and we need not discuss or decide that question.

Be that as it may, before Stena Feine left the mother on April 10, 1945, this defendant undertook to and did assume the former's responsibilities with regard to the mother and her business affairs. At that time, in the presence of all three, it was mutually agreed, and the mother directed that defendant should have authority to handle the mother's business affairs and bank accounts in the same manner as Stena Feine had done, and that

after the mother's death defendant should have authority to pay the funeral expenses and other debts, and make distribution of the money and property remaining to her heirs. At that time the bank accounts were authoritatively changed from "Margaret Meyer or Stena Feine" to "Margaret Meyer or Minnie Kahler" defendant herein and survivor thereof.

Defendant in good faith carried out and performed the duties as authorized and directed aforesaid, not only during the mother's lifetime until May 30, 1945, but thereafter until May 7, 1946, when plaintiff, the administrator, was appointed. The amount on deposit in joint and survivorship bank accounts on May 30, 1945, was concededly $1,647.88, and on May 7, 1946, the balance remaining therein, consolidated into one such account, was concededly $1,060.21, which, before this action was filed, was reduced to $1,035.21 by defendant's payment of $25, a balance due for lettering the mother's monument. In the balance thus remaining, concededly $110.65 was defendant's own money erroneously deposited, and without dispute $413.28 belonged to Mrs. Margaret Lewis, one of the heirs. There were then no other assets of any kind in defendant's possession.

In the meantime, the mother's household goods were by agreement divided among the heirs, or sold. It affirmatively appears that defendant, in good faith, collected therefor, together with rents and other items due and owing the estate, and deposited all of them, except a small amount otherwise accounted for, in the joint and survivorship account, out of which defendant paid the funeral expenses, attorney's fees, taxes, and other just debts of the estate, or proportionately distributed same to the heirs, of which Stena Feine was paid $118.08, and thus, without benefit to herself, in good faith, without dispute accounted in full for the expenditure of all assets coming into her possession before appointment of the administrator. None came into her possession thereafter.

In such a situation, defendant was in law simply acting in the capacity of an executor de son tort, and only liable as such. This court, in a similar action, has approved the rule that the true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound to perform in the due course of administration, and, although an executor de son tort cannot by his own wrongful act acquire any benefit, yet he is protected in all acts, not for his own benefit, which a rightful executor might do. See Lenderink v. Sawyer, 92 Neb. 587, 138 N. W. 744, L. R. A. 1915D 948, Ann. Cas. 1914A 261, and notes.

In the light of the foregoing rule, it was said in that opinion: "Since the district court has acquired jurisdiction of the parties, and the whole subject matter is presented for adjudication, nothing can be gained by rendering a judgment against the defendant and compelling him to file his claim against the estate, thus unnecessarily increasing the litigation and costs. We think that the district court should dispose of the whole case before it."

Likewise, in Dame, Probate and Administration (3d ed.), § 274, p. 292, in discussing an executor de son tort, it is said, citing cases in support thereof: "He is liable to the lawful representative, or a creditor, either in an action at law for conversion, or in equity for an accounting, for all the assets of the estate he received, except such as were used in payment of funeral expenses, of such demands as he affirmatively shows were just claims against the estate, and such payments for the use and benefit of distributees as would have been made in due course of administration."

The defendant comes squarely within the foregoing rules, and having thus without dispute accounted for all assets in her hands other than the bank account, was exonerated of any liability to the administrator unless imposed by the funds remaining in the joint and surviv-

orship account. There was competent evidence in the record that such money was, prior to May 30, 1945, knowingly and authoritatively changed from deposits in the name of "Margaret Meyer or Stena Feine" to the name of "Margaret Meyer or Minnie Kahler" by the joint and several direction, authority, and agreement of Stena Feine, Margaret Meyer, and defendant.

Section 8-167, R. S. 1943, provides: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit, or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business."

That section, this court has held, was not only intended to be for protection of banks, but also fixes the property rights of the payees named in the deposit, and upon the death of one payee, the survivor takes the whole legal title unless a contrary intent affirmatively appears from the terms of the deposit. Concededly, no such contrary intent so appears from the deposits involved herein. We have also held that the statute is not limited in its application to payees of certain relationships and leaves to the depositor the determination of who shall receive the benefits of the act. See, McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Tobas v. Mutual Building & Loan Association, 147 Neb. 676, 24 N. W. 2d 870.

In the light of the foregoing authorities and evidence, we conclude that defendant, having the whole legal title to the bank deposit involved herein, must prevail over the alleged rights of plaintiff as administrator. Whether or not defendant holds the balance of the account as trustee or otherwise for the benefit of the heirs cannot be determined in this action. In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739.

Other matters were argued in the brief, but we deem it

unnecessary to discuss them, and for the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

HENRY WINKELMANN, APPELLANT, V. THEODORE LUEBBE ET AL., APPELLEES.
38 N. W. 2d 334

Filed June 29, 1949. No. 32586.

1. **Mortgages: Deeds.** If a deed is in fact intended as a mortgage and only given as security for a debt such an agreement is enforcible and may be established by parol evidence but it must be established by evidence that is clear, satisfactory, and convincing.
2. ———: ———. A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage.
3. **Frauds, Statute of.** Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing, even though proved by clear and satisfactory evidence, unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation.

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

McKillip, Barth & Blevens, for appellant.

Thomas & Cattle, for appellees.

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

WENKE, J.

Henry Winkelmann brought this action in the district court for Seward County against Theodore D. Luebbe,

Walter A. J. Luebbe, Fay L. Garner, Mathilda M. C. Meyer, and their respective spouses, together with Herman E. Petersen and Theodore D. Luebbe as executors of the estate of Elizabeth Ficke, deceased, and Herman E. Petersen, a single man. The purpose of the action is to specifically enforce an oral agreement permitting the plaintiff to redeem lands he conveyed to Elizabeth Ficke in her lifetime and to require the executors of her estate to execute and deliver to the plaintiff a deed therefor. The trial court found generally for the defendants and dismissed plaintiff's petition. His motion for new trial having been overruled, the plaintiff appealed.

The action being in its nature equitable is reviewable here de novo.

The lands herein involved are the south half of the southeast quarter of Section 12, Township 11 North, Range 1 East, and the southwest quarter of the southwest quarter of Section 7, Township 11 North, Range 2 East, of the 6th P. M., all in Seward County, Nebraska.

The evidence shows that appellant and his family moved onto these lands in 1910 and have lived there ever since. When appellant moved onto these lands they were owned by Herman Harlan, from whom he leased them. He continued to live thereon as tenant until 1923. In 1923 these lands were sold at public sale and appellant purchased them for a consideration of $21,050. The deed thereto was dated March 1, 1923.

In order to finance this purchase appellant borrowed, through B. F. Norval of Seward, the sum of $12,000 and gave a first mortgage on the premises as security therefor. The money loaned by Norval belonged to Elizabeth Ficke, who had no interest in the premises, and the mortgage note and mortgage were made payable to her. The original loan was for five years at five percent interest. When it became due in 1928 and again in 1933, it was renewed upon the same terms. Appellant paid the interest on the loan until 1937, the last payment being made

in the spring of that year. He also paid the taxes up to and including the first half of 1941.

In the spring of 1942, over five years interest then being due and unpaid, Elizabeth Ficke, who will hereinafter be referred to as Miss Ficke, went out to see the appellant at his farm home. Up to this time these people were strangers, all of the business between them had been done through the office of Norval Brothers. A series of negotiations then took place between appellant and Miss Ficke. As a result of these negotiations they met in the office of Norval Brothers in Seward on June 15, 1942. A warranty deed was there drawn in favor of Miss Ficke for a consideration of $14,770, which was the full amount of principal and interest then due on her loan. This deed was signed by appellant and his wife and their signatures were acknowledged by a notary public. The deed was then delivered to Miss Ficke. In return therefor the debt was satisfied and the mortgage note and mortgage were given to appellant. Subsequently, on July 8, 1942, the deed was recorded and the mortgage released. It would appear that the fair and reasonable market value of the land at the time of giving this deed was between $8,400 and $9,000.

The record is not too clear but apparently appellant paid rent for 1942. On November 4, 1942, a written lease was entered into for 1943 for a cash rental of $600. Thereafter it appears that appellant held over under this lease and paid rent for the following years although just what amounts he paid are not clearly shown.

For some 18 years prior to her death Miss Ficke lived in the home of her nephew Herman Petersen. Herman Petersen lived on a farm located southeast of Seward. Miss Ficke became ill in September 1946 and it was discovered she was afflicted with cancer. As a result of this condition she died on January 27, 1947. This action was brought on April 29, 1947.

Miss Ficke left a last will and testament which was allowed and admitted to probate by the county court of

Seward County on February 21, 1947. Therein she selected the appellees Herman E. Petersen and Theodore D. Luebbe to serve as executors of her estate and gave them full authority to sell her real estate and distribute the net proceeds thereof to her niece and nephews, the appellees Mathilda M. C. Meyer, Theodore D. Luebbe, Walter A. J. Luebbe, Herman E. Petersen, and Fay L. Garner.

Appellant's evidence, both received and offered, tends to prove that during the several negotiations between appellant and Miss Ficke, leading up to the deed of June 15, 1942, that Miss Ficke promised that if at any time within five years thereafter he could pay her what she had in the farm she would deed it back to him. It is this offer he seeks to enforce.

It is true, in this jurisdiction, that if the deed is in fact intended as a mortgage and only security for a debt owing that such an agreement is enforcible and may be established by parol evidence, but it must be established by clear, satisfactory, and convincing evidence. Morrow v. Jones, 41 Neb. 867, 60 N. W. 369; Butler v. Peterson, on rehearing, 79 Neb. 715, 116 N. W. 515; O'Hanlon v. Barry, 87 Neb. 522, 127 N. W. 860; Cox v. Young, 109 Neb. 472, 191 N. W. 647.

With regard to this burden we said in Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525:

"Has plaintiff sustained the burden of proving an oral contract the terms of which are clear, satisfactory, and unequivocal; that is, does the evidence of plaintiff with clarity, satisfactorily, and unequivocally, or as unequivocally is defined, not doubtfully and not ambiguously but clearly, when all of its parts and the elements of a contract are taken into consideration, indicate the existence of a contract? If it does then the requirements of the rule in this respect have been satisfied.

"The rule is not one of weight but of quality and substance of evidence. It means that when he has done

this, in the absence of anything to the contrary, his burden in this respect has been sustained."

Assuming the oral agreement herein sought to be enforced comes within the foregoing class, which we find it does not, we do not think the evidence, both received and offered, is of such character as to sustain appellant's burden.

There is no question but what a mortgagee may purchase the mortgaged property and thus acquire the absolute ownership thereof. Here the oral agreement sought to be enforced would permit the appellant, at any time within five years after June 15, 1942, to require the grantee to reconvey the property to him by paying the purchase price. Whether such an agreement is called a condition subsequent or an option to repurchase, which we find it to be, the appellant cannot recover in either event.

As to the former, we said in Lefferdink v. Schmutte, 149 Neb. 695, 32 N. W. 2d 194: "The effect of the evidence rejected was to prove by parol and to attach to the note a condition subsequent. There is no doubt on the record that the note was based on a valid consideration and was for an amount of money due and owing and that it was intended to be a valid and binding obligation. * * * The purpose of the evidence was to effect a modification or change by parol of the note the validity of which as a binding obligation from the date of execution was not brought by evidence into question. This being true, under well-settled legal principles of law the trial court rightly rejected the evidence." See, Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412; Spiegal & Son v. Alpirn, 107 Neb. 233, 185 N. W. 415; Weidenfeld v. Olson, 132 Neb. 303, 271 N. W. 806.

We said in Anderson v. Lincoln Joint Stock Land Bank, 131 Neb. 150, 267 N. W. 355: "The allegation in the petition that the deed was given upon consideration to reconvey for a certain sum and the allegation of the

reply that the deed was given as additional security are inconsistent and contradictory. The one presupposes the passing of the legal title by the grantor; the other, that the legal title is retained by the grantor."

As stated in Sauer v. Fischer, 247 Mich. 283, 225 N. W. 518, 65 A. L. R. 766: "A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase, and not a mortgage. See Blumberg v. Beekman, 121 Mich. 647; Gogarn v. Connors, 188 Mich. 161."

And as stated in Esch v. Leitheiser, 117 Ind. App. 338, 69 N. E. 2d 760: "It is true that appellant continued to have the right to repurchase the property at a certain price, within a certain time, at her option, but the mortgage relationship did not necessarily continue because of that fact. As said by Justice Mitchell, speaking for the Supreme Court in Voss v. Eller (1887), 109 Ind. 260, at page 264, 10 N. E. 74, at page 76: 'It does not follow that a debtor may not convey property to his creditor in payment of an existing debt, nor that the two may not, by a contract made at the time of a conveyance so made, thereafter occupy the relation of vendor and purchaser toward each other, in respect to the land so conveyed. If the pre-existing liability of the debtor is extinguished, and the personal remedy of the creditor is released in consideration of a sale and conveyance of the property, the fact that a contract to resell, upon certain terms and conditions, is entered into, does not constitute the transaction a mortgage. Or, if, as a result of the agreement, the debt is extinguished, leaving the grantor the option to pay or not, as he pleases, and thereby entitle himself to a reconveyance, the transaction operates as a conditional sale.' "

"Oral agreements for the sale of lands are void on

their face as within the statute of frauds because not in writing, even though proved by clear and satisfactory evidence, unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation." Herbstreith v. Walls, 147 Neb. 805, 25 N. W. 2d 409. See, also, Overlander v. Ware, 102 Neb. 216, 166 N. W. 611; Taylor v. Clark, on rehearing, 143 Neb. 563; 13 N. W. 2d 621; Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Baker v. Heavrin, 148 Neb. 766, 29 N. W. 2d 375.

No such part performance as would take the case out from under the statute of frauds has either been alleged or proved. We therefore come to the conclusion that the judgment of the trial court is correct and therefore is affirmed.

AFFIRMED.

MARTIN H. JURGENS ET AL., APPELLEES, V. JOHN B. WIESE ET AL., APPELLANTS.
38 N. W. 2d 261

Filed June 29, 1949. No. 32624.

1. **Adjoining Landowners.** A person on whose land a hedge is located is the owner of it, although the roots and branches thereof extend into and over the land of another, and the adjoining owner has no property in or ownership of the hedge.
2. ———. The fact that an owner of land trims branches from a hedge on the land of an adjoining owner which extend over the property of the first owner is no evidence that he has an interest in or ownership of any part of the hedge or that it is a boundary between the lands of the owners.
3. **Boundaries.** A hedge constituting a boundary between adjoining lands is the common property of the owners of the lands, but neither has a right to cut, injure, or destroy the hedge by the exercise of his desire or judgment.

4. **Adjoining Landowners.** One whose property is invaded by the boughs of a hedge growing on adjoining premises may cut them in a proper manner at the point where they enter his property.
5. **Injunction.** Injunction is a proper remedy to prevent injury or destruction of a hedge by a stranger to the inheritance.
6. **Actions.** The owner of real estate is not required to suffer the devastation of a hedge thereon by a trespasser and seek relief only in an action at law for damages.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Carstens & Pickett, for appellants.

Leslie H. Noble, and *Hubka & Hubka,* for appellees.

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

BOSLAUGH, J.

This case was instituted by Martin Jurgens and Anna Jurgens, appellees, to prevent John B. Wiese and Tena R. Wiese, appellants, from destroying a hedge located entirely, as alleged, on and near the south boundary of the land of appellees, and to recover damages for a partial destruction thereof.

Appellants allege the parties were adjoining landowners and they and their grantors had for more than 10 years last past recognized the boundary between their lands to be the center of the hedge; that appellants had trimmed it on their side; that they did not claim the entire hedge, but only 50 percent thereof; that they were cutting it to protect their property in the hedge; and that they were the owners by adverse possession of any land south of the center of the hedge and north of the original boundary line of their land, as located by the original survey. These matters were pleaded defensively and as a counterclaim with an additional allegation of damages resulting from a cutting of a part of the hedge by appellees, and they ask a dismissal of the petition, a determination of the boundary line, and division thereof between the parties, and damages.

The district court found generally for appellees, that the evidence showed the row of hedge trees was north of the south boundary of their land and wholly thereon, and by decree awarded them damages and a permanent injunction prohibiting appellants from unlawful interference with the hedge. The motion of appellants for a new trial was denied, and they have appealed.

The northwest quarter of Section 18, Township 4 North, Range 8 East, of the 6th P. M., Gage County, Nebraska, was owned by John Williams. He planted the hedge in question many years ago, about 1870, and he claimed that the hedge was a part of his farm and belonged to him. He sold the land to John Lenners about the year 1900. Lenners always claimed the hedge was a part of his land. "Williams sold it that way." He cut posts from trees in the hedge and used them as fence posts; his son Henry Lenners, who later resided on the farm, cut part of the hedge and used posts therefrom in building a fence; and John Lenners in the fall of 1935 gave notice to John B. Wiese, one of the appellants, not to interfere with or destroy any part of the hedge, if he did Lenners would stop him. John B. Wiese cut none of the hedge from 1931 to 1947. About 1935 or 1936 John B. Wiese said he was running into trouble with Lenners and "I want to take that hedge from the old gentleman." John Lenners died, the land was sold in the partition of his estate, appellees bought the west 132.77 acres thereof in 1945, and are the owners of it.

The southwest quarter of Section 18, Township 4 North, Range 8 East, of the 6th P. M., Gage County, Nebraska, was owned by George Wiese, the father of John B. Wiese, one of the appellants. The evidence is uncontradicted that George Wiese never made any claim to the hedge but did complain that it was too close to the line. He stated more than 30 years before the trial of this case, "To my notion it ain't right. Lenners has got that big hedge so close * * * (it) is damaging my land. * * * By sapping and they had to go along it every so

often and cut branches." He did not claim the hedge was on his land or on the line, but said it was too close to the line. Appellants bought this land from the father of John Wiese in the spring of 1933, have owned it since, and resided thereon commencing in the spring of 1934. John B. Wiese, one of the appellants, did not during the period from 1931 to 1947 make any claim that the hedge was on their land or that it was on the boundary line. He did a couple of times during that period complain that the hedge was sapping his ground and causing him damage. After appellees bought their land John Wiese told Mr. Jurgens he could get "damage off you" because the hedge damaged his land, that Wiese did not own the hedge, he only claimed damage. He wanted to have some damage for the injury done his land. The hedge was so close to the line it sapped some of his ground. When Jurgens asked him how much he wanted, Wiese said, "Half of it." Wiese admits he had a conversation with Jurgens in 1947 about the hedge in which he said he felt that the hedge had done him a lot of damage, and that he thought he "was entitled to have half that hedge."

The hedge was all planted by the man (John Williams) who was the original owner of the land, along the west and south of the Jurgens' land. The hedge along the west of the land is 26.5 feet east of the west boundary, and the part thereof along the south is one foot north of the south boundary of the land, wholly upon the land of appellees. The trunks of the trees are north of the center section line dividing the northwest quarter and the southwest quarter of this section. This hedge was planted many years ago, and in some places is very thick, has good-sized trees, and has overhung on both sides from the trunk line six or seven feet. The farm operations on the Wiese land were conducted as close as possible to the hedge, but not within one foot thereof. There is, and had been for quite a number of years, a fence on the Wiese land because of the pasture thereon, about three

feet south of the hedge for a considerable distance from the east boundary of land of appellees. There was such a fence there as much as 35 or 36 years ago. Appellants were cutting the hedge at the time the suit was filed. There was evidence that the damage, because of the part of the hedge cut by them, was in excess of the amount awarded to appellees.

The contention of appellants that they acquired the area between the south boundary line of the land purchased by appellees and the hedge extending from east and west across the south part thereof, by adverse possession or by long acquiescence of a fence or hedge as a boundary line between the lands in question, is not established by the evidence. The proof is the opposite. The record is clear that the hedge was planted and the trunks of the trees thereof are about one foot north of the south line of this area, and wholly upon the land of appellees. The hedge is their property, and no part of it has ever been owned by appellants. There is no evidence that they ever used or claimed any area north of the south boundary line of the land of appellees. The complaint of appellants and their grantor was that the hedge was north of, but so close to the boundary line that it damaged the land now owned by appellants and they sought and demanded the payment of damages. The finding of the trial court generally for appellees and that the hedge was wholly upon their land is abundantly sustained by the evidence. The ownership of trees standing wholly on the land of one owner, although their roots or branches extend into or over the land of another, is vested in the person on whose land the trees stand, and the adjoining owner has no property in them. Weisel v. Hobbs, 138 Neb. 656, 294 N. W. 448; Wideman v. Faivre, 100 Kan. 102, 163 P. 619, Ann. Cas. 1918B 1168; Cobb v. Western Union Telegraph Co., 90 Vt. 342, 98 A. 758, Ann. Cas. 1918B 1156; 2 C. J. S., Adjoining Landowners, § 37, p. 33; 1 C. J., Adjoining Landowners, § 90, p. 1232; 1 Am. Jur., Adjoining Landowners, § 55, p. 536.

The fact that appellants and their grantor cut branches from trees in the hedge which extended over their property is no evidence that appellants had any interest in or ownership of any part of the hedge, neither was it a recognition of the hedge as a boundary between the lands of the parties. One whose property is invaded by the boughs of trees growing on adjoining premises may cut them at the point where they enter his property. The act of cutting the branches to the extent they have entered the adjoining property is the exercise of a right, but it is not evidence of the ownership of a tree or trees from which the branches grew. Michalson v. Nutting, 275 Mass. 232, 175 N. E. 490, 76 A. L. R. 1109; Gostina v. Ryland, 116 Wash. 228, 199 P. 298, 18 A. L. R. 650; Cobb v. Western Union Telegraph Co., *supra;* 1 Am. Jur., Adjoining Landowners, § 56, p. 537; 2 C. J. S., Adjoining Landowners, § 38, p. 33.

If the hedge had been by the parties constituted a boundary line between their lands, it would have been their common property, but neither would have had a right to cut, injure, or destroy any part of it by the exercise alone of his desire or judgment. Weisel v. Hobbs, *supra;* Lennon v. Terrall, 260 Mich. 100, 244 N. W. 245; Musch v. Burkhart, 83 Iowa 301, 48 N. W. 1025, 32 Am. S. R. 305, 12 L. R. A. 484; 1 Am. Jur., Adjoining Landowners, § 59, p. 540; 2 C. J. S., Adjoining Landowners, § 40, p. 35. See, also, Schuster v. Schuster, 84 Neb. 98, 120 N. W. 948, 29 L. R. A. N. S. 224, 18 Ann. Cas. 1078.

Appellants admit they were cutting the hedge and claim they were acting within their legal rights thereby to protect their property in it, that they were the owners of at least one-half of it. They had cut about 20 yards of the hedge and more than 20 hedge trees, and were continuing to cut the hedge at the time the suit was filed. Injunction was a proper remedy. Equity will interfere by injunction to prevent destruction of a hedge by a stranger to the inheritance as being such an injury to the realty as cannot be fully compensated in damages

for the trespass. One who has trespassed upon the land of another, and threatens to continue such trespass may be enjoined from so doing. The owner of real estate is not required to permit the devastation of his hedge by a trespasser and seek relief in an action at law for damages. He may resort to an action to prevent such trespasses. Ayres v. Barnett, 93 Neb. 350, 140 N. W. 634; Sapp v. Roberts, 18 Neb. 299, 25 N. W. 96; Weisel v. Hobbs, *supra;* 1 Am. Jur., Adjoining Landowners, § 59, p. 540.

We make the same findings as did the trial court, and affirm its decree.

AFFIRMED.

IN RE ESTATE OF HARRY K. GRAINGER, DECEASED. THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, TRUSTEE UNDER THE WILL OF HARRY K. GRAINGER, DECEASED, APPELLEE, V. CLARENCE A. DAVIS, GUARDIAN AD LITEM FOR SHEILA NORBURY GRAINGER, A MINOR, APPELLANT.
38 N. W. 2d 435

Filed July 7, 1949. No. 32636.

1. **Statutes.** The rule ejusdem generis, that, where particular words are followed by general, the general words are restricted in meaning to objects of the like kind with those specified, is only an aid to interpretation, and yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed.
2. **Trusts.** Section 30-1801, R. S. 1943, vests judicial discretion in the county court to require a bond of a trustee where the court determines that a bond is required by a change in the circumstances or situation of the trustee or for other sufficient reason, notwithstanding the fact that the testator directs in his will that no bond be required.
3. ———. Where the county court has exercised that discretion and determined that a bond is required, the question on appeal is whether or not there has been a clear abuse of that discretion.

APPEAL from the district court for Lancaster County:

JOHN L. POLK, JUDGE. *Reversed and remanded with directions.*

Davis, Stubbs & Healey, for appellant.

Stewart & Stewart, for appellee.

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

SIMMONS, C. J.

This appeal involves the basic question of whether or not the county court of Lancaster County erred in requiring a trustee to give a bond. On appeal the district court held that a bond should not be required. We reverse the judgment of the district court and remand the cause.

On August 19, 1943, Harry K. Grainger executed his last will and testament. He died March 29, 1947. By his will he provided that his estate be held in trust for his wife and children. The wife elected to take under the statute.

The will also provided that "I nominate, constitute, and appoint THE FIRST TRUST COMPANY OF LINCOLN, NEBRASKA, and its successors, Executor of and Trustee under this, my Last Will and Testament.

"I expressly direct that my said Executor and Trustee shall not be required to give any bond or undertaking for the faithful performance of its duties as such Executor or Trustee, and that, if any such bond or undertaking shall be required by any law, statute or rule of court, no sureties shall be required thereon."

Among other powers given to his designated executor and trustee was the following: "To cause the securities at any time held by it, as such Executor or Trustee, or any part thereof, to be registered in its name, as such Executor or Trustee, or in its own individual name, or in the name of its nominee, or to take and keep the same unregistered and to retain them, or any part thereof, in such condition that title thereto will pass by delivery,

but the interests of my Estate and/or of the Trusts herein provided for in said securities shall be shown at all times on the books and accounts of my said Executor or my said Trustee, which shall be liable for the acts or omissions of its nominee as for its own."

The will was admitted to probate on May 1, 1947, and the execution and administration of the estate was granted to The First Trust Company as executor.

The executor filed its final report, and on June 21, 1948, it was authorized to assign the trust property to itself as trustee upon giving a bond in the sum of $400,000. Upon application of the trustee the bond required was reduced to $200,000. While these proceedings were pending, the executor made application, which was granted, to transfer and register the securities in the name of its nominee, Waugh and Company.

The trustee appealed from the order requiring a bond. The amount of the bond is not questioned. The county court fixed an appeal bond and appointed Clarence A. Davis as guardian ad litem of the minor beneficiary, and directed that he contest the appeal.

Issues on appeal were made presenting the question as to whether or not the county court had discretion to require the bond under the law and facts. Trial was had to the court with the result above stated.

There is no substantial dispute in any of the facts in this matter. We do not have here the record of the evidence, if any, made in the county court. It appears to have been an ex parte hearing. In the district court, the county court records were stipulated in evidence. The parol testimony establishes that the capital, surplus, and undivided profits of The First Trust Company have materially increased, and that there has been no material change in its policies or management since the will was executed; and that there is no reason so far as the trust company itself is concerned that has arisen since the will was executed to cause a bond to be required. Its

present capital, surplus, and undivided profits amount to $858,000.

At the hearing in the district court, the widow, who is not a beneficiary of the trust, and the adult son, who is, filed written requests that no bond be required of the trustee.

The trust estate consists almost entirely of cash and securities amounting in value to about $250,000. Under the provisions of the will the trust continues for 18 years.

The First Trust Company is the only trust company operating in Lancaster County and probably in the state in trusts of this nature. It is trustee in some capacity in over 50 trusts involved in estates probated in Lancaster County. The total amount of these trusts is in excess of $3,500,000. It has fiduciary bonds on file totaling $195,000 in those estates. In most of the estates no bonds have been required, and likewise in most of them no, or only partial, reports have been made to the county court, although reports have been made to the beneficiaries of the trusts. In many instances beneficiaries have not desired that reports be filed. In other instances the court had within months prior to the hearing requested reports and they have not been made. These matters were considered by the county court when the order requiring the bond was made.

The First Trust Company has a general bond in the sum of $40,000 with the Department of Banking, as required by section 8-211, R. S. 1943.

The trustee proposes to use the nominee statute in this and other like cases.

It is the position of the guardian that this matter is controlled by sections 30-1801 and 8-211, R. S. 1943. It is the position of the trust company that the matter is controlled by section 30-1801, R. S. 1943, as a special statute, as against section 8-211, R. S. 1943, being in terms general. As we view the matter, section 8-211, R. S. 1943, need not be here considered, save to point out that

it discloses a general legislative policy in matters of this kind.

Section 30-1801, R. S. 1943, is as follows: "Every trustee to whom any estate, real or personal, shall be devised or bequeathed in trust for, or in whom as trustee any trust shall be created in any manner in favor or for the benefit of any minor or other person by the will of any deceased person, or who may be appointed by any county court to carry out the provisions of any will which creates a trust without naming a trustee, shall give bond to the county judge having jurisdiction of the probate of the will in such sum and with such sureties as the court may order, conditioned as follows: (1) To make and return to the county court, within such time as the court shall direct, a true inventory of all goods, chattels, rights, credits and estate so devised or bequeathed; (2) to file an inventory and render an account to such court of the trust estate in his hands, of the management, disposition and income thereof, at such times as the court shall direct; (3) to faithfully execute such trust under the direction of the court according to the true intent and meaning thereof; and (4) to adjust and settle his accounts with such court at the expiration of his trust, and pay and deliver to the person entitled thereto all balances, money and property in his possession and for which he is liable as such trustee. *But if the testator in his will has directed that no bond be required of such trustee, none need be given by him, unless the court, at the time of proving the will or thereafter, shall determine that a bond is required by a change in the circumstances or situation of the trustee or for other sufficient reason.* The cost of the premium for procuring a bond shall be allowed the trustee."

The issue here depends upon the construction of the language emphasized by us.

The rule of construction here applicable is: "The rule ejusdem generis, that, where particular words are followed by general, the general words are restricted in

meaning to objects of the like kind with those specified, is only an aid to interpretation, and yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed." Dillard v. State, 104 Neb. 209, 175 N. W. 668.

In order to determine the object sought to be accomplished by the act reference is made to our decision in the case of In re Estate of Frerichs, 120 Neb. 462, 233 N. W. 456, filed December 5, 1930. We there had a case where a trust estate of personal property was created by will for a minor son of the testator, the trust to continue into his years of majority. The testator made no requirement that a bond be given by the trustee. The county court held that, the testator not having required a bond of the trustee, and no showing of changed conditions having been made, it was not necessary for the trustee to give bond, and that the county court did not have jurisdiction to administer the trust estate. On appeal we affirmed the decision of the county court. We held that "When the testator by his will creates a trust in favor of a minor and requires no bond or security of the trustee, the county court cannot demand such bond or security unless probability of loss to the cestui que trust, or some other equitable ground, is shown." The effect of the decision was to hold also that the county court did not have jurisdiction to administer the trust. We further held that any change in the law was a matter for legislative action.

Thereafter at the next session of the Legislature there was enacted Chapter 42 (Laws 1931, p. 137). That act was approved April 20, 1931, and in part is now section 30-1801, R. S. 1943.

As stated in the title, that act invested the county court with jurisdiction of trust estates created by will, and provided for the qualification, appointment, and removal of testamentary trustees, and for the management and settlement of such trust estates.

The effect was to substantially change the law in all respects as declared in the Frerichs decision. Subject to the exception to be hereinafter discussed, the act made mandatory the giving of a bond by the trustee. The act specified the conditions of the bond so far as the making and returning of an inventory, the rendering of an account when directed by the court, the faithful execution of the trust, and a final settling of accounts by the trustee are concerned. Whether or not the trustee is required to do those things, in the absence of a bond, we need not here determine. The inclusion of those conditions in the bond indicates the legislative concern that the sureties on the bond guarantee that those acts be done by the trustee.

The exception to the requirement of a bond so conditioned in all cases is that if the testator has directed in his will that no bond be required of the trustee, none need be given. Had the Legislature stopped there, the issue here presented would not arise. The Legislature went further and made an exception to the exception by providing that if the county court shall determine that a bond is required by a change in the circumstances or situation of the trustee, or for other sufficient reason, then a bond may be required notwithstanding the provision of the will.

It is clear that whatever discretion this provision grants is vested in the county court and the question on appeal is whether or not there has been a clear abuse of that discretion. 3 Am. Jur., Appeal and Error, § 959, p. 522; 5 C. J. S., Appeal and Error, § 1583, p. 472; In re Estate of Scott, 76 Neb. 28, 106 N. W. 1003, on rehearing, 76 Neb. 30, 107 N. W. 1004.

We think it apparent that the object the Legislature sought to accomplish was that the trust estate be administered and preserved for the purposes and persons designated by the testator. The exceptions, therefore, must be construed in the light of that purpose.

Was there a change in the circumstances or situation

of the trustee, or other sufficient reason to require a bond? We think such a change is shown and it occurred after the death of the testator. The testator provided in his will by general terms for the use of a nominee by the designated trustee. However, at the time the will was drawn and during his lifetime, Nebraska did not have a nominee statute. Section 24-604, R. S. Supp., 1947, did not become effective until after the testator's death and the admission of the will to probate. That act gives broad powers to the trustee and its nominee. While it is apparent that the testator contemplated the use of a nominee by the trustee, it does not follow that he contemplated the passage of section 24-604, R. S. Supp., 1947. In the light of that change in the situation and power of the trustee it cannot be held that the county court abused its discretion in determining that a bond should be required.

Were there other sufficient reasons? The term is a broad one and its boundaries cannot be exactly defined. The facts and circumstances of each case must be considered in the light of the object sought to be accomplished by the Legislature. It is clear that the testator reposed confidence in the fidelity and financial ability of his designated trustee. It may be assumed that he knew of the facts concerning his trustee. It may not be assumed that he knew of the extent of its obligations and its manner of handling the many trusts being administered by it in Lancaster County alone. The testimony of the testator's attorney is that he advised the testator it was not the practice "at least in New York City" to require bonds of responsible corporate fiduciaries; that if The First Trust Company was a responsible institution, it was foolish to incur the expense of a bond; and that testator stated there was little likelihood that the trustee would not be able to respond for any dereliction of its duties and he did not want his estate burdened with the expense. However, the testator must be held to have known that under the law of this state then ex-

isting, that decision was not exclusively his. The county court is not required to accept the testator's judgment in all cases. Under the facts as they are here shown to be, it cannot be held that the county court abused its discretion in finding that there were other and sufficient reasons, to which the judge testified, that justified the requirement of a bond.

Accordingly, we hold that the county court did not abuse its discretion in requiring the trustee to furnish the bond. The district court erred in its judgment that the bond need not be given.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment in conformity with this opinion and to certify the same to the county court.

REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., dissenting.

Although I agree with the majority opinion in its construction of section 30-1801, R. S. 1943, I cannot agree that the record presents a situation from which it can be said that such a change has taken place in the circumstances or situation of the trustee or other reason exists sufficient to authorize the county court to require bond, contrary to the express wishes of the testator.

LOUP COUNTY, NEBRASKA, APPELLEE, V. CHARLES A. RUMBAUGH ET AL., APPELLANTS.
38 N. W. 2d 745

Filed July 7, 1949. No. 32525.

1. **Evidence.** The general rule is that, while the court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case.
2. ———. However, where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine

its own records and take judicial notice of its own proceedings and judgments in the former action.

3. Waters. An irrigation district is a public corporation and the powers of its officers and directors are limited by the terms of the statute under which the district was created.
4. Taxation. There is no statutory authority in this state authorizing a county board of equalization to assess and levy taxes against landowners and school land leasehold owners within an irrigation district to pay judgments obtained against such public corporations.
5. Judgments. It is a general rule with respect to domestic judgments that they cannot be collaterally impeached by the parties for collusion or fraud not going to the jurisdiction, and that consent judgments are as conclusive on collateral attack as judgments rendered after a trial.
6. ———. If the judgment was collusive or by the consent of an officer to a matter with respect to which he had no authority to bind the public, and it was not a decision by the court after a hearing on the merits, it does not afford a basis for a plea of res adjudicata as against the public interest involved.
7. ———. If a suit is devised for the purpose of having a certain judgment entered, it will not be binding upon the public or those who are not parties to the scheme adopted for that purpose.
8. Taxation. When a county brings an action to foreclose a tax sale certificate against a school land leaseholder within an irrigation district, a public corporation, and the taxes constituting the basis of the action were assessed and levied by the county board of equalization without statutory authority to pay judgments obtained against the district, the county cannot successfully maintain the foreclosure suit against the leaseholder.

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

Davis & Vogeltanz, for appellants.

A. F. Alder, for appellee.

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

MESSMORE, J.

This is a tax foreclosure action brought by Loup County, Nebraska, as plaintiff, against Charles A. Rumbaugh and Rosale Rumbaugh, his wife, to foreclose irrigation taxes levied and assessed upon the school land

leasehold interest held by defendants upon land owned by the state.

The plaintiff's amended petition alleges in substance that the school land leasehold interest in that part of Section 36, Township 24 North, Range 19 West of the 6th P. M., in Loup County, Nebraska, contained within the boundaries of the Calamus Irrigation District, was duly, legally, and regularly assessed and taxes levied thereon by the county board of Loup County, the board of directors of said irrigation district having neglected and refused to make such a levy for and as an irrigation tax the most of the years from 1928 to 1942, said irrigation tax being for the payment of judgments rendered and in force against said irrigation district for expenses growing out of, connected with, and incident to the organization of said district, and for the payment of principal and interest of outstanding bonds, otherwise designated as warrants, of said irrigation district; that said taxes were not paid when due and became delinquent; that on July 2, 1945, after said property was duly advertised and offered for sale at public auction by the county treasurer of Loup County, as provided by law, for the taxes levied for each of said years, and said property remaining unsold for each of said years for want of bidders, the property was, pursuant to proper resolution of the county board in the manner and form provided by law, for the use and benefit of plaintiff, and on said date sold to plaintiff for the sum of $1,251.40, for the amount of taxes, interest, penalty, and expenses thereon; and that the county treasurer did issue to plaintiff county treasurer's tax-sale certificate No. L 100, and the plaintiff is now the owner and holder of said tax-sale certificate which remained in the custody of the county treasurer, subject to assignment of any person wishing to buy for the sum expressed on the face thereof, and interest thereon as provided by law. The plaintiff then set up its lien and the authorization of the county attorney to proceed to foreclose the tax-sale certificate in

the name of the plaintiff as trustee for itself and for the municipal subdivisions for which said taxes were assessed and levied. The plaintiff further alleged that the defendant Charles A. Rumbaugh was at all times mentioned the record title owner of said leasehold by virtue of school land lease as indicated by the records in the office of the county treasurer of Loup County; and that the right and title of each of said defendants in the property above described, are subject, junior, and inferior to the lien of the plaintiff, and the plaintiff was entitled to a foreclosure. The prayer of the amended petition is in the usual form for an accounting, foreclosure, and declaration of liens.

The defendants' answer, for the purposes here to be considered, denied generally the allegations of the amended petition not admitted; specifically denied that the county board of Loup County, Nebraska had any power to levy the taxes for the payment of a judgment, or judgments, against the Calamus Irrigation District as alleged; alleged that the levying of said taxes was null and void, and the same could not become a lien against any of the real estate in suit and upon which the defendant Charles A. Rumbaugh had a school land lease; that no proper and sufficient proceedings were had for the levying of any of said taxes; and prayed dismissal of the plaintiff's case.

On October 22, 1947, the district court entered a decree and judgment of tax foreclosure in favor of the plaintiff and against the defendants, upon the school land leasehold of Charles A. Rumbaugh, as set out in the amended petition. Upon the overruling of the motion for new trial, the defendant Charles A. Rumbaugh appeals.

For convenience the parties will be referred to as originally designated in the district court.

It appears from the record that on September 29, 1927, an action was brought in the United States District Court for the district of Nebraska, Grand Island division,

by Greenshields & Everest Company, a corporation, Trustee, organized and existing under the laws of the State of Iowa and a resident and citizen of that state, against the Calamus Irrigation District, a corporation, which, by stipulation of the parties, was transferred to the Omaha division of said court.

The petition alleged, among other matters, that on December 16, 1925, the defendant, for a valuable consideration, duly and legally executed, sold, and delivered nine certain warrants of the Calamus Irrigation District of the denomination of $500 each, payable to bearer, and which were presented for payment on December 23, 1925. The payment was refused. The plaintiff prayed judgment for the amount of $4,500, with interest and costs. The defendant, by one Roy M. Harrop its attorney, filed an answer alleging the defendant to be a corporation de jure or de facto, with full power to exist and operate as such, subject to be questioned by quo warranto, or otherwise, as to its corporate capacity only by the State of Nebraska; admitted the diversity of citizenship of the plaintiff and defendant and the value of the subject matter in suit; admitted that in the year 1925 it executed, sold, and delivered its nine warrants, payable to bearer, as described in the plaintiff's petition and which were registered December 23, 1925; alleged that it was advised by competent legal authority of this state and an adjoining state of its liability on said warrants, and would confess judgment thereon but for the matter thereinafter pleaded, which constituted a proper subject of adjudication. This matter was with reference to an action pending in the district court for Loup County having to do with obtaining authority to issue bonds in the amount of $163,000 for the purpose of providing a construction fund for the district. The proceedings with reference to this matter are alleged, and are not necessary to be set out. The defendant prayed the judgment of the court that it is and at all times has been, a public corporation and acted

as such, and in the exercise of its powers it duly and legally executed, sold, and delivered its nine warrants as set forth in the plaintiff's petition, payable to bearer, and duly registered the same December 23, 1925, and that the plaintiff be required to make strict proof of the amount, if any, due and owing it and have nothing further by its suit.

On October 24, 1927, the court found that the defendant is and was on July 20, 1925, and at all dates mentioned in plaintiff's petition, a duly and legally created, organized, and existing irrigation district under the laws of the State of Nebraska; that it was a public corporation duly and legally organized, and set forth the names of the officers of the defendant and the real estate embraced within the irrigation district. The court rendered judgment in favor of the plaintiff and against the defendant, in the amount of $4,762.50, with interest and costs, and made the judgment a lien on the real estate described in the order and judgment.

The landowners and leasehold owners within the Calamus Irrigation District sought to intervene in the afore-cited case after the judgment therein was rendered, and the case was appealed to the Circuit Court of Appeals, Eighth Circuit. The case appears in 29 F. 2d 552, entitled Draver v. Greenshields & Everest Co., decided November 9, 1928. The court said: "This is an appeal from an order denying a motion to vacate a judgment in an action at law against an irrigation district, made for the purpose of enabling appellants, landowners in said district, to obtain leave to intervene in that action and make defense. The judgment was entered on October 24, 1927, after the district had filed its answer admitting liability for the amount recovered. One week later appellants appeared and moved that the judgment be set aside and tendered their proposed petition in intervention." The tendered petition in intervention and affidavits sought to avoid the organization of the district. The court did not pass upon the suffi-

ciency of the petition in intervention in such respect, or intimate that the facts as contained therein, if established, would avoid the organization of the district, or that the district was not a corporation de jure, but considered the case on the assumption that the facts relied on were sufficient for appellants' purpose, and held the trial court did not err in denying intervention; that the legality of the organization of public corporations, which are acting under color of law, cannot be raised collaterally, and where proposed interveners failed to file application to intervene before trial of action in which intervention was sought, commenced as required by section 8552, Comp. St. 1922, they could not thereafter insist on being permitted to intervene as a matter of right; and held that the Calamus Irrigation District, under the circumstances was a corporation de facto. This judgment was transcripted and filed in the office of the county clerk of Loup County on December 11, 1928. In a case entitled Greenshields and Everest Company, a corporation, Trustee, relator, v. Everett Satterfield, respondent, the latter at that time being the county clerk of Loup County, peremptory writ of mandamus was served on the respondent. It recited in substance that judgment was rendered in the United States District Court for the District of Nebraska, Omaha division, December 7, 1928, for the issuance of the writ commanding the respondent to enter the levy heretofore made on the real estate in the Calamus Irrigation District on the tax list of Loup County, Nebraska for the year 1928, and to determine, extend, and carry out the sum, or sums, of money levied against every tract in said irrigation district, and prescribed the method by which the respondent should handle the matter and certify obedience and due execution of the writ to said court pursuant to such action.

The record shows the following proceedings of the county board of equalization of Loup County in substance as follows: "Coming now to the request of

Greenshields and Everest Co., a corporation, trustee for a levy to meet the indebtedness of the Calamus Irrigation District which request is as follows: You are hereby notified that on the 24th day of October 1927 the undersigned, Greenshields and Everest Company, a corporation, Trustee, recovered a judgment in the United States District Court at Omaha against Calamus Irrigation District for the sum of $4762.50, with interest at 7% per annum from the date of entry of judgment and costs fixed at $51.74. That a transcript of said judgment has been filed with the County Clerk of Loup County, Nebraska. That on or about the 21st day of February, 1928 Greenshields & Everest Company, a corporation, Trustee, made a demand on the Calamus Irrigation District and its officers to provide funds for the payment of said judgment and to make a levy of taxes on the property within said district to satisfy said judgment, interest and costs. That said Calamus Irrigation District, and its Board of Directors, have refused and failed to make a levy to satisfy said judgment. That under the provisions of Sec. 2875 of the Comp. Stat. of Nebraska, 1922, it is the duty of you, as members of the County Board, to cause an assessment roll of said district to be prepared and to make a levy on the property included in said district to provide funds for the payment of the judgment, interest and costs."

It was moved and seconded that, as requested, a levy of five mills for the year 1928, be made and carried on all real estate included in the Calamus Irrigation District as shown by the plats on file in the office of the county clerk, and described in the judgment, and that the amounts so levied and collected be applied on the payment of said judgment. This motion was carried.

The minutes of the county board of equalization of Loup County included in the record show levies made in different amounts of mills in subsequent years to be used for the payment of the judgment as aforesaid, which we deem unnecessary to set forth.

The foregoing is self-explanatory, and constitutes the history of one of the judgments upon which taxes were levied and assessed upon the land within the Calamus Irrigation District to pay the same, such taxes being a part of the taxes in controversy in the instant case.

The other judgment which constitutes a basis for the balance of the taxes levied and assessed in the instant case was rendered on the 31st day of May, 1934. It was on a report of trustees of the Calamus Irrigation District and was with reference to winding up the affairs of the district and for attorney fees and expenses in such behalf, in the total sum of $3,040.80. Minutes of the county board of equalization of Loup County show a levy of a certain number of mills as taxes to be collected in the payment of such judgment for a period of years.

The aforesaid judgment resulted from an action filed in the district court for Loup County on November 4, 1927, brought on the relation of a special county attorney of Loup County, plaintiff, v. John Harrop, Dan Haskin, Merle Dow, and Roy Harrop, the first three being alleged directors of the Calamus Irrigation District and Roy Harrop being secretary of said board. The information in said action alleged in part: "That on or about March 19, 1925 the said Roy Harrop caused to be filed in the office of the County Clerk of Loup County, Nebraska a petition to organize an irrigation district * * * to be known as the Calamus Irrigation District, * * * under sections 2857, 2858 and 2859 of the Compiled Statutes of Nebraska for 1922, as amended and in force upon said date, * * *" and set forth certain allegations to disclose that said irrigation district was not properly and legally organized. The defendants' answer was to the effect that the irrigation district was properly and legally organized as required, and prayed dismissal of the action. Due to the resignation of the specially appointed county attorney, another specially appointed county attorney was appointed to continue the prosecution of the case. The Calamus Irrigation District filed a petition in inter-

vention, asserting the district was properly and legally organized, and prayed dismissal of the action. The judgment obtained by Greenshields and Everest Company, a corporation, as heretofore set out, was attached to and made a part of the answer of the alleged directors and secretary of the Calamus Irrigation District, and was also attached to and made a part of the petition in intervention. The replies were general denials.

On March 6, 1928, the district court for Loup County entered judgment, finding and adjudging that the Calamus Irrigation District was not legally and properly organized and had never existed as a legally organized irrigation district, and that the county board of Loup County, Nebraska was without jurisdiction to enter an order organizing said Calamus Irrigation District, and that said Calamus Irrigation District, intervener therein, had never had a legal and valid existence as such. The defendants and the Calamus Irrigation District appealed from such judgment to this court. On April 19, 1929, this court entered judgment as follows: "This cause coming on to be heard upon appeal from the district court of Loup county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is therefore, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed * * * mandate issue accordingly. No Opinion."

There appears in 120 Neb. 714, 235 N. W. 95, the case of Elliott v. Calamus Irrigation District, and in 120 Neb. 719, 235 N. W. 97, the cases of Cameron v. Calamus Irrigation District and Stroud v. Calamus Irrigation District. The decision is announced in Elliott v. Calamus Irrigation District, *supra,* and controls the two latter-cited cases. These actions were begun in the district court for Loup County against the Calamus Irrigation District to recover from the district, with interest, certain amounts which the plaintiffs held in warrants sold by the district. These

warrants were part of the same series of warrants held by Greenshields and Everest Company as trustees, and upon which they recovered judgment in the United States District Court, Division of Nebraska. This court held, after setting forth the judgment in the case affirmed without opinion wherein the Calamus Irrigation District was held not legally organized and its officers ousted and that the district as an entity was dissolved and citing statutes which we need not cite here, that the statutes clearly provide that before any warrants may be issued by the board, that is the irrigation district board, a levy must have been made therefor, but in the present case warrants in the sum of $10,000 were issued before any levy was made, and, in the absence of a levy therefor, the directors of an irrigation district board were without statutory authority to issue warrants in any amount. This case held: "The statutes governing the organization and the management of irrigation districts are mandatory and are to be strictly construed. An irrigation district is a public corporation and the powers of its officers and directors are limited by the terms of the statute under which the district was created. When the officers of an irrigation district issue warrants prior to a levy therefor at a time when no fund exists against which a levy may be made, such warrants are void. In the absence of a levy by the officers of an irrigation district, such officers are without statutory authority to issue warrants for any amount." The court further held that the officers of an irrigation district are "charged with notice of the statutory powers and limitations of such officers by the provisions of the statutes relating thereto."

We have heretofore set out that part of the record necessary to a determination of this appeal. In addition thereto we have set forth certain decisions of this court where the assessment and levy of taxes constituting the subject matter of this appeal were involved.

The landowners and leasehold owners were parties to

the litigation in the state courts, as above set out. They were not parties to the litigation in the United States District Court or in the case in the Circuit Court of Appeals, as hereinbefore indicated and which will be discussed later in the opinion.

"The general rule is that, while a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. However, where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action." Witzenburg v. State, 140 Neb. 171, 299 N. W. 533.

" 'There may be cases so closely interwoven or so clearly interdependent, as to invoke a rule of judicial notice in one suit of the proceedings in another suit.' 23 C. J. 114; and a court 'will take notice of its records to the extent of knowing that the controversy involved in an appeal has already been considered by it on a previous occasion.' 20 Am. Jur. 105, sec. 87. 'In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it.' Dimmick v. Tompkins, 194 U. S. 540, 24 S. Ct. 780." Witzenburg v. State, *supra*. See, also, In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923; Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366.

Having the foregoing authorities in mind, we have taken judicial notice of the records of this court in accordance therewith.

The defendants contend that the county board of equalization of Loup County had no statutory authority to levy and assess taxes on the real estate or leasehold interests on school land owned by the state to pay the judgments as heretofore set out.

Section 2875, Comp. St. 1922, as set forth in the minutes of the county board of equalization of Loup County as the authority for the levy of taxes to pay the judgments, is now shown as sections 46-134 to 46-138, R. S. 1943. We set forth briefly a résumé of these sections for the reason that said sections contain the same subject matter as appears in section 2875, Comp. St. 1922.

Section 46-134, R. S. 1943, provides in part as follows: "The board (irrigation district board) shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and all payments due or to become due the ensuing year to the United States * * *" then details the manner of assessment. There was no obligation on the part of the Calamus Irrigation District to the United States government at any time—no bonds were issued, warrants were issued as herein noted.

Section 46-135, R. S. 1943, provides: "If the board deems it necessary, it may at the same time levy an assessment for the care and maintenance of irrigation works already constructed and for the payment of salaries of officers and general expenses, * * *" then details the manner and form of such assessments. The record fails to disclose that an assessment was made for the purposes designated in such section of the statutes.

Section 46-136, R. S. 1943, provides for the collection by the county treasurer in the same manner as other taxes are collected, for the purpose of the general fund as mentioned in section 46-135, R. S. 1943.

Section 46-137, R. S. 1943, provides for the disposition of the taxes raised in the irrigation district.

Section 46-138, R. S. 1943, provides in part: "In case of the neglect or refusal of a board of directors of any irrigation district to cause an assessment and levy to be made as provided in sections 46-134 and 46-135, for the payment of principal and interest of outstanding bonds, * * * (which involves indebtedness to the United States government) and for expenses incurred in organizing such district, then the assessment of property made for

county purposes, after the same shall have been adjusted by the county equalization board, shall be adopted and shall be the basis and assessment for the district, * * *" and provides further the obligation of the county board of equalization with reference to the assessment and the levy to be made. Nothing in this section gives the county board of equalization authority to levy for payment of a judgment obtained against an irrigation district such as the Calamus Irrigation District, or even one that has been dissolved. There is no evidence that either of the judgments were for organization purposes unless the same could be included under general expenses, and if so, there would be no way to tell whether the warrants in question were for that purpose or some other purpose, as far as the record is concerned.

We now refer to section 77-1619, R. S. 1943, which has to do with judgments, and provides: "Whenever any judgment shall be obtained in any court of competent jurisdiction in this state for the payment of a sum of money against any county, township, school district, road district, town or city board of education, or against any municipal corporation, or when any such judgment has been recovered and now remains unpaid, it shall be the duty of the county board, school district board of education, city council or other corporate officers, as the case may require, to make provision for the prompt payment of the same."

Section 77-1619, R. S. 1943, is analogous to section 5987, Comp. St. 1922, which was in force at the time the Calamus Irrigation District was alleged to have been legally formed and the warrants issued and judgment thereon rendered, which is one of the judgments constituting the basis for the assessment and levy of the taxes sought to be foreclosed in the instant case, and the law was the same with respect to the judgment rendered in 1934.

If any authority existed under section 5987, Comp. St. 1922, or what is now section 77-1619, R. S. 1943, for the

county board of equalization of Loup County to make provision for the prompt payment of the judgments mentioned, it must be on the theory that the Calamus Irrigation District was a municipal corporation. In this respect the record reflects the Calamus Irrigation District was a public corporation and pleaded to be such a corporation. This court has held on numerous occasions as follows: "An irrigation district, organized under the laws of Nebraska, is a public corporation, but is not a municipality * * *." Bliss v. Pathfinder Irrigation District, 122 Neb. 203, 240 N. W. 291.

"Irrigation districts organized under our laws are public, rather than municipal corporations, and their officers are public agents of the state." Board of Directors of Alfalfa Irrigation District v. Collins, 46 Neb. 411, 64 N. W. 1086; Lincoln & Dawson County Irrigation District v. McNeal, 60 Neb. 613, 83 N. W. 847; Platte Valley Public Power & Irrigation District v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412; Draver v. Greenshields and Everest Co., *supra;* Elliott v. Calamus Irrigation District, *supra.*

It will be noted that from an analysis of the aforecited sections of the statute, there was no legislative authority vested in the county board of equalization of Loup County to make provision for the prompt payment of the judgments obtained against the Calamus Irrigation District. It was declared to be a public corporation, and not a municipal corporation.

The power to levy a tax must be clearly and distinctly given by law. It is a familiar rule that in the execution of the power to tax, the taxing officers must be able to show legislative authority for every levy of taxes. See Burlington & Missouri River R. R. Co. v. York County, 7 Neb. 487.

The county board of equalization of Loup County, under the authorities heretofore cited, had no power to levy the taxes in suit, and the levy thereof was made

without statutory authority. Therefore, the defendants' contention is well taken, and is sustained.

The judgment in Greenshields and Everest Co., a corporation v. Calamus Irrigation District, as heretofore mentioned, was tantamount to a judgment entered by consent by the attorney and secretary of the defendant district. The landowners and school land leasehold owners upon land owned by the state were not made parties to such action, but sought to intervene therein and were denied the right of intervention and appealed to the Circuit Court of Appeals in the action entitled Draver v. Greenshields and Everest Co., a corporation, wherein the appellants were denied the right of intervention and the judgment of the United States District Court was affirmed.

The plaintiff relies upon the case of Draver v. Greenshields and Everest Co., *supra*. This case has no binding effect in this appeal for the reason that the landowners and school land leasehold owners within the Calamus Irrigation District were not parties to such litigation. In this connection we deem the following authorities pertinent.

In the case of Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757, this court said: "It is a general rule with respect to domestic judgments that they cannot be collaterally impeached by the parties for collusion or fraud not going to the jurisdiction and that consent judgments are as conclusive on collateral attack as judgments rendered after a trial. There is a recognized exception to the general rule in cases involving public interests where the public was a party by representation only. In such cases the persons represented may show fraud or collusion in obtaining the judgment. If the judgment was collusive or by the consent of an officer as to a matter with respect to which he had no authority to bind the public, and it was not a decision by the court after a hearing on the merits, it does not afford a basis for a plea of res adjudicata as against the public interest involved."

The attorney and secretary of the Calamus Irrigation District, a defendant in the case of Greenshields and Everest Co., a corporation v. Calamus Irrigation District, was in no proper sense a representative of the leasehold owners or property owners within the Calamus Irrigation District. Their rights were not derived through him nor dependent upon his acts. This was not the case of a submission to the court of a question for decision on the merits, but it was a consent in advance to a particular decision by a person who had no right to bind the property owners, but in reality was a consent to give life to the warrants involved in such action.

A judgment entered by agreement or consent should not be given a conclusive effect where to do so would violate an important public policy. If a suit is devised for the purpose of having a certain judgment entered, it will not be binding upon the public or those who are not parties to the scheme adopted for that purpose. A taxpayer is not estopped by a consent judgment upon an unlawful contract, (People v. Illinois Central R. R. Co., 298 Ill. 516, 131 N. E. 624), neither can a legal liability be established by such a judgment. See, Warren v. County of Stanton, *supra;* Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 11 S. Ct. 402, 34 L. Ed. 1005; Wadhams v. Gay, 73 Ill. 415; Kane & Co. v. Independent School District of Rock Rapids, 82 Iowa 5, 47 N. W. 1076; Annotation in 2 A. L. R. 2d, pp. 514 through 520.

The case of Boynton v. Moffat Tunnel Improvement District, 57 F. 2d 772, was an action involving bonds issued by the Moffat Tunnel Improvement District wherein the Circuit Court of Appeals of the United States, Tenth Circuit, held that the bonds were valid and the plaintiffs suing thereon were entitled to relief. Proceedings were then pending before the Colorado Supreme Court seeking to have the bonds declared to be invalid. The following language is appropriate. After reviewing several decisions, the court said: "It should not be

understood, from what has been said, that there is any difference in the power possessed by the state and national courts. Each has power to render binding judgments on parties properly before it; neither has power to bind parties who are not before it, as the Colorado Supreme Court has ruled in this particular case. A final decree in the state court suit would be persuasive authority in this court, but it would not be res judicata as to the parties in this case who are not parties in that; neither would a decree of this court be res judicata as to parties in the state court who are not parties here; and different issues are, to a considerable extent, presented in the two courts. The rules to which we have adverted are alike applicable to the courts of the two sovereignties." See, also, Hollingsworth v. Barbour, 29 U. S. 466, 4 Pet. 466, 7 L. Ed. 922; Utilities Production Corporation v. Carter Oil Co., 72 F. 2d 655, 2 F. Supp. 81, 100 F. 2d 1006; Botz v. Helvering, 134 F. 2d 538; Stubbs v. United States, 21 F. Supp. 1007; Baltimore Transit Co. v. Flynn, 50 F. Supp. 382; Strong v. Aetna Casualty & Surety Co., 52 F. Supp. 787.

We deem other assignments of error unnecessary to determine.

For the reasons herein given, the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

YEAGER, J., participating on briefs.

DANIEL B. BOUCHER ET AL., APPELLEES, V. EDMUND G. DITTMER ET AL., APPELLANTS.
38 N. W. 2d 401

Filed July 7, 1949. No. 32585.

Parent and Child. The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties imposed by the relation or that they have forfeited that right.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Towle, Young & Mattson, for appellants.

Michael T. McLaughlin, for appellees.

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

YEAGER, J.

This is a habeas corpus action commenced in the district court for Lancaster County, Nebraska, by Daniel B. Boucher and Julia C. Boucher, husband and wife, plaintiffs, appellees here, for the purpose of having restored to them the custody and control of Harvey Boucher, their minor child now of about the age of 27 months, which child at the time of the commencement of the action was in the custody and control of Edmund G. Dittmer and Margaret Dittmer, husband and wife, defendants, appellants here.

A trial was had to the court whereupon a judgment was rendered whereby custody of the child was restored to the plaintiffs. A motion for new trial was filed which was overruled. From the judgment and the order overruling the motion for new trial the defendants have appealed.

The pertinent facts are that Julia C. Boucher, then being mentally ill, was on or about July 29, 1947, admitted to the State Hospital at Lincoln, Nebraska, where she remained until December 12, 1947, when she was released on parole. She was discharged from the hospital as cured on July 6, 1948.

Julia C. Boucher and Margaret Dittmer are sisters. By consent of the parties hereto the child in question was taken into the home of appellants where he was cared for satisfactorily and well from the date Julia C. Boucher was admitted to the hospital until he was delivered to the appellees pursuant to the decree of the district court in this action.

The appellants resisted the action of the appellees on the grounds that the home and surroundings of plaintiffs are not adequate to properly provide a suitable atmosphere and place in which at this time to place the child; that Daniel B. Boucher is temperamentally unsound and unstable in his habits of industry; and that on account of the mental condition of Julia C. Boucher it would be detrimental to the child and to Julia C. Boucher to have the child returned to the home of appellees.

There is nothing in the evidence to indicate that any detriment would flow from the mental state or condition of Julia C. Boucher. The full effect of the evidence is that her mental health has been restored. It is true that medical witnesses have testified to a possibility of a recurrence of bad mental health but no one has said that any such condition is imminent or threatened.

The legal principles on which the determination of this case must depend have been well stated in the opinions of this court. In Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, it was said: "The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parent of such custody unless it be shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right." See, also, In re Application of Schwartzkopf, 149 Neb. 460, 31 N. W. 2d 294.

In the supplemental opinion in Gorsuch v. Gorsuch, 143 Neb. 572, 10 N. W. 2d 466, 11 N. W. 2d 456, which was an action to modify a portion of a decree relating to the custody of a child, it was said: "The proper rule * * *, 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. Where both parents are affirmatively found to be unfit, the custody of the child will be determined solely by

the welfare and best interests of the child. * * * But this court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide."

There can be no doubt from the record that the appellants are of the highest type and that during the misfortune which befell the appellees they, without hope of reward except the satisfaction which flowed from the consciousness of their good deeds, gave loving care to this helpless infant and that they are willing to so continue on the same basis. There can likewise be no doubt, because of their more improved financial status, that the future economic needs of the child could be more readily supplied by them than by the parents. Doubtless they could furnish luxuries whereas from the parents only necessities could be anticipated.

These things however are not the criteria by which such cases as this may be determined. It would not be proper to deprive these parents of the custody of their child in the absence of a sufficient showing that they are unfit to have custody of him or that they have forfeited that right. No such sufficient showing has been made.

The judgment of the district court is affirmed.

AFFIRMED.

BLANCHE MARQUARDT, APPELLANT, V. WILLIAM B. MARQUARDT, APPELLEE.
38 N. W. 2d 403

Filed July 7, 1949. No. 32625.

Divorce. In a divorce action in the matter of division of property it is the duty of the court to take into consideration the estate of the parties, if any, at the time of the marriage and their respective contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which

the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age and condition of health of the parties; and all other facts and circumstances, and make an award which appears to be fair and equitable.

APPEAL from the district court for Lancaster County: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Beghtol & Rankin, John C. Mason, Kenneth E. Anderson, and *Nathan C. Holman, Jr.,* for appellant.

Lloyd E. Chapman, for appellee.

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

YEAGER, J.

This is an action for divorce by Blanche Marquardt, plaintiff, appellant here, against William B. Marquardt, defendant, appellee here. From a decree granting her a divorce but denying alimony the plaintiff has appealed. The only question presented by the appeal is that of whether or not the district court erred in refusing to make an award of alimony in favor of plaintiff.

The parties were married July 10, 1943, at Waverly, Nebraska. The plaintiff was of about the age of 44 years and the defendant of about the age of 55. The plaintiff had been previously married three times. She had four children. Their ages were respectively about 22, 17, 16, and 13 years. All of these children, except the oldest, took up residence with the parties on their marriage. The defendant had been married once before. No mention is made of children of that marriage.

This court has said with regard to the question presented by the appeal herein: "In the division of the property it was the duty of the court in this case to take into consideration the estate of the parties, if any, at the time of the marriage and their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the

divorce, the social standing, comforts, and luxuries of life which the wife would probably have enjoyed, the conduct of the parties leading up to the divorce, to which party the divorce was granted, the age and condition of health of the parties, and all other facts and circumstances, and make an award which appeared to be fair and equitable." Wade v. Wade, 149 Neb. 502, 31 N. W. 2d 420. See, also, Swolec v. Swolec, 122 Neb. 837, 241 N. W. 771; Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22; Munsell v. Munsell, 147 Neb. 590, 24 N. W. 2d 566; Jensen v. Jensen, 148 Neb. 689, 28 N. W. 2d 444; Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877; Pittman v. Pittman, 148 Neb. 864, 29 N. W. 2d 790.

Measured by these standards was the decree of the district court fair and equitable? Was the plaintiff entitled to alimony? We think on the record presented that the division of property was fair and equitable and that the court did not err in refusing to award alimony.

It is true that the property and estate was not equally divided and that the defendant was awarded a larger portion than was the plaintiff. However an examination of the incidents of the married life of the parties and the conduct of the parties leading up to the divorce does not cause this to appear unjust or inequitable.

At the time of the marriage the parties had no money or property except $600 or $700 worth of furniture and household goods most of which, if not all, had been paid for by the defendant, and an automobile acquired by defendant before the marriage which was of little value. While there appears to have been additions to the household effects since the marriage no value has been placed thereon. Apparently the additions were not extensive or of great value. The parties purchased a home, title to which was taken jointly by them. The equity at the time of the trial was, as near as can be ascertained from the record, worth between $1,600 and $2,600. The defendant had the tools of his trade on which no value was placed.

By the decree plaintiff was awarded, by way of ali-

mony, all household goods except two radios, a smoking stand, a writing desk, an electric heater, a quilt, and a pair of pillows, which items were awarded to the defendant. The defendant was awarded the entire equity in the home. No other or further award of alimony was made in favor of plaintiff.

The record discloses that defendant is a plasterer and cement finisher and that he diligently worked at his occupation during the married life of the parties. It discloses also that his entire earnings were devoted to provision of a home and the support of the parties, the children of plaintiff, and the families of her children.

It appears to be true that contributions were made by these or some of them but not on the basis of any agreement or understanding with defendant and he at no time received any of their contributions and it is very doubtful that he ever had any clear ideas as to the amount of contributions. The general attitude of those making contributions with regard to contributions and toward the defendant in that regard appears to be fairly reflected in the testimony of Milton A. Lewis, a son, as follows: "Q While you have been living at 2035 Euclid Street have you made any contributions to the expenses of the house? A I have paid board and room. I set my price. I figured it was at least as much as anyone else would pay and it was more than he paid me for the same service and I paid my mother $150.00 since I was there and I instructed my wife when I left for Alaska to pay them $15.00 a week."

During a considerable portion of the time that the parties lived together plaintiff was employed. She said that her earnings went to the upkeep of the household. She said also that the money received from the children and their families was used for the same purpose. This is not denied and it is doubtless true. However, it is apparent that contrary to his own will and wish a burden was imposed on defendant by plaintiff and her family

greater than was exacted by any principle of justice or equity.

While the evidence is not too clear on the point it is apparent that the defendant did object to the burden thus imposed upon him but to no avail.

A reasonable deduction from the evidence is, we think, that there was a lack of proper regard of the children and their families for the welfare, comfort, and position of the defendant as the head of his household and when difficulties arose on this account plaintiff's position was not at the side of her husband.

After an analysis of the record in the light of the rules to be adhered to in determining what alimony shall be allowed or what division of property shall be made when a decree of divorce shall be awarded we are unable to say that the court erred with relation to that subject in the decree herein.

The decree of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF JOHN E. NEYLON. JOHN E. NEYLON, DOING BUSINESS AS NEYLON BROTHERS FREIGHT LINES, LINCOLN, NEBRASKA, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

38 N. W. 2d 552

Filed July 7, 1949. No. 32514.

1. **Public Service Commissions.** The grant or denial of a certificate of convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers.
2. **Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
3. **Public Service Commissions.** The Nebraska State Railway Com-

mission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-238, R. S. 1943.

4. **Public Service Commissions: Motor Carriers.** Section 75-240, R. S. 1943, relates to the Nebraska State Railway Commission's authority to approve and authorize, upon such terms and conditions as it finds to be just and reasonable, the consolidation, merger, purchase, lease, contract to operate, or acquisition of control by the purchase of stock, of the properties of motor carriers for the purpose of ownership, management, or operation thereof. However, the Nebraska State Railway Commission has such authority only when the situations therein set forth are present and when the conditions therein specified are found to exist. These conditions are that the transaction proposed will be consistent with the public interest and does not unduly restrict competition.

5. ———: ———. In conformity with the constitutional provision, the Legislature has the right to prescribe how the Nebraska State Railway Commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate.

6. ———: ———. When a certificate of public convenience and necessity has already been issued and an application is made to transfer the operating rights thereunder to another such application comes within the provisions of section 75-229, R. S. 1943, and requires a hearing thereon after notice has been had upon all interested parties.

APPEAL from the Nebraska State Railway Commission: *Appeal dismissed.*

H. B. Muffly, and *Chambers, Holland & Groth*, for appellant.

Davis, Stubbs & Healey, and *John L. Riddell*, for appellees.

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

WENKE, J.

This is an appeal from a ruling of the Nebraska State Railway Commission which will hereinafter be referred to as the commission.

The record discloses that on February 14, 1946, there

was issued to Christine Slagle, doing business as Slagle Transfer Company, Lincoln, Nebraska, and who will hereinafter be referred to as Slagle, upon her application, numbered M-7683, a certificate of public convenience and necessity. This certificate authorized her to engage in the services of handling commodities generally, except as therein specifically restricted, over irregular routes from Lancaster County, to and from Grand Island, Beatrice, and Fairbury, and occasionally to and from points in the state at large.

On September 29, 1947, Slagle and John E. Neylon, doing business as Neylon Brothers Freight Lines, Lincoln, Nebraska, and who will hereinafter be referred to as Neylon, filed their joint application, numbered M-8664, for the transfer of these operating rights to Neylon.

The record discloses, and it is admitted, that Neylon was not, at the time this application was filed or at any time when any action was taken thereon, a "motor carrier" within the meaning of the act. See section 75-223 (8), R. S. 1943.

On December 26, 1947, at executive session and without hearing or notice upon interested parties, the commission entered the following order: "Upon motion agreed to by both Commissioners present, transfer of certificate in M-7683, Christine Slagle, dba Slagle Transfer Company, Lincoln, Nebraska to M-8664, John E. Neylon, dba Neylon Bros. Freight Lines, Lincoln, Nebraska, was granted, and certificate clarified."

On December 29, 1947, the secretary of the commission, by letter, notified Neylon of the action taken and advised him that, "A copy of the formal order will be forwarded to you."

On the same day the director of the Motor Transportation Department notified Neylon that although his application had been granted he could conduct no operations thereunder until he had complied with certain requirements relating to insurance and R. C. plates. On January 13, 1948, and February 5, 1948, Neylon filed,

and on the same day the commission approved, the necessary insurance. On January 30, 1948, February 6, 1948, and March 1, 1948, Neylon paid annual dues totaling $30. See sections 75-226, R. S. Supp., 1947, and 75-239, R. S. 1943.

On March 2, 1948, McAllister Transfer, Inc., of York, Nebraska, a motor carrier authorized to operate routes between York and Grand Island, Lincoln, Omaha via Lincoln, and elsewhere, filed its objection to application M-8664 on the ground that Slagle had willfully abandoned operations under her certificate. It asked that a hearing be held on the application and that all interested parties be notified thereof.

Neylon, on March 5, 1948, filed a motion to strike these objections. This motion was overruled on the same day. Without notice to either Neylon or Slagle the commission, on the same day, entered the following order:

"IT IS THEREFORE ORDERED by the Nebraska State Railway Commission that the action taken in Application No. M-8664, of John E. Neylon, dba Neylon Brothers Freight Lines, Lincoln, Nebraska, on December 26, 1947, be, and the same is hereby, reconsidered and held for naught.

"IT IS FURTHER ORDERED that said matter be, and the same is hereby, referred to the Motor Transportation Department for hearing."

Thereafter, on March 15, 1948, Neylon filed a motion asking for a rehearing. This motion the commission overruled. It is from the overruling thereof that Neylon appeals.

"The grant or denial of a certificate of convenience and necessity by the railway commission requires the exercise of administrative and legislative functions and not of judicial powers. * * * On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission

acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756. See Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545.

Neylon contends that the commission was without authority to enter its order of March 5, 1948, holding for naught its previous order of December 26, 1947, without complying with the provisions of section 75-238, R. S. 1943. If the order of December 26, 1947, did grant to Neylon a certificate then his contention is correct for the commission did not comply with the provisions of section 75-238, R. S. 1943, before entering its order of March 5, 1948.

With reference thereto we said in In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418: "* * * the commission, in order to revoke, change or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-231, Comp. St. Supp. 1941 (now section 75-238, R. S. 1943), * * *."

It is apparent, from the record, that upon the filing of the joint application of Neylon and Slagle that the commission proceeded to act under the authority granted it by section 75-240, R. S. 1943. But section 75-240, R. S. 1943, does not relate to the commission's authority to issue certificates of convenience and necessity. It relates to the commission's authority to approve and authorize, upon such terms and conditions as it finds to be just and reasonable, the consolidation, merger, purchase, lease, contract to operate, or acquisition of control by the purchase of stock, of the properties of motor carriers for the purpose of ownership, management, or operation thereof. However, the commission, under this section, has such authority only when the situations therein set forth are present and when the conditions therein specified are found to exist. These conditions are: "* * * that the transaction proposed will be consistent with the

public interest and does not unduly restrict competition * * *."

Whether, as incident to the authority of the commission to so consolidate, etc., it would have authority to issue new certificates we need not here decide for the facts do not bring application M-8664 within any of the situations to which the statute is applicable.

It is, of course, true that the commission shall exercise the powers and perform the duties imposed upon it and shall have power to make all needful rules and regulations for the administration thereof. See Article IV, section 20, of the Constitution of Nebraska, and sections 75-107, 75-109, and 75-225, R. S. 1943.

But, as stated in In re Application of Hergott, *supra*: "In conformity with the constitutional provision, the legislature has the right to prescribe how the Nebraska state railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate."

In this respect the Legislature has provided as follows: "Application for certificates shall be made in writing to the State Railway Commission, be verified under oath, and shall be in such form and contain such information as the commission shall by regulation require. *Upon filing of such application the commission shall serve notice by mail upon all interested parties.*" (Italics ours.) Section 75-229, R. S. 1943.

This statute is general and controls with reference to all applications unless, by statute, specific exceptions are made thereto.

We have said of such certificates that: "* * * a certificate of convenience and necessity is in the nature of a permit or license and that it is not property in any legal or constitutional sense. * * * Such being the case, it is personal in its character, is not transferable, and does not pass by succession." Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223.

In the absence of provisions in the statute authorizing the commission to approve the transfer of a certificate from one holder to another it must, in all such cases, actually issue a new certificate and revoke the old.

We have searched the statutes for language whereby it could be said that the commission can authorize transfers but have failed to find any, and none has been pointed out to us. Significant in this respect is the fact that although our act is copied in part from the federal Motor Carrier Act of 1935, 49 U. S. St. at Large, Part 1, c. 498, p. 543, we did not include therein subsection (b) of section 212 thereof or any similar language. See Kassebaum v. Nebraska State Railway Commission, 142 Neb. 645, 7 N. W. 2d 464, and In re Application of Hergott, *supra.*

Section 212 (b), 49 U. S. St. at Large, Part 1, c. 498, p. 555, so far as here material, provides: "* * * any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe."

We have therefore come to the conclusion that where certificates have already been issued and applications are made seeking to transfer the operating rights thereunder to others such applications come within the provisions of section 75-229, R. S. 1943, and require a hearing thereon after notice has been had upon all interested parties. This, for the purpose of finding not only if "the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity," but also if "the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of sections 75-222 to 75-250 and the requirements, rules and regulations of the State Railway Commission thereunder * * *." § 75-230, R. S. 1943.

No hearing having been had on or notice given to interested parties of application M-8664 before the order entered on December 26, 1947, it was made without

authority and therefore null and without force and effect. This left the application pending and the order of March 5, 1948, setting it down for hearing meets the requirements of section 75-229, R. S. 1943, provided proper notice was given to all interested parties thereof. But that question is not here as the order of March 5, 1948, was only interlocutory and not appealable.

As stated in Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303: "An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. In such a case, the order is interlocutory."

In view of our holdings herein we find the appeal to be premature and therefore is dismissed.

APPEAL DISMISSED.

SIMMONS, C. J., concurring.

I concur with the conclusion of the court. I would place the decision on the question submitted by the parties as to whether the order of December 26, 1947, was in effect a certificate of convenience and necessity or a procedural order within the control of the commission. I would hold it to be merely a procedural order within the control of the commission.

By its terms section 75-238, R. S. 1943, is applicable only where a certificate of convenience and necessity has been issued. See Gregg Cartage & Storage Co. v. United States, 316 U. S. 74, 62 S. Ct. 932, 86 L. Ed. 1283. The verb "issue" means to deliver and to send out officially. 48 C. J. S., Issue, p. 777.

The term "certificate" when used in the act means a certificate of public convenience and necessity issued under the act to common carriers by motor vehicle. § 75-223, R. S. 1943.

Section 75-230, R. S. 1943, provides for the issuance of a certificate if the applicant is found to possess certain qualifications and 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.

Section 75-231, R. S. 1943, provides: "Any certificate issued under section 75-230 shall specify the service to be rendered, the routes, the fixed termini, if any, and the intermediate and off-route points, if any, and in case of operations not over specified routes or between fixed termini, the territory within which such carrier is authorized to operate. There shall, at the time of issuance, and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the commission."

It is patent that the order of December 26, 1947, does not meet the requirements of the statute, and that in and of itself it cannot be construed to be a certificate of convenience and necessity. Section 75-239, R. S. 1943, requires that Neylon comply with requirements of the commission as to insurance and that "No certificate * * * shall be issued" until that was done. Section 75-226, R. S. Supp., 1947, provides for an annual fee for each motor vehicle operated, payable on or before January 1 of each year after certificate shall have been issued.

Neylon contends that he has complied with these requirements. However, compliance was after December 26, 1947.

In Smith Bros. Revocation of Certificate, 33 M. C. C. 465, the Interstate Commerce Commission had before it and considered section 212 (a) of the federal act, which is comparable to our section 75-238, R. S. 1943. The Interstate Commerce Commission there held that all decisions and orders made before the certificate of convenience and necessity was duly and regularly issued

and became effective were essentially procedural in character and might be set aside, modified, or vacated by the commission. This decision was quoted with approval in Manhattan Coach Lines, Inc. v. Adirondack Transit Lines, Inc., 42 M. C. C. 123, and Lincoln Tunnel Applications, 44 M. C. C. 665. The holding as to this element of the case was approved in United States v. Seatrain Lines, Inc., 329 U. S. 424, 67 S. Ct. 435, 91 L. Ed. 396. We quoted at length from the Smith case in the case of In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418. See, also, Interstate Motor Transit Co. v. Public Utilities Commission, 119 Ohio St. 264, 163 N. E. 713; Pennsylvania R. R. Co. v. Public Utilities Commission, 123 Ohio St. 203, 174 N. E. 737; Penn-Ohio Coach Lines Co. v. Public Utilities Commission, 139 Ohio St. 262, 39 N. E. 2d 745; Reynolds v. Alexandria Motor Bus Line, Inc., 141 Va. 213, 126 S. E. 201; Northern Pac. Ry. Co. v. Board of Railroad Com'rs., 13 F. Supp. 529.

IN RE APPLICATION OF JOHN E. NEYLON. JOHN E. NEYLON, DOING BUSINESS AS NEYLON BROTHERS FREIGHT LINES, LINCOLN, NEBRASKA, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.

38 N. W. 2d 558

Filed July 7, 1949. No. 32515.

Public Service Commissions: Motor Carriers. This case is, in effect, a companion case to In re Application of Neylon, *ante* p. 587, 38 N. W. 2d 552, and is controlled by our holding therein.

APPEAL from the Nebraska State Railway Commission. *Appeal dismissed.*

H. B. Muffly, and *Chambers, Holland & Groth*, for appellant.

Davis, Stubbs & Healey, and *John L. Riddell*, for appellees.

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

WENKE, J.

This is an appeal from a ruling of the Nebraska State Railway Commission, which will hereinafter be referred to as the commission. It is, in effect, a companion case to In re Application of Neylon, *ante* p. 587, 38 N. W. 2d 552.

The record discloses that on March 3, 1942, there was issued to Clarence J. Calabria, doing business as C. & H. Motor Freight Company, Omaha, Nebraska, and who will hereinafter be referred to as Calabria, upon his application in M-6504, Supplement No. 1, a certificate of public convenience and necessity. This certificate, as of February 5, 1948, authorized Calabria to engage in the services of handling commodities generally, except those requiring special equipment, over a regular route from Omaha to and from Aurora via U. S. No. 6 to Lincoln, thence via U. S. No. 34 to Aurora and all intermediate points, with off-route points of Friend, Fairmont, and Henderson.

On February 5, 1948, Calabria and John E. Neylon, doing business as Neylon Brothers Freight Lines, Lincoln, Nebraska, and who will hereinafter be referred to as Neylon, filed their joint application in M-8664, Supplement No. 1, for the transfer of these operating rights to Neylon.

On February 10, 1948, at executive session and without hearing or notice upon any interested parties, the commission entered the following order: "Upon motion agreed to by all Commissioners, transfer of certificate issued in M-6504, Supp. #1, Clarence J. Calabria, d/b/a C. & H. Motor Freight Company, Omaha, Nebraska, to M-8664, Supp. No. 1, John E. Neylon, d/b/a Neylon Bros. Freight Lines, Lincoln, Nebraska, was granted and certificates consolidated."

On February 13, 1948, the secretary of the commis-

sion, by letter, notified Neylon of the action taken and advised him that, "A copy of the formal order will be forwarded to you."

On the same day the director of the Motor Transportation Department notified Neylon that although his application had been granted he could not operate thereunder until he had complied with certain requirements relating to insurance and R. C. plates. The record discloses that on January 13, 1948, and February 5, 1948, Neylon filed, and on the same day the commission approved, policies of insurance. Likewise it shows that on January 30, 1948, February 6, 1948, and March 1, 1948, Neylon paid annual dues. See section 75-226, R. S. Supp., 1947, and 75-239, R. S. 1943.

On February 25, 1948, McAllister Transfer, Inc., of York, Nebraska, a motor carrier authorized to operate routes between York and Grand Island, Lincoln, Omaha via Lincoln, and elsewhere, filed objection to the application in M-8664, Supplement No. 1. These objections, as amended March 2, 1948, alleged that Calabria had never operated part of the route authorized by his certificate and had willfully abandoned all operations thereunder. It asked that a hearing be held on the application and that all interested parties be notified thereof.

On March 5, 1948, Neylon filed a motion to strike these objections. On the same day the commission overruled this motion. Without notice to either Neylon or Calabria the commission, on March 5, 1948, entered the following order:

"IT IS THEREFORE ORDERED by the Nebraska State Railway Commission that the action taken in Application No. M-8664, Supplement No. 1, of John E. Neylon, dba Neylon Brothers Freight Lines, Lincoln, Nebraska, on February 10, 1948, be, and the same is hereby, reconsidered and held for naught.

"IT IS FURTHER ORDERED that said application be, and the same is hereby, referred to the Motor Transportation Department for hearing."

Thereafter, on March 15, 1948, Neylon filed a motion asking for a rehearing. This motion the commission overruled. It is from the overruling thereof that Neylon appeals.

In view of our holding in In re Application of Neylon, *supra*, Neylon was not, at the time he filed the joint application or at any time any action was taken thereon, a "motor carrier" within the meaning of the act. See section 75-223 (8), R. S. 1943.

Our holding in In re Application of Neylon, *supra*, is applicable to the situation herein and controlling. The appeal is dismissed.

APPEAL DISMISSED.

BERYL PLANCK, PLAINTIFF IN ERROR, v. STATE OF NEBRASKA, DEFENDANT IN ERROR.

38 N. W. 2d 790

Filed July 14, 1949. No. 32582.

1. **Appeal and Error: Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Criminal Law.** Where the evidence in a criminal case is conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury.
3. **Trial: Appeal and Error.** Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete.
4. **Criminal Law.** It is the duty of a trial judge during a criminal trial to refrain from asking witnesses questions in such a manner as to indicate the court's opinion regarding the guilt of the accused, however, when the trial judge propounds a question and elicits an answer from a witness which does not, in the light of the record, show bias or prejudice on his part or indicate his opinion regarding the guilt or innocence of the accused, such inquiry does not constitute prejudicial error.

ERROR to the district court for Red Willow County: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Lafayette D. Hurley, George B. Hastings, and *Van Pelt, Marti & O'Gara,* for plaintiff in error.

James H. Anderson, Attorney General, and *Walter E. Nolte,* for defendant in error.

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

MESSMORE, J.

By amended information filed in the district court for Red Willow County, Beryl Planck and three other persons were charged with unlawfully assaulting Orville Burton with intent to inflict a great bodily injury. This trial involves the prosecution of defendant Beryl Planck. A jury found the defendant guilty as charged. His motion for a new trial having been overruled and a sentence imposed that he serve a term of one year at hard labor in the state penitentiary, the defendant, by petition in error, brings the record of his conviction here for review.

For convenience the plaintiff in error will be referred to as the defendant.

The defendant contends that the evidence is insufficient to warrant his conviction of the crime charged against him.

The record discloses that the defendant, about two months prior to July 27, 1948, purchased a used car business located at McCook, Nebraska, from one Bradley Dolan. On July 27, 1948, the defendant, to celebrate his birthday, invited Seymore Whitt, an employee of his, the defendant's secretary, Bradley Dolan and wife, Donald Cafferty and wife, and Bernard Plourd and wife, the latter two couples living at Indianola, Nebraska, to a party at a night club in McCook.

Earlier in the evening a lady acquaintance of Dolan was registered at the Burton cabin camp located at

McCook. Mabel Burton, wife of Orville Burton the manager of the camp, testified that Dolan and the defendant came to the camp and Dolan registered for the lady. Donald Cafferty testified that he was the man with Dolan at the time and, as a friend, registered for the lady and paid the bill.

The party concluded at about one o'clock the morning of July 28, 1948. The Caffertys, Plourds, and Whitt went to Indianola where they visited with the Caffertys. The defendant was to drive to Indianola later and bring Whitt back to McCook. The defendant, his secretary, Dolan, and his wife, left the party in the defendant's car. They let Mrs. Dolan off at the Dolan residence. Dolan suggested the defendant or his secretary drive him to the Burton cabin camp to pick up the lady who had registered there and put her on a train or bus for Denver, Colorado. They arrived at Burton's cabin camp at about 1:30 in the morning, July 28, 1948. The Burtons were in bed. Mrs. Burton was not asleep, and testified she saw the defendant's car when the party drove into the driveway, and saw them enter cabin No. 5 which was the cabin assigned to the lady when she was registered. In a short time the party created a disturbance by swearing and talking loudly. She called her husband and he got out of bed, dressed, and went to the cabin. His testimony is that he knocked on the door three times before he got a response, and then a man from the inside called him a vile name and asked what he wanted. He requested that they be quiet. The same voice then repeated the vile name and said: "You got your money, didn't you?" and the witness replied that he had, but he would like to have them be quiet. The cabin door was opened and the defendant came out carrying two grips, followed by two women and Dolan. Dolan told Burton to take his glasses off, called him a vile name, and struck him in the face with his fist, knocking his glasses off. Burton fought back. Then the defendant

entered the fray and blows were exchanged between him and Burton.

The defendant testified that when they arrived at the cabin camp they might have made some noise, but there was no loud talking; that Burton rapped on the door and told them they would have to be quiet or get out, and they decided to leave because they did not want trouble. He further testified that he heard Dolan and Burton arguing. He did not see the start of the trouble, but that Burton was beating Dolan up and shoved him against the house. The defendant said: "It looks like he has had enough, Mr. Burton" and Burton said: "Would you like to have a little?" and the defendant said no, but if necessary he could take it. Burton made a swing at him and he hit Burton in the nose, and Burton hit him on the jaw. Burton came back, caught him around the waist and they went to the ground. The defendant pushed and shoved Burton loose and got away and into the car. As they started to drive out the police arrived, and there was some conversation with them. Burton demanded that the defendant and Dolan be arrested. The officers stated that they were local men and when Burton signed the charges, they could be picked up at any time.

The defendant and his party claim they made no threats upon leaving, and Burton heard none. Mrs. Burton testified that they called Burton vile names and said they would be back and get him.

The defendant and his party then drove to Indianola, and upon arriving there went to the Cafferty home. There was some talk about the defendant's and Dolan's experience at the camp. Plourd testified that their anxiety seemed to be that they had been evicted and should have their money back. Cafferty said that he had an interest in the matter because he had registered the lady at the camp and had paid the money. Within a short time Plourd, Whitt, and Cafferty left Indianola in Cafferty's car, and Dolan and the defendant in another car.

The testimony with reference to what occurred upon their arrival at the camp at about 2:45 a. m., is in direct conflict. Mrs. Burton testified that she heard brakes screech and that the defendant, Dolan, and other men drove into the yard. They got out of the car, and the defendant, Dolan, Cafferty, and Whitt went to cabin No. 5. This cabin had been inspected when the occupants left and nothing of theirs had been found in it. They came to the door of Burton's house, banged on it, broke through the screen and yelled a vile name to Burton, daring him to come out and saying that if he did they would kill him. She further testified that more than one of the party was calling to Burton. One of them threw a quart can of paint through a window into a room where Burton's 11-year-old daughter was sleeping. Burton came into the bedroom, and they were still making threats, using vile language and saying they were going to kill him. Burton was in front of this witness, and the screen door leading to the front room was locked and the front door of the office was open. The men were pulling on the screen and yelling in vile language threatening to kill Burton. They pulled the screen off and Burton slammed the door shut, then all of the men plunged through the door and piled into the office. She shoved the defendant out; he was on top of Burton calling him a vile name. They were all making threats and she could not distinguish their voices. Then all of the men and her husband went outside and they were fighting on the outside and they had her husband on the ground. They fought in the front yard for a few minutes and Burton got out from under them and ran east half a block to the Mary Meier cabin camp. He was dressed in a pair of shorts, had on his undershirt and no shoes. The men waited for him to return. She next saw her husband in a neighbor's yard about 20 feet from the Burton residence. There the party engaged in another fight. She, at one time, was struck in the face by the defendant. She detailed the lighting conditions surrounding the

premises, and stated that she could see what was taking place.

Orville Burton testified that when Dolan and the defendant returned at 2:45 a. m., they banged the cabin door defying him to come out, calling him vile names and stating they would kill him. He went to the front door. Four of them were in a huddle, and they continued to threaten him. They jerked the front screen loose from the fastener, and he attempted to brace the door. Someone broke the glass, and they pushed into the room. Cafferty was the first man in, and Burton struck him over the head with a piece of pipe 18 or 20 inches long and 1¼ inches in diameter. Cafferty made the remark that Burton did not hit him hard enough and that he was not afraid. Burton was knocked to the floor and the four men got on top of him and hit him so fast that he did not know where the blows came from. He was pushed around and thrown out into the front yard where the fighting continued. He was knocked to the ground and the men got on top of him again. They were all fighting. He was fortunate enough to break away, and ran down to the Meier cabin camp and tried to arouse Mrs. Meier. He heard a voice in the street say: "Get him with that car." He then ran along the same path toward home. The men were strung out along the path and as he proceeded up the pathway they fought with him. He then turned into Julow's yard and the fighting continued. He was struck by all of them, as far as he knew. He went around the Julow house, and blows were exchanged between him and those after him. He was finally cornered by Whitt who struck him several times with the pipe which Burton had lost in the encounter. He made a break from Whitt and dove through Julow's back door to use the telephone to call the police. He braced the door as best he could, and Whitt proceeded to knock the door to pieces, but did not gain access to the room. All of a sudden the

attack ceased. He did not hear a gun, but Mrs. Julow said: "Orville, I shot him."

Mrs. Julow, the neighbor, testified that when the defendant and Dolan and party left the cabin camp after the first encounter they threatened to get a gang and come back, and they used vile language to the Burtons. When they returned at about 2:45 a. m. they went into cabin No. 5 which she could see readily from her premises, kicked the furniture to pieces, and threatened Orville Burton to come out. She saw most of the fighting that took place. During a part of it she endeavored to rescue the Burton girl who was running in the direction of her father, and was told to keep out of the matter because it was none of her business. Her glasses were knocked off, and she was assaulted with the gas pipe. We deem it unnecessary to further relate the testimony of this witness except to say that she corroborated the testimony of the Burtons with reference to the fighting; stated that she could see most of what happened; and detailed the fighting as it occurred on her premises. The fighting ended when she shot Whitt in the leg with a revolver.

Orville Burton testified that he was badly beaten up; his face and head were swollen; and wounds on his lip and head had to be sutured. He was unable to work for three or four weeks due to the condition of his feet.

Plourd testified for the defendant, that he was in the party that returned from Indianola in the car that Cafferty was driving, and that he was present at the Burton's cabin camp; that upon arriving at the camp Cafferty got out of the car, knocked on the front door of Burton's house and asked if anybody was home, or something of that nature; that Cafferty was struck from within, but he did not know who struck him; and that Dolan and the defendant must have parked their car some distance from there. He was unable to give much detail because things were happening fast and there was excitement. Cafferty made a remark that he was floored, and

staggered around a bit and Burton seemed to be angry. From then on the defendant and the other men charged the door and things happened pretty fast. The glass was shattered. They came out in a short time, exchanged blows, struck at each other, and stumbled to the ground. Burton still had the weapon which he presumably struck Cafferty with, and was on top of him. Dolan pulled Burton off of Cafferty and after that Burton got to his feet and ran from the scene of the fight. Whitt helped this witness walk Cafferty over to the car and get him in the car. At that time he saw Burton in Julow's yard and thought it would be a good time to get Cafferty to a doctor, so they left.

The defendant testified that when they left the cabin camp at about 1:30 a. m., they proceeded to Indianola and something was said about getting the money back for the cabin. Finally some of the party decided to go to the camp, and he and Dolan left Indianola for McCook. They drove to the defendant's parking lot where Dolan had left his car. They slowed down and stopped, and Dolan said: "* * * well, maybe we had better go on down to the cabin camp where these boys left for, we started the trouble and Don might get in a lot of trouble, * * *." They went down and parked the car by the Meier cabin camp. At the intersection they heard a commotion, and Dolan got out of the car and ran down to the place. The two girls remained in the car, and the defendant walked to the Burton camp. He saw Cafferty at the door, and afterwards saw Cafferty and Burton roll out on the ground, and they were struggling. Dolan was then a few feet away from them and ahead of the defendant. Dolan walked over and pulled Burton off of Cafferty. He did not hit him, but jerked him off, and Burton got up and ran away. Cafferty got up and started after him, but did not get far until he went down on the ground. Burton went on down the road. Cafferty had blood on his shirt and somebody said they had better get him in the car and get him to a doctor. Whitt and Plourd loaded him

into the car. About that time Dolan and the defendant got into the defendant's car and drove to where the defendant's secretary stayed, and let the girls out. He and Dolan were taken by the police and lodged in jail. He further testified that in the second fight he did not at any time strike Burton or hit anybody at the cabin camp, nor express an intent to do any injury to Burton; that he did kind of slow him down when he hit him in the nose when they were at the camp to pick up Dolan's acquaintance; and that was the only time that he touched Burton. He did not hear any threats made against Burton's life at any time, and he saw nobody hit Burton while he was there, except Cafferty.

Dolan testified that he and the defendant were at the Burton cabin camp at 1:30 for the purpose of picking up his friend to put her on a train or bus to Denver; that after they were there a short time there was a rap on the door; that he made a low remark to the people inside of the cabin that someone was looking for him; and that he did not answer the knock. When he heard the knock the second time he asked what they wanted, and someone in a loud, surly tone said to be quiet or leave. Dolan said they were leaving as quickly as they could. He then told the manner in which they left, and testified that as he walked out Burton said to him: "* * * get going," and he said: "We are leaving," and Burton said something else. Dolan could see that Burton was getting mad, and told him not to get excited. Then, when he turned around, he was hit in the back of the head. He turned around and hit Burton. Burton came at him pretty fast and almost succeeded in knocking him out. He testified that they went to the police station as they were worried about what had occurred, and were informed that if they were wanted they would be picked up.

We conclude the evidence as shown by the record was sufficient to warrant the submission to the jury of the offense charged.

The law is established in this jurisdiction that this

court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. Williams v. State, 115 Neb. 277, 212 N. W. 606; Haines v. State, 135 Neb. 433, 281 N. W. 860; Lee v. State, 124 Neb. 165, 245 N. W. 445.

Where the evidence in a criminal case is conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury. Norton v. State, 119 Neb. 588, 230 N. W. 438; Guerin v. State, 138 Neb. 724, 295 N. W. 274. See, also, Luster v. State, 142 Neb. 253, 5 N. W. 2d 705.

The defendant predicates prejudicial error on the part of the trial court in submitting certain instructions to the jury, especially instructions Nos. 10 and 13.

The court, in instruction No. 7, properly defined the crime charged, and in instruction No. 8, under the authorities of this state, properly defined intent, which is a material element of the offense charged. In instruction No. 9, the court set forth the material elements of the principal offense in the amended information which the State was obligated to prove beyond a reasonable doubt in order to convict the defendant, and specifically named those alleged to have assisted or participated with him in the assault to inflict great bodily injury.

We set forth instruction No. 10, upon which the defendant predicates prejudicial error: "The law further provides, 'Whoever aids, abets or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender.' To 'aid' means to assist; to help in the commission of an act. To 'abet' means to incite, encourage or instigate another to commit an offense. 'Procure' means to contrive; to bring about; to cause. You are further instructed that all persons who act together with a common intent and design

in the commission of a crime, such as charged in the amended information in this case, and all persons who aid, abet or procure another to commit any offense, are equally guilty as principals in the commission of any offense while the parties are so acting. It is not essential to a conviction of the defendant on trial in this case that the State establish that Beryl Planck alone committed the offense charged in the amended information. If you believe from the evidence, beyond a reasonable doubt, that the acts complained of in the amended information were committed by the defendant on trial, conspiring or acting in conjunction with some other person or persons, with a common purpose and design, one doing one thing and one doing another thing in connection therewith; or that the defendant on trial, being personally present, possessing the intent to inflict a great bodily injury as hereinbefore explained in these instructions, in any manner knowingly and intentionally aided, abetted or encouraged some other person or persons in the commission of the offense charged; then, if you so find, the defendant on trial would be equally guilty in the commission of any offense committed while the parties were so acting."

The defendant argues that this instruction withdrew from the jury the question of felonious intent which is required by law to be proved before the defendant could be convicted of the principal offense charged; that the trial court attempted to cover the whole case in this instruction; further, that the question of the commission of the crime by the principals, designated as "other person or persons" is assumed and that question is not submitted to the jury for its consideration as a question of fact to be resolved by them.

It will be noted that the court used the following language in the instruction: "as hereinbefore explained in these instructions." It is apparent the court did not attempt by this instruction to cover the whole case as claimed by the defendant, but only the phase of the case

relating to aiders, abettors and procurers' responsibility as principal. It was necessary for the trial judge to instruct the jury as to the liability of the defendant Beryl Planck by reason of participating in concert with the other men named in the information and as to the guilt under section 28-201, R. S. 1943, as an aider or procurer.

In view of all of the instructions in this case, we conclude the trial court did not, by this one instruction, attempt to or cover the whole case insofar as the principal offense charged is concerned.

The defendant argues that instruction No. 13, which relates to self-defense, contains a limitation in the use of language in substance as follows: If the defendant, or one or more of his companions while acting in conjunction with the defendant, and with a common purpose and design, assaulted the complaining witness at a time when they had no reasonable apprehension of immediate or impending danger to himself or his companions; that the word "they" should have read "he" and cast a burden upon the defendant which under the peculiar facts and circumstances of this case was unduly prejudicial to him; that the question was not as submitted by the court whether Cafferty, Dolan, or Whitt had no reasonable apprehension of immediate or impending danger or had such reasonable apprehension, but whether the defendant Planck, who was alone on trial, had no reasonable apprehension of immediate or impending danger.

The defendant relies on the case of State v. Hartzell, 58 Iowa 520, 12 N. W. 557, which contains an instruction similar to the one given in this case, and wherein it was held the instruction constituted prejudicial error.

The rule in Iowa is that where instructions are conflicting and inconsistent with each other they are necessarily prejudicial. Hoeft v. State, 221 Iowa 694, 266 N. W. 571, 104 A. L. R. 1008. Under such rule the instruction was held to be prejudicial. It would not necessarily

be prejudicial in this state. This court, under section 29-2308, R. S. 1943, has the privilege within its discretion to examine instructions which appear to be conflicting or confusing, and to determine whether, under the instructions considered as a whole, there is any such error in instructions singled out that would result in a miscarriage of justice.

From an analysis of instruction No. 13, we conclude it instructed the jury under the right of self-defense for an individual or for a group of individuals. It specifically states "no reasonable apprehension of immediate or impending danger to himself or his companions," and in view of the whole charge to the jury, the instruction is not prejudicially erroneous.

Further, in this state the applicable law applying to such situation is as follows: "Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete." Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868; Nanfito v. State, 136 Neb. 658, 287 N. W. 58; Norton v. State, *supra.*

"The rule is well established that it is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not; and an instruction or instructions which, by the omission of certain elements, have the effect of withdrawing from the consideration of the jury an essential issue or element of the case, is erroneous; but where the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, then error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining." Jones v. State, 147 Neb. 219, 22 N. W. 2d 710; Sedlacek v. State, *supra;* Lee v. State, *supra.*

From an analysis of the entire charge to the jury in the instant case, we conclude that the instructions com-

plained of did not constitute prejudicial error.

The defendant contends that the trial court committed prejudicial error in interrogating the witness Plourd, witness for the defendant, in that the court argued with the witness and stated in the presence of the jury that the defendant and the witness went to the cabin camp of the complaining witness Burton knowing that an act of violence would be committed, and the court thereby indicated to the jury his belief in the guilt of the defendant, and by reason thereof the defendant was denied a fair trial.

The following questions are involved in this assignment of error. "1327 THE COURT: What was your business in going up to McCook from Indianola? A- Well, it was really none of my affair, your honor, as I said a few moments ago I thought it would be a good idea, knowing the police had already been at the scene of the first altercation that it might be a good idea to go along to see that the $3.00 was peaceably asked for— I just like to see people get along. 1328 THE COURT: Then you expected violence to be used when you got to the Burton Cabin Camp, you anticipated violence? A- As I answered you, I didn't anticipate violence— excitement is bad for me and I don't like fights." Defendant's counsel moved for a mistrial, which was overruled.

Defendant argued that the statement made by the court was not couched as a question; that it solicited no answer but conveyed to the jury the idea that because of the conversation held among the four men at Indianola, the witness expected violence to be used when the parties returned to the cabin camp; and was particularly prejudicial because it instantly set up in the minds of the jury the thought that the plan for the making of this felonious assault was made in the meeting of the men following the birthday party. Defendant cites from Moore v. State, 147 Neb. 390, 23 N. W. 2d 552, as follows: "The trial judge during the course of a trial should refrain from

remarks that are calculated in any way to influence the minds of the jury." The opinion cites 26 R. C. L., Trial, § 27, p. 1026: "The judge should, during the course of the trial, refrain from remarks that are calculated in any way to influence the minds of the jury. This includes remarks to counsel touching the management of the case and reflecting on their conduct, as well as those touching the character of the witnesses and the value of their testimony; and, if the remarks so made are material and improper, they may be prejudicial. Accordingly, if properly excepted to and brought into the record, they may work a reversal of the case on that ground." To like effect is 23 C. J. S., Criminal Law, § 993, p. 349, which was approved in Hansen v. State, 141 Neb. 278, 3 N. W. 2d 441.

As stated in Kraus v. State, 102 Neb. 690, 169 N. W. 3: "It is well known to those who are familiar with jury trials that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal actions."

The authorities cited by the defendant in support of the foregoing contention clearly manifest that the trial court took a prominent part in the trial, and on numerous occasions interjected his personal views and opinion as to the guilt or innocence of the accused, which is not true in the instant case. The trial court's duty in such respect is well exemplified in 23 C. J. S., Criminal Law, § 991, p. 345: "For the purpose of eliciting evidence which has not otherwise been brought out, or to clarify testimony, it is ordinarily proper for the judge to put competent and material questions to a witness either on his examination in chief or on his cross-examination, and where anything material has been omitted, it is sometimes his duty to examine a witness. * * * However, such examination must be conducted without prejudice to accused, and in such a manner as to impress the jury with the idea that the judge is entirely impartial; * * *."

We are not in accord with defendant's contention that

the trial court argued with the witness and elicited his statement. The bill of exceptions shows that he asked the witness a question, the witness answered it, and the matter was pursued no further. We do not believe the court's question in such respect was one of bias or prejudice, or indicated the court's opinion regarding the guilt or innocence of the accused, and the defendant's contention in such respect cannot be sustained.

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

AFFIRMED.

MEENT MEESTER, APPELLANT, V. TATE SCHULTZ, AN INDIVIDUAL DOING BUSINESS AS SCHULTZ GRAIN COMPANY, APPELLEE.
38 N. W. 2d 739

Filed July 14, 1949. No. 32611.

1. **Workmen's Compensation.** Under the workmen's compensation law any appeal from the judgment of the district court is prosecuted in accordance with the general laws of the state regulating appeals in actions at law, the only exception being the period of time in which the appeal should be perfected.
2. **New Trial: Appeal and Error.** While a motion for a new trial is unnecessary in a workmen's compensation case, if such a motion is filed in the district court under the general provisions of the Code of Civil Procedure, the time for perfecting an appeal from the district court to the Supreme Court does not commence to run until the overruling or sustaining of such motion.
3. **Workmen's Compensation.** All of the provisions of the Civil Code are applicable and controlling in a workmen's compensation case as they are in any other civil action equitable in nature.
4. **New Trial.** It is the rule that, where a new trial of all the issues is granted, the first trial is wholly set aside and the case stands as if there had been no trial.
5. **New Trial: Appeal and Error.** Where a motion for a new trial is granted and the losing party does not appeal therefrom but voluntarily participates in a second trial, and does not preserve the record of the first trial in the second trial but appeals from the judgment in the second trial only, there can be no review of the proceedings in the first trial or of the order granting it.

6. **Workmen's Compensation: Appeal and Error.** In a proceeding under the workmen's compensation law, where the evidence is in irreconcilable conflict, the Supreme Court, upon a trial de novo, may consider the fact that the district court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses.
7. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
8. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.

APPEAL from the district court for Adams County: EDMUND P. NUSS and FRANK J. MUNDAY, JUDGES. *Affirmed.*

John E. Willits, for appellant.

Stiner, Boslaugh & Stiner, for appellee.

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

MESSMORE, J.

This is a workmen's compensation case. We set forth the following proceedings had in the district court for Adams County as being essential to a determination of this appeal.

On May 3, 1948, the district court entered judgment in favor of the plaintiff and against the defendant, finding that on July 20, 1945, the plaintiff suffered an accident arising out of and in the course of his employment with the defendant, and as a result thereof suffered a 25 percent permanent partial disability to his right arm and shoulder, and awarding compensation to the plaintiff for such disability at the rate of $18 a week for 56¼ weeks, amounting to a total of $1,012.50, and allowing attorney fees and costs.

On May 11, 1948, the defendant filed a motion for a

new trial, within the 10 days required by law. See section 25-1143, R. S. Supp., 1947. On June 12, 1948, the motion for new trial was argued and submitted. On July 24, 1948, the district court sustained the defendant's motion for a new trial on the ground that the judgment entered in favor of the plaintiff May 3, 1948, was not sustained by the evidence. These proceedings were had at the same term of the district court in which the judgment of May 3, 1948, was rendered. On October 21, 1948, the case was tried again in the district court and was taken under advisement. On November 29, 1948, the district court rendered a judgment in favor of the defendant and against the plaintiff, determining that the evidence was insufficient to sustain any award in plaintiff's favor, and dismissed the plaintiff's action.

On December 3, 1948, the plaintiff filed a motion to set aside and vacate the judgment entered on November 29, 1948, alleging that the judgment rendered May 3, 1948, had become, and was, a final judgment in full force and effect under the law of this state. On December 9, 1948, the plaintiff filed a motion for new trial and reserved therein the rights as set forth in his motion to vacate the judgment entered November 29, 1948. On December 10, 1948, the district court overruled the plaintiff's motion to vacate the judgment entered November 29, 1948, and the plaintiff's motion for a new trial with reference to the judgment entered on such date.

The plaintiff appeals from the judgment entered on November 29, 1948, and the motion to vacate said judgment which was overruled on December 10, 1948.

For convenience the appellant will hereafter be referred to as the plaintiff, and the appellee as defendant.

The plaintiff contends that the trial court erred in not holding the judgment entered May 3, 1948, in favor of the plaintiff and against the defendant in the district court, to be a final judgment. In this connection the plaintiff relies on certain language contained in section 48-185, R. S. 1943, which provides in part as follows:

"Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law except that such appeal shall be perfected within thirty days from the entry of judgment by the district court * * *."

Plaintiff argues that the defendant failed to perfect an appeal within 30 days from the entry of the judgment in the district court as is required by said section, and therefore the judgment entered May 3, 1948, became a final judgment.

This court in Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352, held: "While a motion for a new trial is unnecessary in a workmen's compensation case, if such a motion is filed in the district court under the general provisions of the Code of Civil Procedure, the time for perfecting an appeal from the district court to the supreme court does not commence to run until the overruling of such motion." See, also, Lincoln Packing Co. v. Coe, 120 Neb. 299, 232 N. W. 92; Saxton v. Sinclair Refining Co., 125 Neb. 468, 250 N. W. 655.

Under the afore-cited authorities, in the event the defendant or the plaintiff desired to appeal from the ruling made by the district court, the 30-day period under section 48-185, R. S. 1943, would run from July 24, 1948. The defendant, having obtained a favorable ruling on his motion, there would be no reason for him to appeal.

All of the provisions of our Civil Code are applicable and controlling in a workmen's compensation case as they are in any other civil action equitable in nature. See Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366.

All findings, orders, awards, and judgments of the district court shall be conclusive upon all the parties at interest unless reversed or modified upon appeal as provided in the Workmen's Compensation Act. See section 48-181, R. S. Supp., 1947.

The plaintiff did not appeal from the order of the district court entered July 24, 1948, which sustained the

defendant's motion for a new trial on the judgment rendered May 3, 1948, but voluntarily participated in the second trial of this case held on October 21, 1948, and the record in the second trial does not disclose that the bill of exceptions in the first trial was offered or received in evidence on the second trial.

"Where a ground or grounds for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge of such questions of fact. * * * If a party desires a review of that determination, the showing thereon must be preserved in the record." Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

There is nothing for this court to review with reference to the first trial.

Under the procedure as heretofore outlined, we conclude that the plaintiff waived any error in the granting of a new trial to the defendant from the judgment rendered May 3, 1948. The following cases are applicable.

In Lundblad v. Erickson, 180 Minn. 185, 230 N. W. 473, the court said: "It is the rule that, where a new trial of all the issues is granted, the first trial is wholly set aside and the case stands as if there had been no trial." See, also, Fehr v. Campbell, 288 Pa. 549, 137 A. 113, 52 A. L. R. 506; Evans v. Davidson, 57 Idaho 548, 67 P. 2d 83; Etcherson v. Hamil, 131 Ark. 87, 198 S. W. 520; Zschokke v. Lumley, 22 Cal. App. 2d 224, 70 P. 2d 495; Gilbert v. Marrow, 54 Neb. 77, 74 N. W. 420.

Plaintiff's contention to the contrary cannot be sustained.

The further matter for determination in this appeal is the proceedings had in the second trial and the sufficiency of the evidence to sustain an award of compensation in favor of the plaintiff for permanent partial disability as contended for by him. The disability complained of is limitation of movement of his right arm and shoulder. His contention in such respect is that he now suffers from subdeltoid bursitis.

The record discloses that the defendant Theodore Schultz, also known as Tate Schultz, was engaged in the grain and feed business at Hastings, Nebraska. The plaintiff had been employed by the defendant off and on for a period of ten years as a laborer, prior to July 20, 1945. His duties were primarily to sack feed, load it into trucks, make deliveries as required, and on occasions to scoop grain and clean up around the elevator.

Located in the driveway on the defendant's premises was a pneumatic hoist, or lift, situated in a pit 6 or 7 feet long, 4 or 5 feet wide, and about 9 feet deep. This hoist was used to raise the front of trucks loaded with grain for the purpose of dumping the same, as is usually done in grain elevators. During the early part of the afternoon of July 20, 1945, Herman Schultz, a brother of the defendant, was engaged in repairing the hoist, it being deemed necessary to replace valves therein, and the hoist was in the process of being assembled. The platform which ordinarily covered the pit had been removed and in place thereof some beams were placed across the top of the pit. There were four endless chains, known as hoist chains, hanging over the pit, the lower end of which was approximately 3½ or 4 feet above the level of the floor. Herman Schultz was standing on the frame of the hoist in the southeast corner of the pit, tightening the last bolt of the framework. His waist was about level with the floor, and he was facing southeast. Apparently the bolt he was attempting to tighten failed to hold, and he asked for another wrench. The plaintiff was standing west of the pit when he was directed by the defendant to go into the pit and hold the bolt. He had a wrench in his left hand. The plaintiff was a man at that time of about 60 years of age, weighing 220 pounds. He took hold of one of the chains of the chain hoist. One of the beams which he was crossing was loose, and he slipped and fell on some braces.

The plaintiff testified that when he slipped on the

beam which he was crossing, having hold of one of the chains, it wrapped around his right arm above the elbow and pulled that arm back and, as he expressed it, "throwed" it back. As he fell his body struck the defendant's brother. His head struck the south side of the pit and his body was lying on the braces. He further testified that at the time of the fall his weight was suspended until the chain hoist let loose. He fell onto some braces which saved him from falling into the pit, and he succeeded in getting up by himself. He also testified that after the accident his right arm was bruised and became numb; that he was right handed, and through the loss of use of his right shoulder he was unable to shave himself or do the things and perform the labor that he had previously performed; that he lacked strength in his right hand and it became numb when he laid it down; that since the accident he had been continuously bothered with his right shoulder; that upon his return to work he informed the defendant as to the disability to his right shoulder and arm as he conceived it, but the defendant insisted that he remain, so he continued in the employ of the defendant until in March 1946, when, as he terms it, he was "fired." He further testified that he attempted to obtain employment elsewhere and for a couple of weeks drove for a cab company but his right shoulder and arm bothered him to such an extent that he was unable to continue this employment; and that he made application for janitor work and was turned down and has since been unable to obtain employment. He further testified that he took 30 or 35 treatments from Dr. Uridil which apparently failed to help him in any manner.

The plaintiff's wife testified that prior to the accident the plaintiff was able to perform labor, and in doing so used his right arm and shoulder to advantage; that it was in a normal condition. Subsequent to the accident his right arm disclosed less strength than it had shown previously. From an examination of his right shoulder

and arm she found that he had bruise marks on his right arm between the elbow and shoulder, together with some swelling; and that in doing any work subsequent to the accident he favored his right arm and shoulder and made more use of his left arm.

The plaintiff's son-in-law testified that before the accident the plaintiff's right arm and shoulder were normal; that he had engaged in general farming and performed such duties as pitching hay, and at times had carried a five gallon bucket of slop in each arm to feed the hogs, and was capable of doing everything connected with farm labor; that after the accident the plaintiff came to his place on three or four occasions and was unable to work as he had previously, and when he would slop the hogs he used a two and one-half gallon bucket which he carried with his left hand; and that he was unable to use a hammer with his right hand or to perform farm labor as he had previously done before the accident.

The defendant testified that he saw the plaintiff when he fell; that the hoist chain did not wrap around the plaintiff's elbow or arm in any manner; and that as the plaintiff fell he let loose of the chain and it swung back and hit the defendant's brother who was in the pit, in the head. This evidence was substantially corroborated by the defendant's brother, to the extent that as the plaintiff fell he fell onto him and the chain hoist struck him in the head.

A relative of the plaintiff who was present at the elevator at the time of the accident testified that the plaintiff took hold of the chain hoist and then fell, but he did not see the plaintiff's arm get caught or twisted in the chain hoist.

There is testimony that the defendant did not discharge the plaintiff from his employment after March 1946, because he had sold out the business and was himself working for the new proprietor; and that the plaintiff returned to work the afternoon of the accident and continued to perform the same duties as he pre-

viously had, up to the date of his severance from his employment.

Immediately after the accident the defendant took the plaintiff to the office of Dr. J. W. Brown. This doctor testified that the plaintiff arrived at his office shortly after noon on July 20, 1945, and complained about his right shoulder. The doctor made an examination of the plaintiff's right shoulder and was unable to determine that there was anything wrong with it. However, to be absolutely safe, he recommended that the plaintiff see and consult another doctor and have an X-ray made of the right shoulder.

From Dr. Brown's office the plaintiff went to the office of Dr. Joseph E. Uridil. This doctor testified that upon arriving at his office the plaintiff complained of an injury to his right shoulder. He made an X-ray picture of the shoulder, and subsequent to an analysis thereof, gave the plaintiff various treatments including diathermy, rest, and sedatives to which, after a period of time, the plaintiff failed to adequately respond. As a consequence, the doctor made another X-ray examination of the plaintiff's right shoulder, and from an analysis of both X-rays, determined that they were negative and failed to show any pathology in the plaintiff's right shoulder. However, this doctor continued to treat the plaintiff until it was apparent that his treatment failed to relieve the plaintiff and he informed him that nothing more could be done for him, and ceased to treat him.

Dr. A. A. Smith testified in behalf of the plaintiff on the second trial, to an examination made of the plaintiff on April 22, 1948. From this examination he estimated the plaintiff's right shoulder to have a permanent partial disability of between 15 and 25 percent. He did not testify that this condition resulted from a trauma caused by an accident which the plaintiff might have received arising out of and in the course of his employment, but did testify that the condition could have re-

sulted from a number of causes, such as external force or infection in the plaintiff's system.

It might be stated at this point that Dr. Uridil diagnosed the plaintiff's condition as causalgia, or a neuralgia of the sympathetic nerves, a term applied to pain resulting from injury to a nerve. Plaintiff's counsel did not pursue this diagnosis. Dr. Uridil testified that he thought this condition came on gradually. Dr. Smith apparently found no evidence of causalgia. What he found was that the condition with which the plaintiff claimed to be suffering might be caused from some force exerted from without, from striking the arm or shoulder, from force of twisting or bruising, or it might be due to conditions internally, such as a rheumatic condition or an infection in the system which might spread to a joint and cause it to become partially immobilized and even destroy part of the joint surfaces and cause the joint or member to become disabled.

Dr. L. J. DeBacker testified that he examined the plaintiff on October 15, 1948, including an X-ray of the plaintiff's right shoulder and chest. From an analysis of the X-ray he found no abnormality or pathology of the bony structure. From an examination of the plaintiff's right arm he found approximately 20 percent limitation of active motion, but no evidence of muscle atrophy or disturbance of the nerves of the arm, and no indication that the plaintiff was suffering from causalgia. He further testified that many things could have caused that which the plaintiff complained of in his right shoulder, including periarthritis.

It is apparent from the foregoing medical testimony that the experts testifying were not in accord as to what caused the condition of the right shoulder of which the plaintiff complained. The cause of the plaintiff's condition affecting his right shoulder and arm is speculative and conjectural. In short, there is no testimony that the condition complained of by the plaintiff arose out of and in the course of his employment by the defendant.

We have set out the evidence in some detail to ascertain if the same is sufficient to warrant an award under the workmen's compensation law as claimed by the plaintiff.

In determining the right of a claimant to an award under the workmen's compensation law, there are certain established rules in this jurisdiction. In the first instance, the burden of proof is upon a claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. See, Kaffenberger v. Iverson, 142 Neb. 257, 5 N. W. 2d 687; Chambers v. Bilhorn, Bower & Peters, Inc., 145 Neb. 277, 16 N. W. 2d 173; Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592.

"In a proceeding under the workmen's compensation law, where the evidence is conflicting, the supreme court upon a trial de novo may consider the fact that the district court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses." Sherman v. Great Western Sugar Co., 127 Neb. 505, 255 N. W. 772. See, also, Hudson v City of Lincoln, 128 Neb. 202, 258 N. W. 398; Sbarra v. Middle States Creameries, 140 Neb. 813, 2 N. W. 2d 26.

When the evidence in a compensation case on material issues so conflicts that it cannot be reconciled, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. See, Graham Ice Cream Co. v. Petros, 127 Neb. 172, 254 N. W. 869; Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891; Peterson v. Winkelmann, 114 Neb. 714, 209 N. W. 499.

No recognition of the doctrine that because an injury may probably be the cause of an ailment the court should so find appears in our decisions. It may be so in other states, but not in this jurisdiction. The Nebraska rule, often pronounced and adhered to, is that in proceedings

under the workmen's compensation law awards for compensation are not to be based upon possibilities or probabilities, but only upon sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment. See, Bartlett v. Eaton, 123 Neb. 599, 243 N. W. 772; Townsend v. Loeffelbein, 123 Neb. 791, 244 N. W. 418; Saxton v. Sinclair Refining Co., 125 Neb. 468, 250 N. W. 655.

As is apparent from the evidence, there is a disputed question of fact, and to some degree credible evidence on both sides. However, in the light of the foregoing authorities and from an analysis of the evidence on trial de novo, we conclude that the plaintiff has failed to prove and establish his case by a preponderance of the evidence, as is required by law. We therefore hold that the evidence is insufficient to establish the plaintiff's claim for compensation under the workmen's compensation law, and the judgment of the trial court is affirmed.

AFFIRMED.

THOMAS UMBERGER ET AL., PARTNERS DOING BUSINESS AS THE UNION AIR SERVICE, APPELLEES, v. ROY A. SANKEY, APPELLANT.

38 N. W. 2d 551

Filed July 14, 1949. No. 32544.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. On oral argument on motion for rehearing. See *ante* p. 488, 38 N. W. 2d 21, for original opinion. *Former opinion and judgment modified. Motion for rehearing overruled.*

T. R. P. Stocker, for appellant.

Hammond & Parker, and *Sam Zimmerman,* for appellees.

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

CHAPPELL, J.

Upon consideration of motion for rehearing, same is denied, but the last paragraph of our opinion filed June 10, 1949, reported *ante* p. 488, 38 N. W. 2d 21, is hereby withdrawn and the following substituted in lieu thereof:

We conclude that the action of the trial court in dismissing defendant's cross-petition was correct and it is hereby affirmed. However, for the reasons heretofore stated, the judgment of the district court, upon the issues made by plaintiffs' petition and defendant's answer thereto, should be and hereby is reversed and the cause is remanded for new trial only upon such issues.

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

MARY C. MADDOX ET AL., APPELLEES, V. WILLIAM M. MADDOX ET AL., APPELLANTS.
38 N. W. 2d 547

Filed July 14, 1949. No. 32631.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Trusts.** The foregoing rule is not abrogated by, but must be construed in the light of the rule that the burden of proof is upon one seeking to establish and enforce a constructive trust to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character.
3. ———. Where one person undertakes as agent to purchase property for another, the other to pay part or all of the purchase

price and become owner of all or a part of the property proportionate to his contribution, the purchase thereof by such person in his own name or otherwise for himself gives rise to a constructive trust for the benefit of the other in the agreed proportion, conditional upon reimbursement of the agreed part of the purchase price.

4. **Frauds, Statute of: Trusts.** The statute of frauds, sections 36-103 and 36-104, R. S. 1943, does not apply to a constructive trust growing out of an undertaking by one person as agent to purchase property for another, where in violation of his agreement he has taken the title in his own name or otherwise for himself, and refuses to convey after tender of the agreed part of the purchase price.
5. ———: ———. The basis for the foregoing rule is that in such a case the principal is not seeking to enforce an oral contract, but to declare and enforce a constructive trust resulting from the violation of confidential and fiduciary duties by the agent.
6. **Principal and Agent: Frauds, Statute of.** An agreement by one person to purchase personal property for another is not ordinarily a contract of sale but a contract of agency, and in such a case the statute of frauds, section 69-404, R. S. 1943, has no application.
7. **Husband and Wife: Trusts.** Generally, where a party acting as agent or trustee, is barred from purchasing property because of a confidential or fiduciary relationship, the husband or wife of such party is equally barred and no advantage can be gained by purchasing the property and taking the title thereto in the name of such husband or wife.

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

Wiltse & Wiltse, for appellants.

Paul P. Chaney, for appellees.

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

CHAPPELL, J.

Plaintiffs brought this action in equity seeking to have the trial court declare and enforce a constructive trust with relation to a one-fifth interest in the estate of Wesley H. Maddox, deceased. The trial court found generally for plaintiffs and against defendants, who

appealed, assigning as error that the judgment was contrary to the law and the evidence. We conclude that the assignments should not be sustained.

It is elementary in this jurisdiction that: "Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

The foregoing rule is not abrogated by, but must be construed in the light of the rule that the burden of proof is upon one seeking to establish and enforce a constructive trust to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character. Bruce v. Cadman, 110 Neb. 500, 194 N. W. 726.

Bearing the foregoing rules in mind, we have examined the record. Certain facts are not in dispute. Wesley H. Maddox died testate on January 6, 1947. He left a substantial estate. Surviving him were his widow, Ida M. Maddox, and four children, the three plaintiffs and defendant William M. Maddox. His widow, a second wife, was not the mother of the children. The will of deceased was admitted to probate on February 8, 1947. Defendant William M. Maddox was on that date appointed executor. Thereafter, he qualified, and has since served as such. By the terms of the will all of the estate, both real and personal, was directed to be converted into cash by the executor and then distributed, one-fifth to each of the children, and one-fifth to the widow, who did not elect to take under the statute.

The estate had not yet been converted into cash, and on October 9, 1947, without notice to or knowledge of

plaintiffs, but in the presence of defendant William M. Maddox, the one-fifth interest of the widow was purchased in the name of defendant Inez Maddox, wife of defendant William M. Maddox, for $8,500. The purchase price therefor was paid by a check drawn by defendant, Inez Maddox, upon the joint bank account of herself and husband. At or about the same time, an assignment of such interest was also prepared and approved by the county court without notice to or knowledge of plaintiffs.

The evidence upon other material issues was generally in conflict, but the record discloses ample competent evidence, clear, satisfactory, and convincing in character, which supported the primary contentions of plaintiffs.

In that connection, there was evidence that upon several occasions prior to October 9, 1947, conversations were had between plaintiffs and defendants, and by some of the plaintiffs with defendants, whereat prospective plans and methods were discussed, whereby plaintiffs and defendants could acquire the one-fifth interest of the widow, by each paying his or her share, and each thus own an undivided one-fourth of the estate.

Finally, on March 22, 1947, in the presence of plaintiffs, both defendants, and a husband of one of plaintiffs, the defendant William M. Maddox made a proposition to plaintiffs that the four children should each pay their one-fourth share and buy out the one-fifth interest of the widow for all of them, at a price not to exceed the appraised value thereof, as fixed by the county court, whereby each would then own an undivided one-fourth interest not only in that interest but also in the estate. Such appraised value of the widow's one-fifth interest was concededly $11,348.60. The foregoing proposition so made by defendant William M. Maddox was thereat accepted by each and all of those then present, and by agreement, reaffirmed September 4, 1947, defendant William M. Maddox was designated and agreed to act as agent representing all of them to negotiate for and complete such purchase.

As such, he had some negotiations with the widow, but did not complete the purchase, in conformity with the agreement. Rather, thereafter, on October 9, 1947, the wife, defendant Inez Maddox, in the presence of her defendant husband, with full notice and knowledge of the agreement aforesaid, and in violation thereof, bought the one-fifth interest of the widow, paying therefor by check drawn upon their joint bank account as aforesaid.

Thereafter, plaintiffs, upon learning of the transaction, demanded that defendants convey to each of them an undivided one-fourth of such one-fifth interest, offering to pay therefor, but such demand and offer were refused, and plaintiffs brought this action, offering therein to pay defendants three-fourths of the purchase price of such one-fifth interest.

In the light of the foregoing evidence, there can be no doubt that defendants, while William M. Maddox was serving plaintiffs as agent in a confidential and fiduciary capacity, and his wife was also in a confidential relation with plaintiffs, fraudulently and in violation of the agreement, purchased the widow's interest for defendant William M. Maddox in the name of his wife, thereby attempting to accomplish indirectly that which he could not do directly. Evidence adduced by plaintiffs amply sustained that conclusion, and admissions made by defendants to other witnesses, as well as in their own testimony, affirmatively supported it.

Applicable law is well established in this jurisdiction. Contrary to defendants' contention, there was no question of partnership or resulting trust involved in this case. As early as Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, adhered to on rehearing, 69 Neb. 753, 101 N. W. 9, this court pointed out the distinction between resulting and constructive trusts. This court has never departed from that opinion, but consistently followed it. Resulting trusts we need not discuss, since clearly the evidence

in the case at bar brings it squarely within the classification of a constructive trust.

In the aforesaid case, it was said: "Closely allied to resulting trusts, and frequently confused with them, are constructive trusts. This class of trusts arises from actual or constructive fraud or imposition, committed by one party on another. 1 Perry, Trusts (5th ed.), sec. 166. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Again, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. Thompson v. Thompson, 16 Wis. 94; McLain (McLane) v. Johnson, 43 Vt. 48; Hollinshead v. Simms, 51 Cal. 158." See, also, In re Estate of Scott, 148 Neb. 182, 26 N. W. 2d 799; Box v. Box, 146 Neb. 826, 21 N. W. 2d 868; O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; 65 C. J., Trusts, § 215, p. 454, § 226, p. 476; 54 Am. Jur., Trusts, § 218, p. 167; Restatement, Restitution, § 160, p. 640.

This court has also adhered to the rule that where one person undertakes as agent to purchase property for another, the other to pay part or all of the purchase price and become owner of all or a part of the property proportionate to his contribution, the purchase thereof by such person in his own name or otherwise for himself, gives rise to a constructive trust for the benefit of the other in the agreed proportion, conditioned upon reim-

bursement for the agreed part of the purchase price. Johnson v. Hayward, 74 Neb. 157, 103 N. W. 1058, 5 L. R. A. N. S. 112; Lamb v. Sandall, 135 Neb. 300, 281 N. W. 37; Watkins v. Waits, 148 Neb. 543, 28 N. W. 2d 206; Restatement, Restitution, § 194, p. 795.

This court has repeatedly held that the statute of frauds, sections 36-103 and 36-104, R. S. 1943, does not apply to a constructive trust growing out of an undertaking by one person as agent to purchase property for another, where, in violation of his agreement, he has taken the title in his own name or otherwise for himself, and refuses to convey after tender of the agreed part of the purchase price. Watkins v. Waits, *supra;* O'Shea v. O'Shea, *supra;* Lamb v. Sandall, *supra;* Johnson v. Hayward, *supra.* The primary basis for the rule in such cases is that the principal is not seeking to enforce an oral contract, but to declare and enforce a constructive trust resulting from the violation of confidential and fiduciary duties by the agent. Restatement, Restitution, § 194, p. 798.

Defendants herein seek to rely upon the statute of frauds, section 69-404, R. S. 1943, upon the premise that the will of deceased brought about an equitable conversion of the real estate so that the interests of the beneficiaries thereunder should be treated as personal property instead of realty. Whether or not there was such a conversion we need not decide, since under the circumstances and by analogy the foregoing rule would be applicable to personal property in any event, not only upon the constructive trust theory, but also upon the basis that the agreement between plaintiffs and defendants did not constitute a contract of sale but of agency, and in such a case the foregoing statute of frauds would have no application. Wachob, Bender & Co. v. Omaha Life Ins. Co., 128 Neb. 320, 258 N. W. 657; 37 C. J. S., Frauds, Statute of, § 141, p. 625; 49 Am. Jur., Statute of Frauds, §§ 243 and 244, p. 560.

Finally, it will be remembered that defendant William

M. Maddox, while acting in a confidential and fiduciary capacity, could not acquire the title to the interests involved without the approval or ratification of all plaintiffs, and his wife, also in a confidential relation, would be equally barred from doing so, because said defendant could not do indirectly that which he could not do directly. The rule generally is that where a party acting as agent or trustee is barred from purchasing property because of a confidential or fiduciary relationship, the husband or wife of such party is equally barred, and no advantage can be gained by purchasing the property and taking the title thereto in the name of such husband or wife. In re Estate of Jurgensmeier, 142 Neb. 188, 5 N. W. 2d 233; In re Estate of Statz, 144 Neb. 154, 12 N. W. 2d 829; Johnson v. Hayward, *supra;* 26 Am. Jur., Husband and Wife, § 127, p. 752; 54 Am. Jur., Trusts, § 466, p. 370; 65 C. J., Trusts, § 646, p. 775.

The rules heretofore set forth are controlling in the case at bar. Other matters are presented in the briefs, but we do not deem it necessary to discuss them.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF SOLON L. WILEY, DECEASED. WILLIAM L. SHEARER ET AL., APPELLANTS, V. EMMET S. BRUMBAUGH, ADMINISTRATOR WITH WILL ANNEXED, OF THE ESTATE OF SOLON L. WILEY, DECEASED ET AL., APPELLEES.
38 N. W. 2d 434

Filed July 14, 1949. No. 32483.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. On oral argument on motion for rehearing. See 150 Neb. 898, 36 N. W. 2d 483, for original opinion. *Former opinion clarified. Motions for rehearing overruled.*

Munger & Rhodes, for appellants.

Gray & Brumbaugh, Will H. Thompson, Lee & Bremers, and *Richard W. Lee*, for appellees.

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

WENKE, J.

In order to clarify our opinion in In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483, with reference to the sums therein stated as received and expended by the executors, we set forth the following:

Receipts

1927	Received from Oregon Basin Oil and Gas Co.		$ 75.00
1936	Rent from the ranch		600.00
1936	Water rent		27.99
1937	Rent from the ranch		284.95
1939	Water rent $64.88 and grazing $10		74.88
1940	Water rent		202.98
1941	Rent from the ranch -7/15	$130.00	
	7/24	270.00	
	11/25	500.00	900.00
1941	Water rent		936.97
1942	Water rent		50.00
			$3,152.77

Disbursements

7/20/28	Shearer, expenses on trip to Cody	$ 214.00
3/4/30	Thompson, insurance on ranch buildings	700.00
3/28/30	Thompson, atty. fees for W. E. Mullen	250.00
12/4/31	Thompson, expenses on trip to Cody	153.81

3/25/32	Taxes, 1928-29-30-31 (redemption of ranch)	2,632.15
12/24/32	Thompson, expenses as atty. for executors	90.00
5/27/33	Insurance on ranch buildings	302.50
5/14-18/34	Shearer, expenses on trip to Cody	176.00
11/26/35	Taxes on ranch	352.61
2/13/36	Taxes on ranch	313.62
2/13/36	Insurance on ranch buildings	302.50
1/29/37	Surveying	7.50
7/19/37	Recording, Wyoming	5.00
1/25/38	Thompson, balance of taxes	13.96
2/24/38	Surveying	93.75
8/9/38	Recording	3.85
11/9/38	Taxes on ranch	185.77
1/25/39	Brome, atty. for executors in Wyoming	100.00
2/24-3/4/39	Expenses, trip to Wyoming	30.25
2/24-3/4/39	Hotel room, trip to Wyoming	12.50
	Meals, trip to Wyoming	42.70
4/11/39	Brome, atty. for executors in Wyoming	100.00
4/24/39	Insurance on ranch buildings	220.00
	Supersedeas bond in ranch litigation	49.05
5/5/39	Taxes on ranch	185.76
8/2/39	Thompson, expenses in connection with estate	49.25
11/4/39	Taxes on ranch	184.23
5/2/40	Taxes on ranch	184.21
7/29/40	Settlement of law suit resulting from damage to lower lands caused by break in dam	2,686.28
8/5/40	Insurance on ranch buildings	9.40
11/2/40	Taxes on ranch	179.28
11/18/40	Thompson, expenses	2.52
11/20/40	Damages, suit arising from break in dam	300.00

12/19/40	Engineering expense	77.50
4/26/41	Taxes on ranch	179.28
7/7/41	Surveying	50.00
8/19/41	Expenses of attorney	3.75
8/17-21/41	Expenses, trip to Wyoming	78.05
8/23/41	Expenses, collection charge	1.66
8/26/41	Walker Bank & Trust Co., Bell for commission on sale of ranch	500.00
9/29/41	Taxes on ranch	346.15
		$11,368.84

The motions for rehearing are overruled.

JAMES REYES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
38 N. W. 2d 539

Filed July 14, 1949. No. 32603.

1. **Criminal Law.** The rule is that to sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt.
2. ———. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it.
3. ———. The corpus delicti may, as any fact, be established by circumstantial evidence.
4. **Homicide.** The fact that a person is fatally injured by a cause not established, and the defendant was the one last known to have been with such person before the injuries were sustained, does not permit an inference that the injuries were feloniously inflicted. In such a situation, the presumption is that the injuries were not of criminal origin.
5. ———. The crime of homicide is not established until it is proved that a human being is dead, and that the death occurred as the result of the criminal agency of another. The State must prove that the death was the result of a criminal act, and until it does so, the presumption is the cause of death was not criminal.
6. **Criminal Law.** To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be

of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.

7. ———. In such a case, any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused.

8. ———. Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion.

9. ———. Circumstantial evidence should be weighed and acted upon cautiously, and a conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained.

10. ———. In determining the sufficiency of circumstantial evidence to support a conviction, each case must be determined on its own peculiar circumstances.

ERROR to the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed with directions to dismiss.*

Olsen & Holtorf, for plaintiff in error.

James H. Anderson, Attorney General, and *William T. Gleeson,* for defendant in error.

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

BOSLAUGH, J.

James Reyes, designated herein as defendant, was convicted of the crime of murder in the second degree, and prosecutes error to review the record of his conviction.

On September 3, 1948, at about 9 a. m., two men and two women entered John's Tavern in Lyman, Nebraska. One was Jake Henry, a cowboy, and the women and the other man were unknown to the men in charge of the tavern, but the man was later identified as Freddie or Jake Burkheart. The women were referred to as the "black-haired woman" and "that blond girl." The record

does not identify the woman with the blond hair. The other was later learned to be Avis Phillips, the victim of the alleged crime with which the defendant is accused. They indulged in conversation and drank beer.

James Reyes, the defendant, entered the tavern about 11 a. m., had a beer, and was later in company and drank beer with the four persons above referred to. He drank five or six bottles of beer and bought one round of beer for the others. Jake Henry and Avis Phillips were continuously in the tavern until she left with the defendant sometime between 2 p. m. and 3:30 p. m. She talked most of the time to Jake Henry, but had some conversation with the defendant. She told the defendant, while they were in the tavern, that she had to get out of Lyman, that a woman had to make a living, and she solicited the defendant to have immoral association with her for a monetary consideration. Defendant purchased a half-pint of whisky in the tavern, and shortly thereafter he departed from the tavern in company with Avis Phillips. They left Lyman in the automobile of the defendant, a Model A 1927 Ford tudor coach.

They traveled north and east from Lyman about two miles, about one-half mile west to a large cottonwood tree, remained there for about an hour, and engaged in the conduct in reference to which the deceased had solicited the defendant. They then traveled east about one-half mile and north some distance to a hay field, where they repeated their illicit indulgence. On the trip from Lyman to the cottonwood tree, they each drank a part of the whisky purchased by the defendant. The deceased had the bottle thereafter, and she drank the last of the whisky near the Mitchell Ditch, hereafter referred to. They decided to return to Lyman and drove south on a north and south road, the first section-line road, east of that town, and traveled but a short distance when the deceased, without warning, leaped from the car then moving about 15 miles an hour. She

landed in the borrow pit by the side of the road. Defendant immediately stopped his car, inquired why she jumped, warned her it was dangerous, and that she might get killed. She made light of his anxiety. He asked her to get in his car and he would take her to town. She positively refused, and said she preferred to walk. He drove south on the highway about one-half mile. It was hot and he decided to turn around and go back and again offer her a ride. In turning around the back wheels of his car sank in the grade of the road and he had to get help to get it back on the road. A farmer, Henry Nolde, pulled him out with a tractor. In the meantime the deceased had walked down the road past the place where the car was being pulled out. He drove south in the vicinity of the Mitchell Ditch, stopped his car, and asked the deceased to let him take her to town. She refused and he drove farther south, turned and drove north again until he came to the deceased, stopped his car, asked her to ride, and she got in the car. They then drove north. She complained she had no money, and that she had thrown the five dollars he had paid her when they were at the big cottonwood tree in the car as she jumped out the first time. They could not find the money in the car. They got north to the intersection with the road going east and slightly north, and stopped. She insisted that he take her to Morrill. This he agreed to do. They started down the road to the northeast at a speed of from 30 to 35 miles an hour. She said, "Oh, what the hell, I don't want to go to Morrill," opened the door and jumped out of the car. There was a noise as if something struck the car. "At that time I heard something pound on my car * * *. I didn't know if she got hurt on the car door or if she got hurt on the side of the car * * *. I got scared." The defendant did not know what to do. He continued to drive east on the highway. The distance he traveled east and the time involved are not definitely fixed. Sometime

later he met a car traveling west, and he then returned to the place where Avis Phillips left the car. The man he had met who was traveling west, two other men, and Roy Coffin, the village marshal of Lyman, were there.

The marshal was told by George Ring and his son that a woman was lying in the road "like maybe she had been hit with an automobile." He went about to the intersection near Horse Creek bridge, at the farm of Mr. Kramer, where there is a country road extending north and south, and from which a road proceeds in a slightly northeasterly direction, referred to as the lower road. "It was just around the corner where the lady was laying on the road" northeast from the intersection of the two roads. Her head was near the edge of the shoulder of the road, her feet were about in the traveled part of the road, and her body was on an angle. This was sometime between 4 p. m. and 5:15 p. m. on September 3, 1948. The body was about 60 yards northeast from the intersection, and on the right of the road looking from the intersection to the northeast. There was a shoe on her right foot. There was no shoe on the left foot, but the shoe she had been wearing, with the heel detached therefrom, was near her on the edge of the shoulder of the road. Her dress was torn around her right shoulder and her waist in the back. There was no one with the body of Avis Phillips when George Ring and Henry Ring saw it in the road before they went into Lyman and notified the marshal. The marshal, Irvin Freel, and James Reyes, the defendant, came there about the same time. Defendant denied knowing or having seen this woman before. Before he left he told the marshal he was going to, and would be in Lyman. A doctor arrived at the place where she was about 5 p. m. He examined her, found she was bleeding from her left ear, her nostrils, and her mouth, her left side was completely paralyzed, and she was unconscious. He attended her until her death

on September 7, 1948. She did not regain consciousness.

He conducted an autopsy, and when he removed the top bone of her head "there was kind of a watery fluid ran out * * *." There was about one-sixteenth of an inch lapping of bone on the side of her head running from about the angle of the eye to the mid-occipital region in the posterior aspect of her head. The upper fragment of the bone over-lapped the lower temporal bone on the side of her head. There was a lot of blood inside the skull, a few adhesions attached to the dura and skull proper, much of the blood was directly in the brain tissue, and big clots of blood underneath the meninges of the brain. There was an area of considerable size at the base on the right side of the brain which had gone into soft tissue and sloughed off and made a hollow mass in this region. There was a fracture to the base of the left eye and into the ear proper. His opinion was that the deceased came to her death by "some type of blow, that is all I could tell, some large surface, it couldn't be anything narrow because there wasn't any indentations, it covered too large a surface; it had to be something pretty round and pretty firm." The blow had to be on the side of her head at about the top of her ear line. A very hard and severe blow to get that extensive a fracture, by something that was blunt, flat, or somewhat rounded instrument. He gave it as his opinion that all her injuries were caused by one blow, that her injuries were caused by some object with a broad surface—not by "something like a crank or anything small of that sort * * * it would have to be something heavy and wide, if it was narrow I think you would have a localized fracture * * *. It would be a cut or a black and blue spot, but she didn't have that." When he was asked if he thought that an injury such as she suffered would have been caused by her being struck by any part of a motor vehicle when she jumped from it, he stated, "Well, I wouldn't know."

A deputy sheriff testified that he had a conversation with Avis Phillips in her room in the hospital, notwithstanding the doctor testified positively that she was unconscious when he first saw her on September 3, 1948, and remained in that condition until her death on September 7, 1948. The deputy sheriff did not relate anything he claimed was said in that conversation. He said he saw her on September 6, 1948, and made some examination of her and saw that she had black and blue bruises above the knees, and a very bad large bruise on her right shoulder blade that came up to her neck; that the skin on her legs and shoulder was not broken; and she gave no evidence of any scratches.

The doctor who examined her soon after she received her injuries, attended her until her death four days later and conducted the autopsy, and said she was unconscious when he first saw her; that she never regained consciousness; that she had no "black and blue spot"; he neither found nor described any injury to her knees, to the right shoulder or neck; and he said the skin of her body was not broken. A probable explanation of this discrepancy was the condition of the deceased while she was in the hospital. She rolled and tossed, was violent and hard to restrain, and a fence was used along the side of the bed in an attempt to keep her in it.

The automobile of the defendant was taken by the sheriff and examined thoroughly inside and out three times. Nothing of any significance was found. There was a car crank in the car which showed no evidence of improper use.

Defendant made conflicting and in some instances untrue statements in reference to the identity of the deceased, his association with her, and other incidental and collateral things, and this he substantially admitted.

He was closely and searchingly examined on four occasions while he was in custody by the officers, but no one claims that he made, and in fact he did not make, any admission from which it could be inferred that he

struck or in any way ill-treated the deceased. He at all times consistently and vigorously denied having assaulted or injured her.

Defendant while a witness, was asked what happened when his car was stopped near the intersection of the roads shortly before the deceased jumped from his car, and he testified, "she wanted to go to Morrill and she was arguing with me * * *. So I decided I'd take her to Morrill, and I started my car up and I had to back to the bridge in order to take this road that goes east, so I started off pretty fast * * * she was just sitting there with me saying nothing, when she all at once said, 'Hell, I am not going to Morrill,' and she threw the door open and jumped out, * * * I * * * heard something pound real hard on the side of the car * * *." He got scared and kept on driving down the road, but in a short time returned to the place where she had jumped from the car. He was driving better than 30 miles an hour when she jumped. He positively denied killing Avis Phillips. A farmer, Irvin Freel, arrived at the place the deceased was found on the road just before the marshal did. He saw the place where she was lying in the road and noticed "right west of it where there had been a place or two something had hit the ground—about three or four places, and then where her body had hit the ground. * * * It looked like something had hit the ground. * * * Well, there was some marks on the ground—three or four marks on the ground. * * * it just been marked in about three or four places, there was marks on the ground, something had drug or hit or something." These marks extended along the ground to the east starting west of the place where Avis Phillips lay. He spoke to Mr. Coffin, the marshal, about these. He also said, "there was a shoe laying someplace, I don't remember where, and then the heel lay there. * * * I believe it was west of her."

The sheriff and a highway patrolman about ten days after the day when the deceased was injured, went to the farm where defendant was employed and picked up

a gallon jug and an army boot. The defendant called his employer, George Schaub, as a witness, and he testified that he had heard the testimony about the jug. He said it was a water jug the defendant had used sometimes in his work on the farm since about June when he started in the beets until they were through with the beets. This jug was chipped at the top, but he had seen this condition before September 3, and he saw the jug after that date and it wasn't any different than it had been before; it had the same chip marks on it before and after September 3; that the defendant had quit carrying it when he finished with the beets, and it had been "laying around the feed shed * * * it sat by the feed shed there." The witness had seen it there many times, and the children of the defendant kicked it around. The witness went to this place to feed his stock, and he noticed the jug there "a lot of times."

The defendant denied that he had any jug with him on September 3, 1948, or that the jug had been in his car or that he had carried it at any time since he had quit work in the beets.

The corpus delicti is the body or substance of the crime, and in its primary sense it is the fact that a crime has been committed without regard to the identity of the person committing it. Whomble v. State, 143 Neb. 667, 10 N. W. 2d 627. It may, as any fact, be proved by circumstantial evidence, but it must be established by evidence beyond a reasonable doubt to sustain a conviction. Harms v. State, 147 Neb. 857, 25 N. W. 2d 287; Wilshusen v. State, 149 Neb. 594, 31 N. W. 2d 544. The crime with which the defendant was charged is, in its essence, that he, without deliberation or premeditation, purposely and maliciously killed Avis Phillips. The fact that she was violently and fatally injured; that the cause thereof is not definitely known; and that the defendant was the person with her before her misfortune, is not evidence that her injuries were feloniously inflicted. The presumption is that her injuries were not of criminal origin.

Harms v. State, *supra*. An extrajudicial admission or confession by the defendant of the essential facts constituting the crime charged would not alone have been sufficient to establish the corpus delicti. Whomble v. State, *supra*. There is in this case uncontradicted evidence produced by the State to the effect that the deceased, without warning, voluntarily jumped from a motor vehicle in which she was riding while it was traveling at a very considerable speed on a highway; that at that time something was heard to strike the vehicle with force; and that she was shortly thereafter found near the place where she left the vehicle in the injured condition which resulted in her death. This was consistent with the spontaneous, unprejudiced impression of the two farmers who were first to discover her in the highway in an injured condition and who reported what they had seen to the marshal at Lyman. They thought she was the wife of a resident of that community, Mrs. Derr. They told the marshal a woman was lying in the road down there like she had been hit by an automobile. That Avis Phillips jumped from the car and was injured is corroborated by the physical facts. The car at the time was traveling easterly. Without dispute of the testimony of the farmer who reached the place where she was before the marshal got there, there were marks on the ground from west of where she was found on the highway to the east of where she was lying. "* * * there had been a place or two something had hit the ground—about three or four places, and then where her body had hit the ground. * * * It looked like something had hit the ground. * * * Well, there was some marks on the ground—three or four marks on the ground. * * * it just been marked in about three or four places, there was marks on the ground, something had drug or hit or something." When she was found lying in the highway she had a shoe on her right foot, the left shoe with the heel detached and the heel were near her in the road. The heel had been detached from the shoe, and the shoe

had been taken from her foot by some force. There was no evidence of any struggle or combat. The evidence of the State tended to show that the injuries inflicted on the deceased were not of criminal origin. The theory or hypothesis that they did not result from a criminal act is a reasonable one. Homicide corpus delicti is not established until it is proved that a human being is dead, and the death occurred as the result of the criminal agency of another. The fact that the deceased sustained severe and fatal injuries which caused her death does not permit an inference that she was foully dealt with. When the State contends that she was, it must prove that her death was the result of a criminal act, and unless and until this is proved, it is presumed that death resulted from innocent, noncriminal causes. Treppish v. State, 126 Neb. 21, 252 N. W. 388; State v. Pienick, 46 Wash. 522, 90 P. 645, 13 Ann. Cas. 800, 11 L. R. A. N. S. 987. There is no evidence in this case as the law requires from which it can be concluded that the injuries were done her and her death was caused purposely and maliciously by the defendant or any other person. McCue v. State, 112 Neb. 9, 198 N. W. 163; Harms v. State, *supra*.

If circumstantial evidence is relied upon in a criminal prosecution, proof of a few facts or of a multitude of facts all consistent with the supposition of guilt is not sufficient to warrant a verdict of guilty. In order to convict, it is necessary not only that the circumstances all concur to show beyond a reasonable doubt that the defendant committed the crime and be consistent with the hypothesis of guilt, since that is to be compared with all the facts proved, but that they be inconsistent with any other rational conclusion and exclude every other reasonable theory or hypothesis except that of guilt. The facts proved must be consistent with each other and with the main fact sought to be established. Any fact or circumstance susceptible of two interpretations must be resolved most favorably to the accused. Treppish v. State, *supra;* Lowe v. State, 110 Neb. 325, 193 N. W.

707; Vinciquerra v. State, 127 Neb. 541, 256 N. W. 78; Dreessen v. State, 38 Neb. 375, 56 N. W. 1024; State v. Johnson, 37 N. M. 280, 21 P. 2d 813, 89 A. L. R. 1368; State v. Heinz, 223 Iowa 1241, 275 N. W. 10, 114 A. L. R. 959; Bowie v. State, 185 Ark. 834, 49 S. W. 2d 1049, 83 A. L. R. 426; Gardner v. State, 27 Wyo. 316, 196 P. 750, 15 A. L. R. 1040; State v. Pienick, *supra.*

When circumstantial evidence is relied upon, the facts and circumstances must form a complete chain and point directly to the guilt of the accused in such a conclusive way as to exclude any other reasonable conclusion, every element essential to the conclusion must be proved by competent evidence beyond a reasonable doubt, and the existence of a reasonable doubt as to any one of them requires an acquittal. Treppish v. State, *supra;* Lowe v. State, *supra;* Walbridge v. State, 13 Neb. 236, 13 N. W. 209; 20 Am. Jur., Evidence, § 1217, p. 1068; Vinciquerra v. State, *supra;* Harms v. State, *supra;* State v. Hooper, 222 Iowa 481, 269 N. W. 431; State v. Sigman, 220 Iowa 146, 261 N. W. 538; State v. Lewis, 69 W. Va. 472, 72 S. E. 475, Ann. Cas. 1913A 1203; State v. Suitor, 43 Mont. 31, 114 P. 112, Ann. Cas. 1912C 230; 23 C. J. S., Criminal Law, § 907, pp. 154 to 156.

Caution should be exercised in drawing inferences from circumstances proved in a criminal case. Suspicion or speculation may never justify a conviction. Circumstantial evidence as a basis of a conviction of crime should be acted on and weighed cautiously, and this is especially true where the crime is heinous. A conviction should not be based on the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. In determining the sufficiency of circumstantial evidence to support a conviction, each case must be determined on its own peculiar circumstances. Bourne v. State, 116 Neb. 141, 216 N. W. 173; Lowe v. State, *supra;* O'Neil v. State, 118 Neb. 360, 224 N. W. 855; Vinciquerra v. State, *supra;* Hiner v.

State, 196 Ind. 594, 149 N. W. 168; State v. Pienick, *supra;* 23 C. J. S., Criminal Law, § 907, p. 146.

These requirements of the law insulate the defendant from a sustainable conviction in this case. The record shows, without any contradiction, that a very short time before the deceased was injured, she, without any indication of her intention, and with entire absence of provocation, leaped from the vehicle in which she was riding. The car was moving slowly and she suffered no injury from that imprudent act. The defendant protested her conduct and warned of the danger involved. A brief time thereafter she jumped from the car a second time without warning or disclosed reason at or near the place where she was found injured and unconscious in the highway. The speed of the car was much greater on this occasion, and her rash act resulted, so far as the evidence advises, in her injury and death. The details of this have been related in the discussion of the failure of the evidence to show the corpus delicti, and will not be repeated. What is there said is applicable here. The significance of this is that an attempt to alight from a motor vehicle moving at a considerable speed is inherently hazardous and likely to result in probable injury and possible death. The indications are it did in this instance. It is a frequent occurrence that serious injuries from imprudent acts involving the use of motor vehicles are frequent from a minor cause, and conversely, serious accidents involving motor vehicles often result in only minor injury to persons in or about them at the time. The reason for this is many times beyond explanation. This is a reasonable theory or hypothesis of the source of the injuries to the deceased. It is the only rational explanation shown in the record. The evidence is not such to permit of a conclusion that every reasonable theory or hypothesis except that of the guilt of the defendant has been excluded by proof beyond a reasonable doubt.

The difficult situation of the State in this case induces

it to theorize that the defendant ejected Avis Phillips from the car after he "haggled over the price for her services"; that he afterwards overtook her while she was walking; induced her back in the car; took her to an intersection of a much-traveled road at the very boundary of Lyman; and in broad daylight "in a sudden rage struck Phillips in the head with the jug, the only weapon at hand." This is pure speculation, and in its essence is disproved by the evidence of the State. The deceased, if she had been mistreated in any way by the defendant, had an opportunity to complain and escape when she came to the Nolde farm, saw and passed Mr. Nolde in the road, and Mrs. Nolde, who was only a short distance therefrom. It overtaxes credulity to believe that this defendant would have selected a much-frequented highway near the border of a town in mid-afternoon to commit a murder and risk probable detection in the very act when he and his supposed victim had just been in, and could easily have proceeded to and selected, a more secluded place. Likewise, the capabilities ascribed to the defendant for committing murder, with a jug, the evidence shows he did not have, and leave no evidence of a struggle, combat, blood, or trace indicating such to be the fact, is much beyond the probable, rational or reasonable, and what is more important, foreign to any substantial evidence produced. Evidence concerning an instrument which it is contended was used in committing the crime charged is neither competent nor important until there is a showing connecting it with the crime. State v. Davis, 60 Mont. 426, 199 P. 421; People v. Hill, 123 Cal. 571, 56 P. 443; Herman v. State, 75 Miss. 340, 22 So. 873; 16 C. J., Criminal Law, § 1225, p. 619. There is no such foundation in this case.

The State dwells on the fact that the defendant made conflicting and in some instances untrue statements as to his knowledge of and association with Avis Phillips and certain other matters. These are all in reference to incidental and collateral subjects. He was a foreigner

with obvious imperfect knowledge and understanding of or ability to use or express his meaning in the English language, and he was frightened and under the stress resulting from being arrested, detained, and charged with murder. He had no material resources of his own for a defense. Failure of exact frankness and meticulous verity in such a situation is probably not excusable, but it is certainly understandable. However, he was closely, searchingly, and exhaustively questioned and cross-examined on numerous occasions by the officers while he was in custody. He was subjected to various approaches and attitudes of the officers in repeated attempts to induce, pressure, or trick him into or extract from him some statement tending to show his guilt of the offense charged. These attempts were all unsuccessful. No one claims that he made any statement or admission from which it could be understood or inferred that he struck or in any way ill-treated the deceased. He consistently asserted she jumped from the car of her own volition, without warning to him, and he denied in every instance that he assaulted or in any manner injured her.

The challenge of the sufficiency of the evidence by the motion of the defendant made at the close of the evidence of the State should have been sustained. The conviction and sentence of the defendant should be, and they are, set aside, with directions to the trial court to dismiss the case and discharge the defendant.

REVERSED WITH DIRECTIONS TO DISMISS.

DORALENE THUROW, APPELLEE, v. IVAN SCHAEFFER, APPELLANT.

38 N. W. 2d 732

Filed July 21, 1949. No. 32612.

1. **Trial: Appeal and Error.** An objection that the court has failed to instruct with relation to a statutory provision which fails to identify the provision contemplated by the objection will not be considered.
2. ———: ———. The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error.
3. ———: ———. Where the charge to a jury in a particular respect contains a correct general statement of the law error cannot be predicated on a failure to give a more specific instruction in the absence of a request therefor.
4. **Negligence.** The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given state of facts and set of circumstances.
5. ———. Negligence is to be tested by submission of the facts, if they are not admitted or if not more than one inference or conclusion may be drawn from the evidence, to a jury to determine whether or not the person charged with negligence failed to exercise the care and prudence required of a reasonably careful and prudent person under the given circumstances.
6. **Trial: Negligence.** Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury.
7. **Automobiles: Negligence.** It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead.
8. ———: ———. This general rule is not an arbitrary one. Its purpose is to remove from the jury the question of negligence and cause it to be determinable as a matter of law only in cases where the facts are not in dispute or where they are so conclusive in character that reasonable minds may not differ in relation thereto.
9. **Trial.** Where the evidence is in dispute and where reasonable

men might draw different conclusions from the evidence negligence is a question for the jury.

10. **Automobiles: Negligence.** The general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision ahead, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care and prudence required of a reasonably careful and prudent person under the circumstances of the particular situation.
11. **Appeal and Error: New Trial.** This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions.

APPEAL from the district court for Kimball County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

Ivan Van Steenberg, for appellant.

Torgeson & Halcomb, and *Bernard F. O'Brien,* for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries by Doralene Thurow, plaintiff, appellee here, against Ivan Schaeffer, defendant, appellant here, growing out of an incident wherein an automobile operated by plaintiff overturned and in overturning came into contact with a combine operated by Leonard I. Schaeffer, son and employee of the defendant. The gist of the action is negligence on the part of Leonard I. Schaeffer attributable to the defendant.

There was a trial to a jury which resulted in a verdict and judgment in favor of plaintiff for $1,350. From the judgment, an order overruling a motion for new trial, and an order overruling a motion for judgment

notwithstanding the verdict, the defendant has appealed.

As grounds for reversal the defendant asserts that the court erred in the giving of certain instructions; that the court erred in failing to instruct that it was negligence for plaintiff to drive at such a rate of speed that she could not stop within the range of her vision; that the court erred in failing to instruct that the plaintiff was under obligation to use due care in observing other vehicles on the highway and that she was not entitled to insist upon her right of way under the circumstances; that the court erred in failing to instruct that if the plaintiff had seen or should have seen the vehicle of defendant and was driving at such a rate of speed that she could not stop within the range of her vision, she was guilty of contributory negligence as a matter of law; that the court erred in overruling the motion of defendant for a directed verdict at the close of the evidence; that the court erred in overruling the motion of defendant for judgment notwithstanding the verdict; and that the court erred in overruling the motion of defendant for a new trial because of the misconduct of a member of the jury.

The accident occurred on a country road about three miles south and two miles west of Dix, Kimball County, Nebraska, at about five p. m. on September 19, 1947. The road extends north and south and at the point of collision is about 21 feet in width. At the time of the accident plaintiff was driving in a northerly direction and without question on her right side of the road. The defendant's combine was coming from the opposite direction at about seven miles an hour and occupying its entire left side of the highway. Whether or not it occupied a portion of the right side is in dispute. The witnesses for defendant said that the combine extended sufficiently beyond the roadway to its left so that 12 or 13 feet on the right side was open. In any event they said that there was ample room for plaintiff to have turned to the left and to have passed along the west

side of the combine. Instead of turning to her left she turned right to avoid striking the combine, applied her brakes, but was unable to stop, in consequence of which her automobile turned over. There was no direct collision but there was sufficient contact so that some slight damage was done to the left end of the combine.

To the south of the point of the accident was the apex of a small hill. Just how far is not made certain by the evidence but it was probably from 100 to 300 feet. This rise to the top from both directions is not sharp and the top is rounded and according to some witnesses practically level for the distance of about 100 feet. The elevation of the apex of the hill is 11.2 feet higher than a point 450 feet to the north and 11 feet higher than a point 200 feet south.

The plaintiff for her charge of negligence declared that the defendant was moving his combine, which exceeded eight feet in width, south on the left or east side of the road upward toward the crest of the hill which combine was occupying more than half of the traveled portion of the road without leaving a sufficient space to pass on the west side, without keeping a proper lookout, and without giving any warning of the position thereof, on account of which she drove into the ditch on the east side in an effort to avoid striking the combine and thus she sustained injury and damage.

For answer the defendant alleged that the operation of the combine was being carried out in the most careful and prudent manner available under the circumstances and that there was ample room for plaintiff to have driven her automobile and to pass the combine without collision. Further answering, the defendant alleged that plaintiff was driving her automobile at a high and excessive rate of speed; that she did not have it under proper control; that she did not keep a reasonable lookout for other persons and vehicles who might have been on the highway; that her rate of speed was so high that she could not stop within the range of

her vision; and that the accident was caused by her negligence and carelessness in these respects.

The affirmative allegations of the answer were by reply denied by the plaintiff.

The first point in the assignments of error is directed to instruction No. 2 given by the court. The objection is that while the instruction contains rather fully the plaintiff's claims as to the negligence of defendant it fails to contain a specification of the allegations of negligence and contributory negligence charged against the plaintiff in the answer, also that nowhere is there to be found a specification of the grounds of negligence charged against the plaintiff.

Since properly this is an objection based on failure to instruct on issues rather than objection to instruction given and that subject is dealt with specifically under two other assignments of error discussion thereof will be deferred and taken up on that basis in proper order.

The second point is directed to instruction No. 5. This point requires consideration no further than to say that no argument in the brief is directed to this instruction. Purportedly under this point instruction No. 4 is discussed but no objection is made to instruction No. 4 in either the motion for new trial or in the assignments of error.

The third point is a criticism of instruction No. 6. It is contended that by this instruction the jury was limited in the consideration of negligence on the part of plaintiff to the question of whether or not there was sufficient room on the highway for plaintiff to have passed the combine to the west. The instruction when read with other instructions and parts of other instructions discloses that the contention is without merit. No such limit was imposed. The question actually submitted in this connection was that of whether or not plaintiff was guilty of negligence in failing to drive her car past the combine by driving along the west side of the highway. The jury was told in instruc-

tion No. 2: "The defendant claims that the plaintiff was guilty of negligence in failing to drive her car past such combine by driving along the west side of such highway."

The fourth point is that in instruction No. 7 the court purported to set out the rules governing the use of the highway under the circumstances as set forth in the statutes but did not set out all of the pertinent provisions. Particular objection is made that no reference was made to section 39-7,108, R. S. Supp., 1947. The provision or provisions of this very lengthy section which it is contended should have been set out by instruction is not indicated in the assignments of error nor in the argument hence this court will not speculate on what is contemplated by the assignment.

The fifth, sixth, and seventh points are that the court failed to instruct that plaintiff was negligent for failure to drive at such rate of speed that she could not stop her car within the range of her vision, that she was under obligation to use due care in observing other vehicles on the highway and was not entitled to insist upon her right of way under all circumstances, and that if the plaintiff had seen or should have seen the vehicle operated by defendant and was driving at such a rate of speed that she could not stop within the range of her vision, she was guilty of contributory negligence as a matter of law.

It is to be observed that these assignments do not depend upon a refusal of the court to give requested instructions but on a failure to instruct in these respects on its own motion.

In dealing with the subject at hand two rules are to be borne in mind. One is that the trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not and a failure to do so constitutes prejudicial error. Hackbart v. Rohrig, 136 Neb. 825, 287 N. W. 665; Yorke v. Seddon, 140 Neb. 101, 299 N. W. 333; In re Estate of Keup, 145

Neb. 729, 18 N. W. 2d 63; Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

The other is that where the charge to a jury in a particular respect contains a correct general statement of the law error cannot be predicated on a failure to give a more specific instruction in the absence of a request for a more specific statement. Larsen v. Savidge, 103 Neb. 79, 170 N. W. 353; Hannah v. American Live Stock Ins. Co., 111 Neb. 660, 197 N. W. 404; Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173; Horn v. Goldberg, 137 Neb. 813, 291 N. W. 493.

It cannot be said that the former rule is applicable to this case unless it can first be said that the court failed to instruct generally on the issue of the negligence and contributory negligence charged against the plaintiff in the answer. We think the court did so generally instruct.

As pointed out the jury was told in instruction No. 2 that the defendant contended that plaintiff was guilty of negligence in failing to drive her car past the combine along the west side of the highway. In instruction No. 8 negligence was defined as follows: "By 'Negligence' is meant the doing of some act under the circumstances surrounding the injury involved, which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken." In the same instruction contributory negligence was defined as follows: "By 'Contributory Negligence' is meant any negligence of plaintiff directly contributing to the proximate cause of injuries for which recover (sic) is sought."

A reasonable interpretation of the instructions is that the jury was told that it was the theory of the defendant that plaintiff was guilty of negligence in failing to pass to the west of the combine and in order to so find they must find that in some manner plaintiff did something in connection with the control and operation of her automobile that a man of ordinary prudence would not have done or that she failed to take some precaution

which a man of ordinary prudence would have done or taken.

The definition of negligence given, in its application to plaintiff, is broad enough not only to cover generally excessive speed, failure of proper control, no proper lookout, and inability to stop within the range of plaintiff's vision but also any other phase of negligence which might have found support in the evidence. It in nowise limited the jury in the consideration of the subject.

If the defendant desired a more specific instruction on this subject, it was his duty under the rules announced to make an appropriate request therefor.

Thus we conclude that there was no reversible error in the giving of instructions or in the failure to instruct in any of the phases mentioned in the assignments of error.

The eighth and ninth points are that the court erred in overruling the motion for a directed verdict and the motion for judgment notwithstanding the verdict. The two must stand or fall together since they both depend upon whether or not there was sufficient evidence of negligence to sustain a cause of action against the defendant, and if so, whether or not the evidence was sufficient as a matter of law to defeat a recovery by plaintiff on account of contributory negligence on her part.

It appears that there was sufficient evidence to sustain a cause of action against the defendant. In Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610, it was said: "The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given set of circumstances." It was also pointed out in that case in the following words that the test of negligence in any particular case is to be made by submission of the evidence to a jury unless the facts in relation thereto are admitted or unless not more than one inference or conclusion may be drawn from the evidence: "The test of negligence is made by submission of the facts, if they are not admitted or if not more than one inference or conclusion may be

drawn from the evidence, to a jury to determine whether or not the person charged with negligence failed to exercise the care, caution and prudence required of a reasonably careful, cautious and prudent person under the given circumstances."

In Thomison v. Buehler, 147 Neb. 811, 25 N. W. 2d 391, it was said: "Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury."

On the facts it is not disputed that the defendant's employee was approaching the hill from the north on the left side of a highway the traveled portion of which was about 21 feet wide with a combine over 19 feet in width, that the plaintiff came over the hill on her right side of the highway, that she set her brakes at or near the crest of the hill, and slid her wheels to within about 50 feet of the combine when she turned off the highway to the east where her automobile turned over.

There is a dispute as to how much of the traveled roadway was occupied by the combine. There is evidence from which a reasonable conclusion could be drawn that not more than half was occupied and that it was observable to plaintiff in the exercise of ordinary care that there was ample space for her to pass with safety to the west of the combine. From the evidence the contrary conclusion could be arrived at that most of the traveled way was occupied by the combine and that it was not reasonably observable to plaintiff under the circumstances that there was space for her to safely pass to the west.

The evidence of plaintiff is to the effect that in the exercise of ordinary care she did not and could not see the combine until she reached the crest of the hill and that at that time though she was proceeding from 40 to 45 miles an hour it was not possible in the exercise of

ordinary care to bring the automobile to a stop without colliding with the combine or to avoid it without turning to the right off the highway. There is evidence that the combine was about 12 feet high and it is contended that plaintiff could and should have seen it well before she arrived at the crest of the hill. It is clear that the overall height applied only to the elevator which was obviously well to the west or right end of the combine. There was evidence offered by defendant from which a conclusion could be drawn that plaintiff could not have seen the combine until she was about at the crest of the hill. Another son of defendant stated that he was riding on the combine and that his head was about three inches below the top of the elevator and that he did not see the automobile until it was about to the crest of the hill. On the part of defendant there was evidence that plaintiff's speed was about 60 miles an hour as she came into view. The weight of this evidence was proper to be considered in the light of opportunity and time for observation in view of the fact that immediately on the automobile coming into view plaintiff set her brakes. There is no dispute about the fact that defendant failed to give warning of the fact of the position and progress of the combine on the road.

There is no question of the right of the defendant to move this combine on the highway as it was being moved. The question is rather that of whether or not he failed to exercise the care of a reasonably prudent person under the given circumstances to protect the plaintiff in proper use of the highway by her.

The conclusion is that, under the legal principles outlined and the evidence, the question of whether or not defendant was guilty of negligence was one to be determined by a jury.

Is the record such as to require that it be said that plaintiff was guilty of contributory negligence of a kind and a degree which as a matter of law defeats a right of recovery? Defendant contends that it is. Before the

contention may be sustained the evidence must be sufficient to permit the court to say within the meaning of the comparative negligence doctrine that plaintiff was guilty of more than slight negligence. There is no question in this case of the comparative negligence doctrine but only of its application.

As authority for his contention that plaintiff was guilty of contributory negligence in a degree sufficient to defeat a recovery defendant relies on Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473; Most v. Cedar County, 126 Neb. 54, 252 N. W. 465, and section 39-7,108, R. S. Supp., 1947.

The rule in Roth v. Blomquist, *supra,* relates to driving in the nighttime and is as follows: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps."

The rule in Most v. Cedar County, *supra,* relates to driving in the daytime and is as follows: "It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead and the rule applies to driving in the daytime where vision is shortened by storms or other physical conditions."

The provision of statute to which reference is made is the following: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing."

It is pointed out in the opinion that the rule in Roth v. Blomquist, *supra,* has its exceptions and in Hardung v. Sheldon, 133 Neb. 427, 275 N. W. 586, it is pointed out that the rule in Most v. Cedar County, *supra,* also has its exceptions. An examination of these three cases discloses that the rules and the exceptions in these re-

spects are substantially the same as regards daytime and nighttime driving.

It has been made clear in the later cases, if indeed it was not already clear, that the rules of Roth v. Blomquist, *supra,* and Most v. Cedar County, *supra,* were never intended to be arbitrary. Their purpose was to remove from the jury the question of negligence and to cause it to be determinable as a matter of law only in those cases where the facts were not in dispute or where they were so conclusive in character that reasonable minds could not differ in relation thereto. It has been made clear in these later cases that in cases where the evidence was seriously in dispute and where reasonable minds might draw different conclusions from the evidence the question of negligence or contributory negligence was not determinable as a matter of law but was for the jury.

In Hardung v. Sheldon, *supra,* a case somewhat similar to this one, it was said: "Where the evidence is seriously in dispute, as here, and where reasonable men might draw different conclusions from the evidence, negligence is a question for the jury."

In Fulcher v. Ike, *supra,* it was said: "The general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lamps on the automobile, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution and prudence required of a reasonably careful, cautious and prudent person under the circumstances of the particular situation."

From an application of the rules set forth, with their exceptions, to the facts and circumstances as disclosed in the light of what a motorist properly using a highway has a right to expect and anticipate in the use of

a highway by others we are unable to say as a matter of law that the plaintiff was guilty of contributory negligence in the premises. We conclude that the question of negligence of defendant and of contributory negligence of plaintiff were properly submissible to a jury.

The remaining question is that of whether or not the court erred in overruling the defendant's motion for a new trial on the ground of misconduct of a member of the jury. This question is not subject to review. The motion was supported by affidavit but the affidavit was not included in the bill of exceptions.

In the case of Dryden & Jensen v. Mach, 150 Neb. 629, 35 N. W. 2d 497, it was said: "This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions."

The judgment of the district court is affirmed.

AFFIRMED.

VIOLET KREPCIK, ADMINISTRATRIX OF THE ESTATE OF CALVIN L. KREPCIK, APPELLANT, V. INTERSTATE TRANSIT LINES, A CORPORATION, APPELLEE.

38 N. W. 2d 533

Filed July 21, 1949. No. 32594.

1. **Trial.** Before the act of 1947 (Laws 1947, c. 85, p. 262) a judgment notwithstanding the verdict could only be rendered when the pleadings of the party in whose favor the verdict was given showed a right to judgment in favor of the other party.
2. **New Trial.** If the verdict was not sustained by the evidence or was contrary to law, or if the court was convinced it erred in submitting the case to the jury, the remedy, at that time, was a new trial, and not a judgment of dismissal of the case.
3. **Appeal and Error: New Trial.** A ruling of the court on a motion for an instructed verdict could not, at that time, be

reviewed by this court unless it had been assigned as error in a motion for a new trial by the party aggrieved thereby.

4. ———: ———. If a motion for an instructed verdict was granted, in the absence of a motion for a new trial, the review in this court was, at that time, limited to a determination that the pleadings did or did not support the judgment.
5. **Trial: Appeal and Error.** The act of 1947 (Laws 1947, c. 85, p. 262) provided a new procedure in each of the instances above referred to in all cases within the provisions thereof.
6. ———: ———. The purpose of the act (Laws 1947, c. 85, p. 262) was to prevent needless cost and effort, and to simplify and expedite the final disposition of litigation.
7. **Courts.** A litigant has no vested right in any mode of procedure.
8. **Appeal and Error.** The manner of appeal is statutory, and one who complies with the requirements of the applicable statute is entitled to a review of his case within the scope provided by law.
9. **New Trial.** The primary purpose of a motion for a new trial is to enable the court to correct errors occurring at the trial of a cause.
10. **Trial.** The issue raised by a motion for judgment, or in the alternative for a new trial, as authorized by the act of 1947, is one of law; it requires a mere examination of the record made on the trial and a determination of the legal questions raised by the motion.
11. **New Trial: Appeal and Error.** A motion for a new trial is not necessary to a review in this court on appeal of any order made by authority of the act of 1947 (Laws 1947, c. 85, p. 262).

APPEAL from the district court for Lincoln County: J. LEONARD TEWELL, JUDGE. *Motion to affirm judgment denied. Motion to extend brief day of appellee granted.*

William S. Padley, and *Beatty, Clarke, Murphy & Morgan,* for appellant.

Robert B. Hamer, J. G. McIntosh, T. F. Hamer, and *G. C. Holdrege,* for appellee.

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

BOSLAUGH, J.

A motion by appellee to affirm the judgment of the trial court has been submitted. It presents a novel and

important question of procedure that should be determined before further proceedings are had in this case.

This is an action for damages for the alleged wrongful death of appellant's decedent and damages for the destruction of a truck owned and operated by the deceased, occasioned by a collision with it of a bus of the appellee.

The defense was a denial by appellee of negligence on its part and a charge of contributory negligence on the part of the deceased. Appellee at the close of all of the evidence made a motion for a directed verdict in its favor. The motion was denied. Appellant recovered a verdict on the two causes of action alleged by her. Appellee, within the time allowed therefor, moved to have the order denying its motion for a directed verdict and the verdict vacated, to have an order sustaining its motion for a directed verdict, and for judgment in its favor upon each of the causes of action, or, in the alternative, an order granting a new trial. The motion for judgment or a new trial was heard and the court found that appellant as a matter of law was prevented from any recovery because the negligence of her decedent proximately causing the collision and injuries was, as a matter of law, more than slight, and any negligence of appellee was less than gross in comparison with the negligence of the decedent. The court vacated the verdict and all proceedings subsequent to the motion of appellee for a judgment in its favor, sustained its motion, and dismissed the case with prejudice. Appellant gave timely notice of appeal The transcript filed in this court on December 16, 1948, Appellant did not make a motion for a new trial after the finding and judgment of the court in favor of appellee. The transcript filed in this court on December 16, 1948 fails to show any motion for a new trial made by appellant. A supplemental transcript filed several months later shows that appellant filed a motion for a new trial in the office of the clerk of the district court on November 26, 1948, two days after the filing by her of notice of appeal.

Appellee by its motion contends that the answer of appellee alleges defenses; that the district court had jurisdiction to set aside the verdict and to make a finding and to enter a judgment in favor of appellee; that the appeal having been taken and perfected, without appellant having filed a motion for a new trial after the verdict of the jury was vacated, a finding made and a judgment entered by the trial court in favor of appellee, this court in the exercise of its appellate jurisdiction is limited solely to a determination that the judgment is or is not supported by the pleadings; that the position of appellant is that the judgment of the trial court is not supported by the evidence, but that this question cannot be considered or determined by this court because of the failure of appellant to interpose a timely and appropriate motion for a new trial.

A district court was not, prior to an act of the Legislature of 1947 (Laws 1947, c. 85, p. 262), authorized to render a judgment notwithstanding the verdict except where, upon the statements in the pleadings, one party was entitled by law to a judgment in his favor. Where the pleadings did not show a right to a judgment, the court could not disregard a verdict and enter such a judgment as the evidence justified. If the verdict was not sustained by the evidence or was contrary to law, the remedy was, on motion therefor, to award a new trial. If the trial court was convinced it erred in submitting the case to the jury and should have directed a verdict, the remedy was a new trial, not a judgment of dismissal. § 25-1315, R. S. 1943; Winterson v. Pantel Realty Co., 135 Neb. 472, 282 N. W. 393. The limitation of this procedure was thought to be unjust because it sometimes coerced the losing party to compromise or abandon legal rights involved in the case or to suffer the delay, expense, and effort of another trial upon what frequently proved to be substantially the same evidence. It was believed that if material error occurred in the case during the trial and this was discovered or determined

upon further consideration after the trial when there was better opportunity for further study, the court should be authorized to grant a new trial, or without another trial, to render judgment for the party entitled thereto as a matter of law, upon the evidence which had been produced. It was because of this that the Legislature of 1947 changed the rule and prescribed a new procedure in this regard. Laws 1947, c. 85, p. 262; §§ 25-1315.02 and 25-1315.03, R. S. Supp., 1947; Patrick v. Union Central Life Ins. Co., 150 Neb. 201, 33 N. W. 2d 537.

This was within the power of the Legislature. A litigant has no vested right in any mode of procedure. Lovelace v. Boatsman, 113 Neb. 145, 202 N. W. 418; Department of Banking v. Hedges, 136 Neb. 382, 286 N. W. 277.

The mode and manner of appeal is statutory, and a litigant who complies with the requirements of the applicable statute is entitled to a review of his case to the extent of the scope provided by law. Larson v. Wegner, 120 Neb. 449, 233 N. W. 253; Barney v. Platte Valley Public Power and Irrigation District, 144 Neb. 230, 13 N. W. 2d 120.

At the time the act of the Legislature of 1947 above referred to became effective, it was a part of the procedure of this state that if a motion for a directed verdict was made during the trial of the cause, the ruling of the court thereon could not be reviewed by this court unless it was, by the party aggrieved by it, assigned as error in a motion for a new trial, and a ruling thereon secured in the trial court. Albright v. Peters, 58 Neb. 534, 78 N. W. 1063; Link v. Reeves, 3 Neb. (Unoff.) 383, 91 N. W. 506. See, also, Waxham v. Fink, 86 Neb. 180, 125 N. W. 145, 28 L. R. A. N. S. 367. A failure to observe this requirement, if the motion for an instructed verdict was sustained, limited the review in this court to a determination that the pleadings did or did not support the judgment rendered on the verdict in accordance with the direction of the court. Tait v. Reid, 91 Neb. 235, 136 N. W. 39;

Shipley v. McNeel, 149 Neb. 790, 32 N. W. 2d 639.

The answer of the appellee alleges defenses to the causes of action of the appellant, and the pleadings support the judgment. If the act of the Legislature of 1947 did not relieve the appellant of the necessity of interposing in this case a motion for a new trial, and securing the ruling thereon before invoking the jurisdiction of this court, the motion of appellee to affirm the judgment should be granted.

The act of 1947, to the extent pertinent to this inquiry, provides that when a motion for a directed verdict made at the conclusion of all of the evidence is not granted, the court is authorized to submit the case to the jury "subject to a later determination of the legal questions raised by the motion" and the party who made the motion, within the time limited, has the right to ask the court to vacate the verdict and any judgment entered thereon, to move that judgment be entered in accordance with "his motion for a directed verdict"; and such a judgment "is an appealable order, and the time for taking appeal shall commence to run from the date of entry" thereof. This court "on appeal from the judgment" is authorized to order "judgment * * * in favor of the party who was entitled" thereto, without regard to whether it approves or disapproves the conclusion of the trial court. Laws 1947, c. 85, p. 262; §§ 25-1315.02 and 25-1315.03, R. S. Supp., 1947. The purpose of this was to eliminate needless costs and effort, and to simplify and expedite the final disposition of litigation. It was obviously not the intention of the lawmakers that this legislation should be understood or interpreted to create pitfalls or to complicate the judicial process. If the terms of the act will reasonably permit, it should be construed to avoid these results.

The right of the Legislature to authorize an appeal within a time limited from the rendition of the judgment and a trial in this court de novo upon the entire record made, including the evidence taken in the dis-

trict court, without the filing of a motion for a new trial, has been sustained and the procedure enforced. Before 1905, section 675 of the code permitted appeals in equity cases "within six months after the date of the rendition of the judgment or decree or * * * the final order" by the filing in this court of a transcript of the proceedings, pleadings, judgment, decree, or final order, and all proofs offered in evidence in the district court. Comp. St. 1903, § 7265. There was no requirement of a motion for a new trial and the filing of such a motion did not extend the time for taking an appeal. This section of the code was construed to require this court to try the appeal de novo on the entire record made in the trial court, including the evidence received on the trial. Douglas County v. Barker Co., 125 Neb. 253, 249 N. W. 607; Dodge v. Healey, 103 Neb. 180, 170 N. W. 828; Smith v. Silver, 58 Neb. 429, 78 N. W. 725; Union Central Life Ins. Co. v. Burgess, 131 Neb. 20, 266 N. W. 898. See, also, Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619. The act of 1947 is a special statute complete within itself, authorizes an order for a judgment notwithstanding a verdict, makes it an appealable order, and limits the time to 30 days within which an appeal may be taken from the entry of such order.

A motion for a new trial is essential to a review of alleged errors and rulings occurring upon a trial of a cause, but this rule has not been extended to every order or decision and is indispensable only in cases where questions of fact are tried and determined. The purpose of a motion for a new trial is to enable the court to correct errors that have occurred in the conduct of the trial. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772; Slobodisky v. Curtis, 58 Neb. 211, 78 N. W. 522; Bailen v. Badger Import Co., 99 Neb. 24, 154 N. W. 850; Furnas County Farm Bureau v. Brown, 112 Neb. 637, 200 N. W. 451. A "trial" is a judicial examination of the issues, whether of law or of fact in an action. A "new trial" is a re-examination

in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. §§ 25-1103 and 25-1142, R. S. 1943.

An issue of fact exists when the court or jury is required to weigh and consider evidence to determine what the facts essential to a decision of a matter in litigation are, and when the trier of fact must determine which evidence is to be believed, what part thereof is to be disregarded. In considering and passing upon a motion for a judgment notwithstanding the verdict, the court does not examine any issue of fact. The court, by the mandate of the statute, considers the record made on the trial and decides as a matter of law whether the evidence already in the record justified the submission of the case to the jury or whether the court on the trial should have sustained the motion for a directed verdict. The court cannot, in such a situation, weigh or consider any part of the evidence in the sense of deciding any issue of fact. The matter presented by the motion for a judgment is one of law. A "trial" of an issue of fact means an original investigation by the court and an examination of evidence, produced by the parties, including the rulings of the court, which if not satisfactory must be brought to the attention of the court by a motion for a new trial. The part of this case concerning the motion of appellee for a judgment or for a new trial was a mere examination of the record made on the trial before the motion was interposed, and a motion for a new trial by appellant after the judgment was rendered for the appellee could have alleged nothing except that the court erred in deciding the matter upon the record incorrectly in favor of appellee. The proceedings by the trial court on the motion of appellee for judgment was in the language of the statute only a "determination of the legal questions raised by the motion." Bennett v. Otto, 68 Neb. 652, 94 N. W. 807; Lee v. Brittain, 74 Neb. 591, 104 N. W. 1076; Bannard v. Duncan, 65 Neb. 179, 90 N. W. 947;

Walker v. Burtless, on rehearing, 82 Neb. 214, 118 N. W. 113; Weideman v. Estate of Peterson, 129 Neb. 74, 261 N. W. 150.

The motion of appellee requested the court to render a judgment in its favor, or if that was denied, to grant a new trial. The act of 1947 authorizes this procedure by the provision: "If a verdict was returned, the court may allow the judgment to stand, or may re-open the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." § 25-1315.02, R. S. Supp., 1947. If the court had denied the motion for a judgment and had sustained the motion for a new trial, the appellant would not have been required to make (and could not have made) a motion for a new trial as a condition of a review on appeal to this court of the evidence in the record to determine the question of the correctness of the action of the trial court in granting the appellee a new trial. The appellee concedes the correctness of this conclusion. The complaint of appellant in such a situation would have been that a new trial had been incorrectly granted appellee; the objection would not have been to a judgment because none would have existed. Where the trial court sustains a motion for a new trial and grants a new trial, as this statute permits, and the court does nothing more, the party "aggrieved" by the order is effectively prevented from filing a motion for a new trial. If he did, the court would, of course, sustain it and he would be prevented from maintaining an appeal because he had obtained through his motion and action the order concerning which he alleges error. He would have invited the alleged error forming the basis of his appeal. It would be an unfortunate and unjustified construction of this statute to conclude that if a motion for a judgment notwithstanding the verdict is sustained, the party aggrieved thereby must make a motion for a new trial, but if a motion for a new trial is sustained and a new trial awarded, the party aggrieved thereby

need not file a motion for a new trial as a prerequisite of an examination of the complete record by this court on an appeal from the order of the trial court. The party against whom a judgment notwithstanding the verdict has been rendered does not want a new trial and should not be required to make application for a new trial, a ruling on which he might not be able to secure in the limited time permitted for an appeal. What he wants is the right of a review in this court of the correctness of the action of the trial court in setting aside the verdict and rendering a judgment adverse to him. This the act of 1947 furnishes him.

The first sentence of paragraph 2 of the act is significant and important in considering the problem presented by the motion to affirm. Appellee concludes that the last clause of this was obviously inserted to harmonize the time for taking an appeal from any order authorized by the act with the time specified in the general statute on the subject of appeals from the district courts to this court. § 25-1912, R. S. Supp., 1947. This explanation is neither satisfactory nor convincing. That section provides that an appeal may be taken "within one month after the rendition of such judgment or decree or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause" while the act of 1947 dogmatically states "the time for taking appeal shall commence to run from the date of the entry of such order." § 25-1315.03, R. S. Supp., 1947. This applies to all orders "as provided in this section"—an order entering judgment or granting or denying a new trial. These provisions are not in harmony. If they are, then there is no rational explanation as to why the last section was made a part of the act. It was not written therein by accident, but for a purpose. The first paragraph of this act is a copy of Rule 50 (b) of the Federal Rules of Civil Procedure, and was a part of the report of the Advisory Committee appointed by this court. 11 S. C.

J., p. 882. Paragraph 2, or anything similar thereto, does not appear in the Federal Rules, but it is almost a copy of the rule approved by this court and reported to the Legislature as Rule 50 (b)(2) (11 S. C. J., p. 897) with the exception that the Legislature before making it a part of the law added thereto the language: "and the time for taking appeal shall commence to run from the date of entry of such order." The Legislature had been considering the subject of appeals to this court and had amended the general statute fixing the time within which an appeal could be taken (§ 25-1912, R. S. Supp., 1947), and thereby limited the time to within one month from the making of the order or within one month from the overruling of a motion for a new trial in the cause. It shortly thereafter passed L. B. 19 (§ 25-1315.03, R. S. Supp., 1947), having added the language: "and the time for taking appeal shall commence to run from date of the entry of the order." Nothing is said therein about a motion for a new trial. This act applies only to a case in which a motion for a directed verdict is made at the close of the evidence. The Legislature had before passing this act at the same session adopted a law providing that "A motion for a directed verdict shall state the specific grounds therefor." Laws 1947, c. 88, p. 267; § 25-1315.01, R. S. Supp., 1947. It is logical to conclude that the lawmakers entertained the view that a motion for a directed verdict stating the specific grounds therefor, and a motion for a judgment notwithstanding the verdict or for a new trial, supplied the primary purpose of a motion for new trial and called to the attention of the court all of the alleged errors made during the trial of the cause, and because of this, that no motion for a new trial should be required in reference to any order made by the court by virtue of the provisions of this act. The time for taking an appeal commences to run from the entry of the order (§ 25-1315.03, R. S. Supp., 1947), and expires 30 days thereafter (§ 25-1912, R. S. Supp.,

1947). A litigant could not be assured in all cases of a ruling on a motion for a new trial within that short time. He should not be harassed with a construction of the law that requires him to do something as a condition of the exercise of a right of appeal that might on occasion be impossible to perform, with the result that his appeal would fail.

The motion of appellee to affirm the judgment should be, and it is, overruled and denied. The motion of appellee for an extension of time to prepare, serve, and file its brief herein should be, and is granted, and the time therefor should be, and is, extended to the 15th day of September, 1949.

MOTION TO AFFIRM JUDGMENT DENIED. MOTION TO EXTEND BRIEF DAY OF APPELLEE GRANTED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1949

HOWARD SPARKS, APPELLEE, v. CATER ELECTRICAL CONSTRUCTION CO., INC., APPELLANT.
39 N. W. 2d 274

Filed October 14, 1949. No. 32626.

Contracts. One who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation, unless the terms or nature of the contract indicate that he does not assume this risk.

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

George B. Hastings, for appellant.

W. C. Conover, and *McGinley & Lane,* for appellee.

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

SIMMONS, C. J.

Plaintiff, as a veteran entitled to the benefits of the Servicemen's Readjustment Act of 1944, Public Law 346, Laws of the 78th Congress, 2d Session, a part of what is popularly known as the "G. I. Bill of Rights," brought this action to recover the value of subsistence benefits under that act, which defendant allegedly promised

would be paid. He, as assignee, joined with his own cause of action the cause of three other veterans seeking a like recovery. Issues were made and trial had to a jury. At the close of all the evidence, both plaintiff and defendant moved for an instructed verdict. The trial court dismissed the jury, found for and entered judgment for the plaintiff on all causes. Defendant appeals. We affirm the judgment of the trial court.

Plaintiff alleged an oral contract of employment at an agreed wage; that as a part of said contract defendant agreed that the employment was subject to the provisions of the on-the-job training program of the Veterans' Administration under Public Law 346, and that defendant was a qualified and approved on-the-job training institution under said law; that plaintiff and his assignors would receive under said contract the subsistence benefits allowed by the act, provided plaintiff and his assignors delivered to defendant their applications for training under the act, and defendant would take care of all further matters required; that plaintiff and his assignors delivered to defendant their certificates of eligibility and entitlement under the act and entered defendant's employment and performed labor for periods of time. Plaintiff further alleged that the representation and agreement of defendant that it was a qualified on-the-job training institution were false and fraudulent and that defendant was not so qualified during the periods of the employment and by reason thereof plaintiff and his assignors did not receive the allowances.

Defendant by answer pleaded, among other things, that it was a Missouri corporation and was at the time of the contract an approved on-the-job training institution in Missouri; that it acted in good faith; and that as soon as it found out that it was necessary to secure approval in Nebraska it applied for and secured the approval and was at the time of filing the answer such an approved institution.

The trial court found generally for the plaintiff and against the defendant and made specific findings of fact. We summarize these findings.

The marital status of plaintiff and his assignors was determined and each was found to be a veteran entitled to the benefits under Public Law 346. The court further found that the defendant represented to plaintiff and his assignors that it was an approved on-the-job training institution in Nebraska, and that the parties would receive subsistence allowances provided under the said Public Law 346 in addition to base pay; that these representations were made to induce the parties to enter the employment of the defendant company; that defendant posted a bulletin stating that it was an approved on-the-job training institution; that at the time the representations were made defendant company was not qualified as an on-the-job training institution in Nebraska; that the defendant was under a duty to know and should have known the requirements of the Veterans' Administration to qualify and be approved, and lacking such knowledge made the representation above set forth as an inducement to the plaintiff and his assignors to become employees of or to remain in the employ of the defendant; and that by reason of the fact that the defendant was not a qualified on-the-job training institution in Nebraska, the plaintiff and his assignors did not become entitled to the subsistence allowances as provided by Public Law 346. The court made further findings as to the amount of subsistence allowance plaintiff and his assignors would have received had the agreement been kept, and entered judgment against the defendant and in favor of the plaintiff.

The amount of the judgment is not questioned. The question here is whether or not plaintiff is entitled to recover in any amount.

Defendant's first contention is that the decision of the Administrator of Veterans' Affairs on claims for benefits under the act is final and conclusive and not subject

to review by a court. That contention is beside the point. Plaintiff does not seek to have reviewed the decision of the administrator. He seeks to recover here that which the defendant promised would be paid as a part of the consideration of the employment and service and that which plaintiff and his assignors would have been paid by the United States had defendant been a qualified on-the-job training institution in Nebraska.

The rule is that one who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation, unless the terms or nature of the contract indicate that he does not assume this risk. 6 Williston on Contracts (Rev. ed.), § 1932, p. 5413; 12 Am. Jur., Contracts, § 370, p. 941; 17 C. J. S., Contracts, § 459, p. 949. See, also, Hokanson v. Western Empire Land Co., 132 Minn. 74, 155 N. W. 1043, L. R. A. 1917C 761; Frenzer v. Dufrene, 58 Neb. 432, 78 N. W. 719; City of Topeka v. Industrial Gas Co., 135 Kan. 646, 11 P. 2d 1034. The findings of the trial court bring the defendant within this rule and without the exception.

Defendant next contends that the subsistence allowances claimed by plaintiff and his assignors are gratuities; that the parties had no legal right to compel their payment by the United States; and that as a consequence the defendant has not infringed upon their legal rights. Here, again, the defendant mistakes the issue. Plaintiff does not seek to compel the government to pay subsistence payments. Plaintiff seeks to recover the value of that which the defendant promised the plaintiff and his assignors would receive from the government. That payment was a part of the consideration which the defendant promised would be paid the plaintiff and his assignors in consideration for services performed for the defendant. Plaintiff and his assignors have been deprived of the very material benefits of that promise.

Defendant next argues that to sustain an action for

fraud and deceit, plaintiff must prove actual damage, and that because plaintiff and his assignors still have available to them all the rights and benefits of the federal act, they have not been damaged. The answer to this is clear. Plaintiff and his assignors have not been paid that which defendant agreed would be paid to them in consideration of the labor which they performed for it. The fact that they yet may or may not be entitled to be paid by the United States for other labor performed under the training program does not excuse the defendant.

Finally defendant argues that the fraud and injury must sustain the relation of cause and effect; that plaintiff's causes must fail because of inability to prove that the defendant's fraud was the proximate cause of the failure to receive the subsistence allowances; and that it is only conjecture and speculation to say that the payments were not made because the defendant was not an approved institution for on-the-job training in Nebraska. That contention is answered by the finding of the trial court that the plaintiff and his assignors did not become entitled to the subsistence allowances because the defendant was not a qualified on-the-job training institution in Nebraska. The evidence sustains the finding.

We see no merit in defendant's contentions.

The judgment of the district court is affirmed.

AFFIRMED.

KENNETH KITTS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
39 N. W. 2d 283

Filed October 14, 1949. No. 32599.

1. **Criminal Law: Evidence.** In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior

to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats.

2. ———: ———. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury.

3. ———: ———. Where the trial court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to refuse to submit to the jury for its determination, under appropriate instructions, the factual question of whether defendant's alleged confession was voluntary, in which event it should be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded.

4. **Criminal Law: Trial.** An instruction in a criminal case that "yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so unless you find it irreconcilable with the other testimony which you find to be true," is erroneous and ordinarily prejudicial.

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

Bernard J. Boyle and *Hugh J. Boyle,* for plaintiff in error.

James H. Anderson, Attorney General, and *William T. Gleeson,* for defendant in error.

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

CHAPPELL, J.

The first and second counts of an information filed in the district court for Douglas County respectively charged defendant with burglary and possession of certain described instruments or tools with intent to commit a burglary. A third count therein charged that defendant was a habitual criminal. At arraignment, defendant

stood mute upon advice of his counsel, and the trial court entered a plea of not guilty. Trial to a jury was had upon the first and second counts respectively, whereat defendant was found guilty as charged. Defendant's motion for new trial was overruled, and thereafter hearing was had by the court upon count three, as provided in sections 29-2221 and 29-2222, R. S. Supp., 1947, and in conformity with Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462. At the conclusion of such hearing it was found and adjudged that defendant was a habitual criminal as charged, and, in the light thereof, upon the verdict of guilty he was sentenced to serve 12 years in the Nebraska State Penitentiary.

Defendant appealed to this court, and his brief assigned as error substantially: (1) That the verdict was contrary to law and not sustained by the evidence; (2) that the trial court erred in admitting evidence of the State relating to alleged confessions made by defendant; (3) erred in holding, as a matter of law, that such confessions were voluntary, and refusing to submit that question to the jury as one of fact for its determination, as requested by proffered instructions and otherwise throughout the trial; and (4) that the trial court erred in giving instruction No. 19 relating to credibility. We sustain the third and fourth assignments.

Evidence in the record discloses that the State adduced competent evidence from which a jury could have reasonably concluded as follows:

On December 22, 1947, at or about 1:20 a. m., after the barroom in the South Omaha Eagles Lodge building had been searched, closed, and locked, a burglar alarm installed therein sounded at American District Telegraph headquarters. Police were called, who drove to the building, where outside thereof they exchanged shots with an unidentified man who fled from the scene and escaped in the darkness down an alley between buildings. A window on the east wall of the semibasement was found to have been opened, at the foot of which were two

crowbars. Police entered the building, and in the semi-basement defendant was found, armed with a loaded pistol, hiding behind tables stacked near the south wall. A cap was found near the open window, as was also a kit containing two pair of gloves and certain tools, the like of which are ordinarily used for the purpose of breaking and entering. The cap, gloves, pistol, shells removed therefrom, and kit of tools were respectively identified, offered, and received in evidence, but apparently were never actually delivered to this court with the bill of exceptions.

At command of an officer defendant stepped out, hands raised. The pistol was seen by such officer projecting from defendant's pocket, and as defendant reached for it, the officer struck him on the head with a revolver, thereby producing an injury or laceration of some proportions from which blood flowed down over his face and clothing. The loaded pistol in defendant's possession was taken from him, and he was placed under arrest. Thereafter police officers placed defendant face down on a pool table in spread-eagle fashion, and he was searched. Blood flowed from his head wound down on the table, and in a few moments he was removed therefrom and laid in the same manner on the floor. While in those positions, defendant was plied with questions by the officers, and voluntarily, without the use of any force, threats, or fear, gave answers, confessing that he broke into the premises through the window heretofore described, identified the person by name who fled from the scene as his accomplice, identified the cap found as that of his accomplice, admitted that the kit of tools was his own, which he had brought to the building, and admitted ownership of the pistol, telling where he had purchased it sometime previously.

On the other hand, defendant adduced competent evidence generally conflicting, contradictory, and irreconcilable with that adduced by the State. We do not deem it necessary to recite such evidence at length,

except to say that defendant testified that while he was on the pool table and floor the officers beat him about the head and face with a blunt instrument and with their fists, removed him to the floor because blood was running from his head down upon the pool table, and that after he was on the floor, they kicked him on the head, sides, back, and body, and upon more than one occasion and manner threatened to kill him if he did not confess and name his accomplice. Defendant's testimony that his eyes were blacked, his nose and face cut and swollen, and his body bruised black and blue from his armpits to his hips, was corroborated by other witnesses, and photographs taken December 24, 1947, gave some support to that testimony. Defendant testified that, half conscious, and fearing for his life, he involuntarily confessed, although innocent, and named a supposed accomplice who never in fact existed.

In the light of the foregoing circumstances, we conclude that there was sufficient evidence to sustain the verdict.

Of course, that conclusion rests basically upon the admissibility of the evidence relating to defendant's alleged confession, and, as hereinafter observed, the final force and effect of such evidence depends upon the manner in which the issues involved therein were decided or submitted by the trial court.

We turn then to the question of admissibility. In that connection, it was said in Holthus v. State, 138 Neb. 200, 292 N. W. 603: "The correct rule is: In laying a foundation in a criminal case for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making of the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. The following cases support this rule: Grammer v. State, 103 Neb. 325, 172 N. W. 41; Bush v. State, 112 Neb. 384, 199 N. W. 792; Stagemeyer v. State, 133

Neb. 9, 273 N. W. 824." See, also, Jones v. State, 97 Neb. 151, 149 N. W. 327, and Cheney v. State, 101 Neb. 461, 163 N. W. 804.

In that regard, the question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of such evidence is one of law for the court, and if the court determines as a matter of law that no sufficient foundation has been laid, then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury. Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323.

When the State in the case at bar offered testimony relating to defendant's alleged confession, his counsel opportunely and appropriately objected to its admission for the reason that no sufficient foundation had been laid, and requested that all the evidence relating to foundation therefor, and the nature and character of the statements allegedly made by the defendant, should be first adduced out of the presence of the jury, as approved in Schlegel v. State, 143 Neb. 497, 10 N. W. 2d 264, and cases cited therein. In conformity with defendant's request, such evidence was so adduced, whereat defendant's counsel had opportunity to and did freely cross-examine the State's witnesses, and defendant, as well as other witnesses for him, took the stand and gave testimony directly conflicting and irreconcilable with that adduced by the State, in the manner approved by Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824.

At the conclusion of such hearing, the trial court, as a matter of law, did not err in holding that the State's evidence was admissible. However, over defendant's repeated objections, the trial court did erroneously hold, as a matter of law, that defendant's confession was voluntarily given, without submitting that factual question to the jury. The evidence thus adduced, in the absence of the jury, was not read back to it upon the jury's return to the courtroom, although such evidence was all sub-

stantially retaken and repeated in the presence of the jury.

At the conclusion of the trial defendant timely requested instructions Nos. 6, 10, and 12, proffered by him, which offer was refused by the trial court, who gave no instructions whatever to the jury upon the issues presented or thus requested to be submitted. The effect of the requested instructions was to submit to the jury, as a question of fact for its determination, whether defendant's alleged confession was voluntary as claimed by the State, in which event it should be considered as any other evidence, or whether it was obtained by force, threats, or fear, as claimed by defendant, in which event it should be wholly rejected and disregarded by the jury. We conclude that the refusal to submit such issues was error prejudicial to defendant, which conclusion is supported by the following authorities: Heddendorf v. State, 85 Neb. 747, 124 N. W. 150; Shellenberger v. State, 97 Neb. 498, 150 N. W. 643, L. R. A. 1915C 1163; Ringer v. State, 114 Neb. 404, 207 N. W. 928; Stagemeyer v. State, *supra;* Cramer v. State, *supra*; Schlegel v. State, *supra.* See, also, cases cited in annotation, 85 A. L. R., pages 881 to 908 inclusive.

The applicable rule is that where the trial court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to refuse to submit to the jury for its determination, under appropriate instructions, the factual question of whether defendant's alleged confession was voluntary, in which event it should be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded.

Instruction No. 19, given by the trial court, relating to the credibility of witnesses, did not in any manner submit the foregoing issues to the jury, and if this instruction had been proper in form and substance it could not have cured the foregoing prejudicial error. Further, upon the authority of Schluter v. State, *ante*

p. 284, 37 N. W. 2d 396, and cases cited and relied upon therein, instruction No. 19 as given was itself prejudicially erroneous by reason of the language appearing in the last sentence thereof, to wit: "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so unless you find it irreconcilable with the other testimony which you find to be true."

Other alleged errors were presented in oral argument to this court, but none of them were assigned as error or supported by any cited authority in the brief. An examination of the record discloses that none of such alleged errors were plain errors unassigned and prejudicial to defendant. It has now become elementary that they will not be discussed.

For the reasons heretofore stated, the judgment of the trial court is reversed and the cause is remanded for new trial.

REVERSED AND REMANDED.

HOBART SORTER, APPELLANT, V. CITIZENS FUND MUTUAL FIRE INSURANCE COMPANY, A CORPORATION, APPELLEE.
39 N. W. 2d 276

Filed October 14, 1949. No. 32600.

1. **Appeal and Error.** When a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness.
2. **Trial.** The findings of the court in a law action in which a jury is waived are accorded the same weight as a verdict of a jury.
3. **Appeal and Error.** The weight of evidence or credibility of witnesses is not a concern of this court in the review of an action at law tried without a jury, except to determine that the findings and judgment are supported by the evidence and are not contrary to law.
4. **Insurance.** By statute no representation or warranty made in the negotiation for a contract of insurance by the insured is

material or can void the policy unless the representation or warranty deceived the company to its injury.

5. ———. If an applicant in negotiations for a contract of insurance makes false representations to the company upon a subject within the knowledge of the applicant relating to a matter material to the risk and the company relies and acts thereon, they will void the policy if the company takes timely advantage thereof.

6. **Fraud.** Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that he was induced by the fraud or misrepresentation.

APPEAL from the district court for Lancaster County: RALPH P. WILSON, JUDGE. *Affirmed.*

Herbert W. Baird, for appellant.

Perry & Perry, for appellee.

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

BOSLAUGH, J.

This is an action at law by appellant to recover on a policy of insurance issued to him by appellee, the amount of loss claimed to have been sustained by appellant from the destruction by fire of the property described in the policy.

The appellant says that he was, on the 8th day of July, 1946, the owner of a building at 104 R Street, Lincoln, Nebraska; that the appellee for a consideration issued to appellant a policy of insurance protecting the building against loss by fire; that while the insurance was in force the building was destroyed by fire; that he performed all of the conditions of the policy of insurance on his part to be performed; and that he is entitled to recover the amount of the insurance with interest, costs, and attorney fee.

Appellee denied the allegations of the appellant and asserted that the contract of insurance was obtained by

fraud and misrepresentation; that to secure the policy of insurance appellant represented that he was the owner and in lawful possession of the real estate described in the policy; that appellee believed, relied, and acted thereon in issuing and delivering the policy of insurance, and it would not have done so if it had not relied upon the representations made by appellant; that he was not the owner of the real estate and had no interest therein; that the building of appellant was movable and situated in a street of the city of Lincoln, Nebraska; that the insurance contract contains a provision that it shall be void if the interest of the insured is other than unconditional and sole ownership, or if the subject of insurance is a building on ground not owned by the insured in fee simple; and that appellee as soon as it learned that the insurance had been obtained by fraud offered to return the premium paid to it by appellant, and the offer was refused.

The parties waived a jury, trial was had, and the court found all issues in favor of appellee and entered judgment of dismissal. Motion of appellant for a new trial was denied.

The contention of the appellant was, until the case reached this court, that he was the owner of the real estate where the insured building was located, that the fire resulted in total loss of the building, and he was entitled to recover the amount of the insurance policy by virtue of the valued policy law. § 44-380, R. S. 1943. This is shown by his failure to offer evidence as to the actual value of the property described in the insurance contract and by the admissions in his brief that plaintiff since 1928 had his buildings, including the one burned and involved in this case, on First Street near its intersection with R Street in Lincoln; that "the plaintiff never owned the land"; that "the plaintiff's want of land ownership dispenses with the valued-policy and attorney-fee features of this case"; and that "If * * * this court is able to determine the money value of the plaintiff's loss, the court should render judgment for the plaintiff for that

amount. If * * * the evidence is defective or incomplete on this subject, the cause should be remanded to the district court for re-trial and determination of this issue."

The appellant may not change his position in this court from what it was in the trial court. The rule is that when a theory on any issue is relied upon by a party in the trial court as the proper one, it will be adhered to on appeal, without regard to the correctness of the theory. Gillan v. Equitable Life Assurance Society, 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496.

Appellant testified that he owned the land where the building in question was located; that he did not have a deed for it at the time of the trial, but he had "one in Washington, D. C." He denied any conversation with the agent of the insurance company during the negotiations in reference to the writing of the insurance with regard to his ownership of the land.

The evidence is clear and abundant that the appellant represented to the agent of appellee in the negotiations to obtain the insurance that appellant was the owner of the house sought to be insured; that it was on, affixed to, and was a part of the land owned by him; that the agent advised the general agent of the insurance company of these representations made by the appellant, and the general agent believed, relied, and acted thereon in approving the application of appellant for the insurance and in issuing and delivering the policy; that he would not have done so if it had not been represented by the appellant that he was the unconditional owner thereof; that the building of appellant described in the insurance contract was located in First Street in the city of Lincoln, except the west 2.6 feet of the garage, and this was on land owned by Barton Green; and that the insurance contract contains the provisions that it shall be void if insured has misrepresented any material fact, or in case of fraud by the insured touching any matter relating to the insurance, or if the subject of the insurance be a

building on ground not owned by the insured in fee simple.

There is evidence in agreement with each of the findings of the trial court. This is an action at law, and the findings of the court are accorded the weight of a verdict of a jury. The weight of evidence or credibility of witnesses is not a concern of this court in the review of such a case except to determine that the findings and judgment are supported by evidence and are not contrary to law. Foltz v. Brakhage, *ante* p. 216, 36 N. W. 2d 768.

The provision that no representation or warranty made in the negotiation for a contract of insurance by the insured is material or can defeat or avoid a policy of insurance unless the representation or warranty deceived the insurer to its injury is pertinent to the disposition of this case. § 44-358, R. S. 1943. The appellant inferentially argues that any misrepresentation by him concerning the ownership of the location of the building insured should not have been relied upon by the appellee and resulted in no injury to it. The statute does not deprive an insurance company of the defense of fraud. In negotiations for a contract of insurance, its terms are that misrepresentations may not avoid the policy unless they deceive the company to its injury. The statute requires fair play; that an applicant for insurance must exercise towards the company the same good faith which may rightfully be expected of it; and that there be fair dealing by both parties. If untrue statements of the insured, material to the risk, are made to the company and they are believed and acted upon by it in the issuance and delivery of a contract so that the company is obligated when it would not have done so had a truthful disclosure been made in the negotiations, it is clear that the company was deceived to its injury, and the statute does not deprive it of a remedy. Goodell v. Union Automobile Ins. Co., 111 Neb. 228, 196 N. W. 112; Quisenberry v.

National Fire Ins. Co., 132 Neb. 793, 273 N. W. 197; Muhlbach v. Illinois Bankers Life Assn., 108 Neb. 146, 187 N. W. 787; Gillan v. Equitable Life Assurance Society, *supra;* George v. Guarantee Mutual Life Co., 144 Neb. 285, 13 N. W. 2d 176.

The representations of appellant as shown by the evidence above related were concerning matters peculiarly within his knowledge and were material to the risk. Farmers & Merchants Ins. Co. v. Hahn, 1 Neb. (Unoff.) 513, 96 N. W. 255; Gillan v. Equitable Life Assurance Society, *supra.*

The general agent of appellee, who was authorized to and who did act for it in passing on and approving the application of appellant for insurance, testified he relied and acted upon the representations of appellant, and that the company would not have issued and delivered the policy of insurance if the appellant had reported the fact that the building was not located on land belonging to him but was in a public street of the city of Lincoln. There is nothing to dispute his statements in this regard. Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that he was induced by the fraud or misrepresentation. Restatement, Contracts, § 479, p. 915; George v. Guarantee Mutual Life Co., *supra.*

Appellant insists that Farmers & Merchants Ins. Co. v. Mickel, 72 Neb. 122, 100 N. W. 130, is decisive. Its inapplicability to this case sufficiently appears by the language therein that the insurance company entered into a contract of insurance "without making inquiry as to the condition of the property or to the state of its title * * *" and that "no representation of any kind was made touching the nature of the plaintiff's title to the land on which the building was situated." The court in that decision said that an insurer could protect itself if it would "make an inquiry as to the nature of

the title of the insured to the grounds upon which the building is located, before accepting the premium and delivering a policy of insurance covering such risk." See, also, Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537, 62 N. W. 877, 48 Am. S. R. 745. Appellee complied with that suggestion before it accepted the application of appellant for insurance, and relied thereon in entering into the contract of insurance. It asked appellant as to the nature of his title to the ground upon which the building was located, and he falsely represented that he was the owner thereof and that the building was located thereon and affixed thereto as a part of the real estate.

The findings and judgment of the district court should be affirmed.

AFFIRMED.

O-N-L MILLS, INC., A CORPORATION, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, ET AL., APPELLEES.

39 N. W. 2d 501

Filed October 27, 1949. No. 32635.

1. **Contracts.** The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles.
2. ———. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.
3. ———. If a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it. But if the construction must depend upon proof of other and extrinsic facts, then these questions of fact should be submitted to the jury, under proper instructions from the court.
4. **Courts.** Ordinarily the meaning of words in common use is a question for the court.

APPEAL from the district court for Valley County: ERNEST G. KROGER, JUDGE. *Affirmed.*

Kirkpatrick & Dougherty, and *E. L. Vogeltanz,* for appellant.

C. B. Matthai, G. C. Holdrege, R. B. Hamer, and *T. F. Hamer,* for appellees.

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

SIMMONS, C. J.

This is an action in which plaintiff seeks to recover damages caused by a fire allegedly negligently set by defendant railroad and its engineer, also a defendant. Issues were made and trial had. At the close of the evidence for the plaintiff each defendant moved for a directed verdict. The trial court sustained the motions, entered judgments for the defendants, and dismissed plaintiff's cause with prejudice. Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff is the owner of a tract of land 300 feet square lying north of and adjoining the right-of-way of the defendant railroad east of Ord in Valley County.

As assignee of a lease with defendant railroad, plaintiff also had possession of a strip of land 26.5 feet wide and 300 feet long adjoining its property on the south, so that plaintiff's holding was 300 by 326.5 in size. This land originally was leased by the defendant railroad to Saunders Mills, Inc., to be used for an alfalfa dehydrating plant. The lease contained this provision: "It is understood by the parties hereto that the leased premises are in dangerous proximity to the tracks of the Lessor, and that by reason thereof there will be constant danger of injury and damage by fire, and the Lessee accepts this lease subject to such danger. It is therefore agreed, as one of the material considerations for this lease and without which the same would not be granted by the Lessor, that the Lessee assumes all risk of loss, damage or destruction of or to buildings or contents on the leased premises, and of or to other property brought thereon by

the Lessee or by any other person with the knowledge or consent of the Lessee, *and of or to property in proximity to the leased premises when connected with or incidental to the occupation thereof,* and any incidental loss or injury to the business of the Lessee, where such loss, damage, destruction or injury is occasioned by fire caused by, or resulting from, the operation of the railroad of the Lessor, whether such fire be the result of defective engines, or of negligence on the part of the Lessor or of negligence or misconduct on the part of any officer, servant or employe of the Lessor, or otherwise, and the Lessee hereby agrees to indemnify and hold harmless the Lessor from and against all liability, causes of action, claims, or demands which any person may hereafter assert, have, claim or claim to have, arising out of or by reason of any such loss, damage, destruction or injury, including any claim, cause of action or demand which any insurer of such buildings or other property may at any time assert, or undertake to assert, against the Lessor." (Emphasis supplied.)

The lease was assigned in writing to plaintiff and contained this provision: "The Assignee hereby accepts the above assignment and agrees to be bound by and to perform and observe fully and faithfully all of the covenants, stipulations and conditions contained in said agreement to be performed and observed by the Assignor and *assumes all liabilities mentioned in said agreement to be assumed by the Assignor.*" (Emphasis supplied.)

There was constructed on the property so owned and leased an alfalfa dehydrating plant. From south to north there were on the leased premises, first, a loading dock, and to the north of it a meal warehouse. To the east about 20 feet and largely on the leased property was a two-story mill building. To the north, as a part of the mill but not on leased property, was a one-story structure. To the north of the mill and lengthwise north and south was a hay warehouse 96 by 60 feet and 24 feet to the eaves. The south side of this warehouse was 57 feet

from the north line of the defendant railroad's right-of-way. It was built entirely upon plaintiff's land. Between the mill and the hay warehouse was built a one-story passageway for a conveyor from the warehouse to the mill. This small building was not physically attached to the hay warehouse. Other structures on the premises need not be mentioned.

The hay warehouse was covered with one-by-twelve inch boards on the sides, and cracks as wide as one-half inch in places were between the boards. The roof was metal. The function of the warehouse was to store hay prior to milling operations.

On the morning of March 25, 1948, there were in the warehouse considerable equipment and, within and in two stacks about 60 feet to the north of the warehouse, 459 tons of baled alfalfa hay. A strong wind was blowing from the southeast. About 11:30 that morning the train of defendant railroad passed plaintiff's property. At that time large amounts of black smoke were coming from the engine. This smoke was carried close to the ground across plaintiff's property. Within ten minutes smoke was seen coming from the south center of the hay warehouse, immediately followed by fire which spread rapidly and entirely destroyed the warehouse, its contents, and the hay outside. That afternoon the smoke arrester was not on the smokestack of the engine as it had been in the past.

The plaintiff sued the railroad and its engineer, alleging that they caused the engine to be fired up as it passed plaintiff's property and negligently caused the engine to throw out sparks and coals of fire and cast them upon plaintiff's property causing the fire and resulting damage. The plaintiff charged particular acts of negligence in that the defendants knew the engine was not equipped with spark arresters or other fire preventives; that the defendants knew or ought to have known that the wind was from the southeast; and that the engine was casting out sparks and coals of fire upon the property of the

plaintiff, caused by the firing of the engine as it approached.

Defendants denied generally, specifically denied negligence, and pleaded the terms of the lease and the assignment above set out.

The trial court sustained the motion of defendant engineer on the ground that the evidence was insufficient to establish negligence as to him and for the further reason that by the lease agreement plaintiff had expressly assumed the risk, including that of negligence on the part of employees of the railroad. The court sustained the motion as to defendant railroad on the ground that all of the property destroyed was property in proximity to and connected with or incidental to plaintiff's occupation of the leased premises and that defendant railroad had been exempted from liability by the lease agreement.

Pursuant to rule 8 a 2 (4) of this court, we limit our consideration to errors assigned and discussed.

As to the liability of defendant railroad, plaintiff presents two contentions. The first is that the exemption in the lease, emphasized above, does not extend to the hay warehouse, the nearest point of which was 57 feet from the railroad right-of-way, nor to the hay outside the warehouse which at its nearest point was 213 feet from the right-of-way. Plaintiff, conceding that the defendant railroad had the right to exempt itself from loss to all property of plaintiff, argues that it did not do so in this instance. Plaintiff's argument is that we must interpret the contract on the basis of the location of the destroyed property in its relation to the size of the area of land owned or held by lease by plaintiff.

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195.

What, then, was the intention of the parties as manifested by the terms of the contract? The premises leased were to be used for the purpose of an alfalfa dehydrating plant. The buildings constructed on the leased premises and on the property adjoining were consistent with and for that purpose. They comprised one unit making up the dehydrating plant. The alfalfa hay within and without the hay warehouse was there in connection with that occupation and use of the premises. The personal property within the hay warehouse, other than hay, was also there consistent with that use of the premises. There is no ambiguity in the contract. While stated in general terms, it clearly appears that the intention of the contracting parties was that the plaintiff assumed all risk of the loss here involved. The liability or nonliability of the defendant railroad is not shown to be related to the area of land other than the leased premises owned or occupied by the plaintiff. We find the first contention to be without merit.

Plaintiff's next contention is that the question as to whether the property destroyed was in proximity to the leased premises when connected with or incidental to the occupation was a question of fact which should have been submitted to the jury.

The rule is: "* * * if a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it. But if the construction must depend upon proof of other and extrinsic facts, then these questions of fact should be submitted to the jury, under proper instructions from the court." Coquillard v. Hovey, 23 Neb. 622, 37 N. W. 479, 8 Am. S. R. 134. See, also, Rosenthal v. Ogden, 50 Neb. 218, 69 N. W. 779; Meyer v. Shamp, 51 Neb. 424, 71 N. W. 57; Sabin v. Cameron, 90 Neb. 347, 133 N. W. 422.

Here all questions of fact were undisputed. There was no fact issue to submit to the jury. The effect of plaintiff's contention is that the jury be permitted to define

and then apply the words used. The rule is that ordinarily the meaning of words in common use is a question for the court. 13 C. J., Contracts, § 1000, p. 788; 17 C. J. S., Contracts, § 620, p. 1289.

As to the dismissal of the cause as to the defendant engineer the plaintiff suggests that the engineer was in charge of the train and that plaintiff had shown negligence on the part of the railroad in setting the fire and that accordingly a prima facie case of negligence was shown as to the engineer. Plaintiff makes no reference to any evidence in the record to sustain its contention above made or to show negligence as charged on the part of defendant engineer as required by rules 8 a 2 (6) and (7) of this court. We find no such evidence in the record. The contention is without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

LAWRENCE E. KUEBLER ET AL., APPELLEES, V. CITY OF KEARNEY, APPELLANT.
39 N. W. 2d 415

Filed October 27, 1949. No. 32649.

1. **Municipal Corporations.** In order to maintain an action which is brought, either under a statute or at common law, to remove agricultural lands from within the corporate limits of a city or village, on the basis that justice and equity require that it be disconnected therefrom, it is only necessary for the plaintiffs to allege and prove that they are the owners and in possession of the several tracts of land and to allege and prove such other facts as would show that it is inequitable to retain the territory within the corporate limits of the city.
2. ———. When an action is brought, either under a statute or at common law, to remove agricultural lands from within the corporate limits of a city or village, on the basis that justice and equity require that it be disconnected therefrom, it is sufficient to show that the lands sought to be removed have no unity or community of interest with such city or village and receive few, if any, benefits by reason thereof.

3. ———. When an action is brought, either under a statute or at common law, to remove agricultural lands from within the corporate limits of a city or village on the basis that justice and equity require that it be disconnected therefrom and appeal is taken from a final decree rendered therein, the same is reviewable under the provisions of section 25-1925, R. S. 1943, and it will be here tried de novo.
4. **Opinion clarified.** Our holding in Michaelson v. Village of Tilden, 72 Neb. 744, 101 N. W. 1026, is clarified as to our consideration of the issues of fact on review.

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

Kenneth H. Dryden, for appellant.

Blackledge & Sidner, for appellees.

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

WENKE, J.

Appellees brought this action in the district court for Buffalo County for the purpose of having their lands disconnected from the city of Kearney. A decree was rendered in their favor finding that justice and equity required that each of the several tracts owned by appellees should be disconnected from the city of Kearney and it was so ordered. Its motion for new trial having been overruled, the city of Kearney perfected this appeal.

Appellees Bernard B. Bond and Dorothy May Bond are husband and wife and the owners, as joint tenants with right of survivorship, of a tract of approximately 53 acres of land lying in the northeast corner of the corporate limits of the city of Kearney. This land lies just west of and adjacent to the east corporate limits of the city and south and east of Grand Avenue. Grand Avenue is a graded and graveled street in the city of Kearney which was built and is now being maintained by the city. It enters the city at a point just south of the northeast corner of the city and then runs in a southwesterly direction for a distance of about a mile

until it intersects Twenty-fifth Street, which runs east and west. There is evidence to indicate that Grand Avenue has been renamed John J. Pershing Road but herein we shall refer to it as Grand Avenue since it is so referred to by the witnesses.

Appellees Lawrence E. Kuebler and Mildred Kuebler are husband and wife and the owners, as joint tenants with right of survivorship, of a tract of approximately 42 acres of land lying in the northeast corner of the corporate limits of the city of Kearney. This land lies to the south but somewhat west of the north corporate limits of the city but adjacent thereto and to the west and north of Grand Avenue.

Appellees George V. Segard and Arlene Segard are husband and wife and the owners, as joint tenants with right of survivorship, of a tract of approximately 16 acres of land lying in the northeast corner of the corporate limits of the city of Kearney. This land lies just south of and adjacent to the north corporate limits of the city and west and north of the Kuebler land and contiguous thereto.

The lands in these three tracts are agricultural in nature and used exclusively for that purpose by the owners thereof, except such part as is used for the location of the improvements constituting the farmstead on each tract. These farmsteads are occupied by the respective owners of each tract. While the several tracts are platted on paper the streets and alleys so platted have never actually been opened or worked, except that the Kuebler and Bond lands are divided by Grand Avenue. The whole area can be and is used exclusively for agricultural purposes.

Except for some five or six residences located along Thirty-fourth Street, which is located south but extends to the west of these properties, there has been no development of that part of the city of Kearney which lies to the south, west, and southwest of these three tracts and there is a considerable undeveloped area to

the south, west, and southwest therefrom. The residences above referred to are between these tracts and the fair grounds, which is located to the west thereof. This development took place many years ago as the record discloses there has been no recent building in this part of the city.

Just south of the Bond land and contiguous therewith is the property on which the buildings of the former Kearney Military Academy are located. This organization ceased to function many years ago and the site and buildings have since become the property of the Lutheran Hospital Association, which intends to use it for hospital purposes. Apparently it is being readied for that purpose but at the time of trial it does not appear that any work had actually been done to rehabilitate them.

The record discloses, with reference to the services of the city that are available to these premises or the occupants thereof, as follows: That no sewer is available; that no street lights have been erected on or adjacent thereto; that no city bus service serves this community; that there are no sidewalks; that city water is available to a part thereof but as a practical matter it would be too expensive to make connections therewith; that some fire protection is available from the fire hydrants in the area along Grand Avenue and the fire fighting equipment purchased and maintained by the city; that some police protection is provided by a patrol car which covers this area every night while checking the fair grounds and academy properties; that in part of this area better telephone rates and different classes of service are available to telephone patrons than is true of rural areas generally but this is not necessarily due to this area being within the corporate limits of the city; and that lower electrical rates and priority of service are available in this area to users of electricity because they were in the city when such rates were established.

It appears from the foregoing that the area of the

city herein involved has the benefit of only a few of the services provided by the city of Kearney.

This action is maintainable under section 16-110, R. S. 1943, which provides in part that: "If the court finds in favor of the petitioner or petitioners or any of them and that justice and equity require that such territory, or any part thereof, not less than twenty acres be disconnected from said city, it shall enter a decree accordingly." It is also maintainable at common law for as stated in Sole v. City of Geneva, 106 Neb. 879, 184 N. W. 900: "But the statute above referred to does not provide an exclusive remedy for disconnecting territory from a city or village. Such relief may on proper pleading and proof be granted by the district court in the exercise of the general chancery and common law powers conferred upon it by the Constitution. This power of the district court has been exercised heretofore and approved by this court. State v. Dimond, 44 Neb. 154; Village of Osmond v. Smathers, 62 Neb. 509; Village of Osmond v. Matteson, 62 Neb. 512." See Witham v. City of Lincoln, 125 Neb. 366, 250 N. W. 247.

And, as stated in Sole v. City of Geneva, *supra*: "It was necessary, therefore, only for the plaintiff to allege and prove that he was the owner and in possession of the tract of land, and to allege and prove such other facts as would show that it was inequitable to retain the territory within the corporate limits of the city."

As stated in Haney v. Village of Hyannis, 97 Neb. 220, 149 N. W. 405: "* * * the burden is upon the petitioner to establish by sufficient averments and evidence that justice and equity require that such territory be disconnected." See, also, Sole v. City of Geneva, *supra*.

As to just what it is necessary to allege and prove in order to have farm lands disconnected from a city or village has not been too clearly set forth in our previous holdings and necessarily must depend upon the facts of each case. In Bisenius v. City of Randolph, 82 Neb. 520, 118 N. W. 127, it was said: "It follows that in con-

struing section 8978, *supra,* it should be considered that whenever unplatted lands within the boundaries of, and adjacent to, the corporate limits of such city or village are so situated that they do not have that unity of interest with the platted portion hereof, justice and equity dictate that they should be excluded therefrom."

We have come to the conclusion that when an action is brought, either under a statute or at common law, to remove agricultural lands from within the corporate limits of a city or village, on the basis that justice and equity require that it be disconnected therefrom, it is sufficient to show that the lands sought to be removed have no unity or community of interest with such city or village and receive few, if any, benefits by reason thereof. See Lee v. City of Harvard, 146 Neb. 807, 21 N. W. 2d 696.

This court has often announced a rule in connection with our review of this type of case as follows: A decree of the district court finding that justice and equity require detachment of farm land from the boundaries of a municipal corporation will not be set aside unless it is clearly shown that the trial court made an important mistake of fact, or made an erroneous inference of fact or of law. This limitation of our review thereof was first announced in Michaelson v. Village of Tilden, 72 Neb. 744, 101 N. W. 1026, and most recently was quoted in Hustead v. Village of Phillips, 131 Neb. 303, 267 N. W. 919. This type of proceeding is equitable in its nature and comes within the provisions of section 25-1925, R. S. 1943, which requires that on appeal thereof to this court, with reference to findings of fact, we must: "* * * retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all of the evidence, without reference to the conclusion reached in the dis-

trict court or the fact that there may be some evidence in support thereof." Such being our duty under this statute, we shall retry the issues of fact without reference to or consideration of the conclusions reached by the trial court.

From a review of the record de novo we have come to the conclusion that these three tracts of land are exclusively agricultural in nature and have no unity or community of interest with the city of Kearney and, receiving but few benefits by reason of being within the corporate limits thereof, that justice and equity require that they be disconnected therefrom. We therefore affirm the decree of the lower court which so ordered.

AFFIRMED.

IN RE ESTATE OF CARRIE H. HUNTER, DECEASED. BERTHA P. MCKIM, APPELLEE, V. ELMORE Y. ABBOTT, APPELLANT.
39 N. W. 2d 418

Filed October 27, 1949. No. 32621.

1. **Wills.** In the contest of a will on the charge that the testator was mentally incompetent to make it, the burden is on the proponent throughout the litigation to prove by the greater weight of the evidence the testamentary capacity of the testator at the time the will was made.
2. ———. The elements of mental capacity to make a will are that the testator understands the nature of his act in making the will, the nature and extent of his property, the proposed disposition of it, and the natural objects of his bounty.
3. **Wills: Appeal and Error.** A defeated litigant in a will contest is not entitled to a trial de novo on appeal from the judgment of the district court. The existence of an issue of fact in such a contest is determined in this court by the sufficiency of the evidence to sustain a verdict of the jury.
4. **Trial.** In testing the sufficiency of evidence to support the verdict it will be considered in the light most favorable to the successful party, any controverted fact will be resolved in his favor, and he will be given the advantage of any inferences that can reasonably be deduced therefrom.

5. ———. If an instruction is given, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be applied, the attention of the court should be called to the claimed omission by an instruction containing the alleged omission, otherwise there can be no ground for complaint.
6. **Evidence.** A presumption is not evidence, but may take the place thereof until evidence is produced to rebut it, and when evidence sufficient in quality appears to rebut the presumption, it disappears, and thereafter the determination of the issue depends upon the evidence, with the requirement as in all civil actions that the party having the affirmative of the issue involved in order to succeed shall sustain his position by a preponderance of the evidence.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Charles W. Phillips, for appellant.

Chambers, Holland & Groth, and *Roy V. Nelson,* for appellee.

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

BOSLAUGH, J.

This is an appeal from the judgment denying probate of an instrument dated October 17, 1947, as the will of Carrie H. Hunter, deceased.

Carrie H. Hunter was a resident of the city of Lincoln. She died on the 19th day of October 1947, and left an instrument purporting to be her will in which Elmore Y. Abbott, a nephew, was named as sole beneficiary. Proceedings in the county court resulted in its probate. The contestant, Bertha P. McKim, appellee, appealed. The proponent, Elmore Y. Abbott, is the appellant. The ground of the contest in the district court was that the deceased at the time of the execution of the document in question did not have testamentary capacity. The trial resulted in a verdict adverse to the proponent and a judgment denying probate. The motion of proponent for a new trial was overruled.

Appellant assigns as error the submission to the jury of the issue of the mental competency of the testatrix to make a will. The contest of a will on the charge that the testator was mentally incompetent to make a will imposes the burden upon the proponent throughout the litigation to prove by the greater weight of the evidence the testamentary capacity of the testator at the time it was executed. The burden of proof does not shift, but the burden of going ahead, as some authorities state it, does. The proponent must make, at least, a prima facie case as to this requirement. The burden is then on the contestant to introduce sufficient evidence to support a finding by a jury that the testator did not have testamentary capacity, and failing so to do, there is no question to submit to a jury in such a case. In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203; In re Estate of Johnsen, 149 Neb. 34, 30 N. W. 2d 70; In re Estate of Kaiser, 150 Neb. 295, 34 N. W. 2d 366.

Proponent introduced all his evidence in making his case-in-chief. He made much more than a prima facie case and produced sufficient evidence to have sustained a verdict if one had been returned in his favor that the instrument in question was the will of the deceased. In this situation a statement of the evidence of the proponent is not required.

A defeated litigant in a will contest is not entitled to a trial de novo on appeal from the judgment of the district court. An issue of fact in such a contest is determined in this court by the sufficiency of the evidence to sustain the verdict of the jury, and in testing the sufficiency thereof to support the verdict it will be considered in the light most favorable to the successful party, any controverted fact will be resolved in his favor, and he will be given the advantage of any inferences that can reasonably be deduced therefrom. In re Estate of Johnsen, *supra;* In re Estate of Witte, *supra;* In re Estate of Kaiser, *supra;* Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

The elements of mental competency to make a will are that the testator understands the nature of his act in making the will, the nature and extent of his property, the proposed disposition of it, and the natural objects of his bounty. In re Estate of Johnsen, *supra*. It devolved upon the contestant to negative one or more of these to justify a conclusion that the testatrix did not have testamentary capacity.

The record contains evidence tending to establish the following relative to the issue of mental capacity of the testatrix at the time the will was executed. When she signed the will on October 17, 1947, she was 78 years of age, and died on the morning of the second day thereafter. She was seriously ill in the hospital as early as September 30, 1947, suffering from nausea and shingles, and was "most uncomfortable." After she had been in the hospital for about two weeks she was confused and thought she was in the home of a nephew. She was semi-comatose at times. During the week before her death she developed edema, and puffiness of her hands and feet and around her eyes. She had lucid and semi-comatose intervals, an impediment in her speech caused by the edema, and her mouth was very dry most of the time because she had difficulty in retaining fluids. "In her general condition it didn't seem possible for a person to live. She was extremely ill and her age of course was a contributing factor." Before the will was made she at times talked incoherently, was confused, thought she was in the home of her sister, on occasions was "out of her head," would not respond, circulation was poor, moaned but did not move, did not seem to have strength to move, her eyes were "coated with film," was in such condition that she could not turn herself in bed, and had been bedfast for at least 20 days before her death. Her illness was serious enough that the nurse thought many times while she was with the testatrix that she was going to die. At 2:45 a. m., October 18, only hours after the will in ques-

tion was made, the testatrix had a violent convulsion of about 30 seconds' duration, frothed from the mouth, lost consciousness, and had alternately sudden extreme tension and relaxation of muscles at repeated intervals. Later she had marked swelling of the eyeballs, the feet, and hands, her circulation was bad, and she died less than 48 hours after the will was executed. Mr. Chapman, who prepared the will, observed that she was physically ill, had difficulty in talking, was difficult to understand, could hardly hold the pen to sign the will, and asked for someone to "hold my hand, and direct my hand" which was done. The other witness to the will stated that when she talked with the testatrix before the will was signed and attested that she stated "she had one heir." A nephew of the testatrix and his wife came from Des Moines, Iowa, to Lincoln on October 15, 1947. They were at the hospital and saw his aunt twice that evening and once on the following day. She had been cared for in their home for about six weeks immediately prior to September 1, 1947. Her condition was so bad when they saw her in the hospital they could get no response or recognition from her. "She was in a terrible condition * * * and her eyes were set." John C. Thompson, a specialist in diagnosis and internal medicine of 28 years practice, first saw the testatrix on the 31st day of May 1947, in the hospital when she appeared very seriously ill with an outstanding symptom of anemia. His examination demonstrated that she was not suffering from pernicious anemia, but had many of the factors involved in that disease, and had had a high blood pressure over a period of years. Associated with the high blood pressure was a kidney condition which caused them to fail to eliminate the poison from her body. Instead of having 100 percent elimination in a given time, only 10 percent of the waste accruing in her body in such interval was discharged, and this condition afforded the reason for the effect which was the limitation of the reproduction of blood. The treatment

at that time included blood plasma, transfusions, and much medication. He cared for her in the hospital until about the middle of July 1947. When she was permitted to leave the hospital the doctor testified that her condition was "chronic and progressive" and he knew she would suffer recurrences of her trouble. She returned to the hospital and the doctor was again consulted sometime before October 1, 1947. He saw her thereafter once each day until her death. She complained of severe pain around her hip. A very serious eruption appeared, and it was determined that she had shingles. She was anemic, weak, and gave the symptoms of which she complained when she was in the hospital earlier. Her pain aggravated her other difficulties and for as much as ten days before she died her attendants were hardly able to arouse her. She had marked stiffness and rigidity due to the effect of pressure on the brain known as an encephalopathy. For days before her death she was confused to the extent that it was almost impossible to get an intelligent answer from her or to arouse her. Her mentality had become very definitely affected. There was a continual development of brain deterioration from the time he first saw her in the hospital and during the period of which October 17 was a part. She laid immobile in bed, was moved by a nurse, and for the most part "she was just almost a vegetable. She was living, but she didn't know what was going on around her." She had a physical condition that made her mentally incompetent. Tissue of the body requires blood to be brought into it to maintain its activity, and any condition which prevents this causes the tissue to close up. Her brain could not get blood and it did not do a lot of things it should have done. The disease from which she was suffering was progressive and was not a "fly-by-night process, from day to day or night to night." It was difficult to do anything with the anemia with which she was afflicted and this resulted in a condition by which the tissues of her brain were affected

to the extent there was a softening in it. Any person with this kind of trouble appears sometimes to be thinking, but he is incapable of thought or comprehension. She did not know anything. Her arms were rigid and the thing that positively showed her brain involvement was the fact that she could be raised by her head and her body would come up as if she were a solid mass. A constant irritation was present and so bad for several days before her death that nothing more could be done for her. He expressed an opinion that on the 17th day of October 1947, she did not have mental capacity to know the nature and extent of her property or to know the natural objects of her bounty or who her heirs or relatives were; that in the last two weeks or ten days of her life she did not have mentality enough to know anyone; that she was not competent to execute a will; and did not have the mentality or capacity to transact any business of any kind.

An examination and evaluation of the evidence results in the conclusion that it is of such a nature that it could reasonably have convinced the jury that the incompetency alleged had been established. The assignment of the appellant that the verdict is without competent evidence to sustain it, and that a verdict for him should have been instructed by the court, is not sustained and must be denied.

The proponent also bases error on the failure of the court to instruct the jury that after the proponent had made a prima facie case a presumption arose that the testatrix had testamentary capacity and that the presumption continued until overcome by evidence produced by the contestant. There was no instruction tendered the court to that effect. A party desiring a more explicit instruction than that given should offer such an instruction. If the instructions are not sufficiently specific in some respect, it is the duty of counsel to offer a request for an instruction that will supply the omission, and unless this is done, the judgment will not ordinarily

be reversed for such defect. If an instruction is given to a jury, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be applied, the attention of the court should be called to the omission, as claimed, by an instruction containing the alleged omission, otherwise there can be no ground for reversal therefor. Plumb v. Burnham, *ante* p. 129, 36 N. W. 2d 612.

The court advised the jury that if Carrie H. Hunter, when she executed the will, had the ability to understand the nature of her act, the extent of her property, the proposed disposition of it, and the natural objects of her bounty, it should find that she had mental capacity to make a will; that the question for its determination was whether or not she had capacity to make a will on October 17, 1947; that the burden was on the proponent to establish by a preponderance of the evidence that on that date she had such capacity; and if from a preponderance of the evidence and the instructions the jury found she had mental capacity to make a will, then the verdict of the jury should be that the instrument in controversy was the last will and testament of Carrie H. Hunter, deceased. These instructions were correct and adequate. The essential elements of testamentary capacity were accurately stated. In re Estate of Johnsen, *supra*. The burden of proof in this case was on the proponent throughout the trial. If he sustained it by the greater weight of the evidence, he was entitled to a verdict that the questioned instrument was the will of the deceased. In re Estate of Witte, *supra*.

The presumption that the testatrix had mental capacity to make a will created by the prima facie case of the proponent was not evidence, and when evidence sufficient in quality was produced to rebut it, the presumption disappeared. The rule is that a presumption is not evidence, but it may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to

rebut it, the presumption disappears, and thereafter the determination of the issue depends upon the evidence, with the requirement as in other civil actions that the party having the affirmative of the issue involved in order to succeed will sustain his position by a preponderance of the evidence. In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417. The error claimed by proponent in this regard is without substance.

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

AFFIRMED.

JOY U. MYERS, APPELLEE, V. CHARLES WILLMEROTH, APPELLANT.
39 N. W. 2d 423

Filed October 27, 1949. No. 32654.

1. **Forcible Entry and Detainer.** In an action of forcible detainer, plea of not guilty puts in issue all facts necessary to entitle plaintiff to a judgment for restitution of the premises.
2. **Trial.** The refusal to give a requested instruction is not error if the subject thereof is substantially and correctly included in the charge of the court to the jury.
3. ———. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear.
4. ———. When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions.
5. ———. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject.
6. ———. The court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend.

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

J. E. Willits, for appellant.

James E. Addie, for appellee.

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

BOSLAUGH, J.

This is an action for the forcible detention of a residence property brought by the appellee on the claim that the appellant was holding over his term because of the failure to pay rental therefor when due. Appellant interposed the defense of not guilty. The trial resulted in a verdict and judgment for appellee. The record shows that appellee was the owner of the property; that appellant was a tenant thereof from month to month by an oral lease for a rental of $10 a month, an installment of which was due on February 15, 1947; that demand was then made for it; that no rental was paid on that date; and that appellant was served with a proper notice to quit.

The issue was whether or not the appellant was in default of payment of his rent to the appellee on February 15, 1947. The plea of not guilty by appellant put in issue all the facts necessary to entitle appellee to have restitution of property. Myers v. Willmeroth, 150 Neb. 416, 34 N. W. 2d 756. Appellee was required to establish by a preponderance of the evidence that appellant had defaulted in the payment of the rental.

The rental was to be paid in cash, by the performance of work, or the furnishing of supplies. Appellant claims that he performed work and furnished commodities of a value in excess of the amount of the rent. This is denied by appellee. The evidence was in conflict, and the determination of the fact was for the jury.

Appellant claims error in the failure of the court to give to the jury instruction No. 1 requested by him. It

stated that before the appellant could be found guilty, the burden of proof was on the appellee to prove by a preponderance of the evidence that $10 rent was due from appellant on February 15, 1947, and was unpaid either by work performed, supplies furnished, or cash paid by him to appellee, and if a preponderance of the evidence failed to show that the rent was unpaid by any of the methods mentioned, or if the evidence in reference thereto was evenly balanced, the verdict of the jury should be for the appellant. An instruction given by the court fully and correctly advised the jury as to all of the matters included in the tendered instruction. It told the jury that the verdict must be not guilty unless it was satisfied by the greater weight of the evidence that on February 15, 1947, the total unpaid balance owing by appellant to the appellee was greater than the total indebtedness of appellee to appellant for services rendered and articles furnished; that the jury should compute the total amount of rent which accrued during the time appellant occupied the house, and deduct therefrom all cash payments made thereon, and the balance would be the unpaid rent referred to in the instruction; that it should determine the value of all work done and supplies furnished by appellant to appellee; that the unpaid rent as determined by the jury should be compared with the total amount it found due from appellee to appellant for services and supplies, and if the unpaid rent was greater than the amount found due for the services and supplies, then the verdict should be for appellee; but if the jury found the unpaid rent was less than the indebtedness of appellee to appellant, or if it found the respective amounts were equal, or if the evidence in reference thereto was evenly balanced, then the verdict of the jury should be not guilty. The refusal to give a requested instruction is not error when the subject thereof is substantially and correctly included in the charge of the court to the jury. Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; Allen v. Massachusetts Mutual

Life Ins. Co., 149 Neb. 233, 30 N. W. 2d 885; Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832.

The appellant asserts it was error for the court to give instruction No. 1 to the jury. It advised the jury that the question for it to decide was whether or not the appellant was on February 15, 1947, in default of his rent to appellee; that the evidence established without dispute that appellee owned the building in question; that he rented it to appellant for a rental of $10 a month, payable in advance on the 15th of each month; that as tenant appellant had occupied the building since 1941; that appellant did not pay the $10 agreed rental on February 15, 1947; that demand was made for it; and that appellee served notice on appellant to quit, as provided by law. The evidence justified each of the statements made in this instruction. There is no dispute of fact as to any of them. The appellant makes specific objection to the clause therein "that the defendant did not pay the $10.00, agreed rental on February 15, 1947." The appellant contends by this the court decided the issue in the case; that it was a direction by the court to the jury to render a judgment for the appellee, and that it is in direct and total conflict with the prior statement in the instruction that the question for the jury to decide was "whether the defendant on February 15, 1947, was in default in his rent to the plaintiff." The jury was not advised by the court that the rent due February 15, 1947, was not paid. The instructions considered as a whole, as they must be, clearly show that what the court intended by the phrase objected to was that the appellant did not pay the agreed rental due on February 15, 1947, on that date when demand was made for its payment, and that the court did not intend and did not withdraw from the jury the question of whether the appellant had prior thereto paid cash, performed labor, or furnished supplies to appellee sufficient to satisfy the rental due that date.

The meaning of an instruction, and not the phraseology, is the important consideration, and a claim of

prejudice will not be sustained when the meaning of an instruction is reasonably clear. When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, it will not be reversed for seeming indefiniteness or ambiguity in one of the instructions. In determining whether or not there was error in the giving of a sentence or clause in an instruction, it will be considered in connection with the instruction of which it is a part, and all the other instructions, and the true meaning of the instruction will be determined not from a separate phrase or sentence but by considering all that is said on the subject. Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175; Pruitt v. Lincoln City Lines, 147 Neb. 204, 22 N. W. 2d 651; Oliver v. Nelson, 128 Neb. 160, 258 N. W. 69; Zelenka v. Union Stock Yards Co., 82 Neb. 511, 118 N. W. 103.

It appears from the evidence that appellant had been paying his monthly rental on the 15th day of each month in advance for a period of 20 months immediately preceding February 15, 1947. The last payment was made on January 15, 1947. There is no contradiction in the evidence that he did not pay the rent due on February 15, 1947, although demand was then made therefor, and the court was justified in advising the jury that it was an established fact. The trial court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. Major v. Harrison, 132 Neb. 363, 272 N. W. 201; Zancanella v. Omaha & C. B. St. Ry. Co., 93 Neb. 774, 142 N. W. 190; Fitzgerald v. Union Stock Yards Co., 91 Neb. 493, 136 N. W. 838; Bee Building Co. v. Weber Gas & Gasoline Engine Co., 86 Neb. 326, 125 N. W. 518. The instructions given by the court when considered as a whole are free from conflict, and fairly submitted the case to the jury.

The judgment of the trial court should be, and is, affirmed.

AFFIRMED.

HENRY HAWK, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
39 N. W. 2d 561

Filed November 10, 1949. No. 32587.

1. **Criminal Law: Coram Nobis.** The common-law writ of error coram nobis to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment, exists in this state under section 49-101, R. S. 1943.
2. ———: ———. The purpose of a writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented.
3. ———: ———. Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied.
4. ———: ———. Proceedings to obtain a writ of error coram nobis are essentially civil in character.
5. ———: ———. The petitioner for a writ of error coram nobis carries the burden of proof in a collateral attack on a judgment which he seeks to have declared a nullity.
6. ———: ———. Upon an application for a writ of error coram nobis, the court will not weigh conflicting testimony adduced in the original trial nor pass upon the credibility of witnesses where the jury has determined the same.
7. ———: ———. The common-law writ of error coram nobis is not a substitute for the statutory remedy of a writ of error under the Nebraska criminal procedure.
8. **Constitutional Law.** The rights guaranteed to an accused in a criminal prosecution by Article I, section 11, of the Constitution of Nebraska are all personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure.
9. **Criminal Law.** No standard length of time must elapse before defendant in a capital case should go to trial, and each case, and facts surrounding it, provides its own yardstick.
10. **Constitutional Law.** Courts do not deny due process just because they act expeditiously, and if no witnesses are suggested or information furnished that would possibly lead to some material

evidence or witnesses, the mere failure to delay in order to investigate would not be a denial of due process.

11. ———. In passing upon claims of denial of due process of law contrary to the Fourteenth Amendment in state criminal trials, doubt should be resolved in favor of the integrity, competence, and proper performance of their official duties by the judge and the prosecuting attorney lawfully chosen to discharge serious public responsibilities under their oaths of office.

12. ———. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.

13. **Criminal Law: Coram Nobis.** The writ of error coram nobis will not lie to vacate a judgment of conviction and secure a retrial of the accused because of his inability, within statutory limits of time, to prepare a record on appeal to this court showing the errors of which complaint was made. Such writ lies only to correct errors of fact in ignorance or disregard of which the judgment was pronounced.

ERROR to the district court for Douglas County: WILLIS G. SEARS, ARTHUR C. THOMSEN, and HENRY J. BEAL, JUDGES. *Affirmed.*

Matthews, Kelley, Matthews & Delehant, for plaintiff in error.

James H. Anderson, Attorney General, *Clarence S. Beck, Robert A. Nelson, James J. Fitzgerald,* and *Joseph P. Inserra,* for defendant in error.

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

MESSMORE, J.

This is a proceeding in error coram nobis begun in the district court for Douglas County to vacate a judgment of conviction of Henry Hawk, and to secure for him a retrial. The district court denied the writ. From the order of denial and the overruling of the motion for new trial, this proceeding in error was instituted.

The principal assignments of error relied upon by the petitioner are: (1) The court erred in failing to find

that the petitioner was, when originally tried and convicted of murder in the first degree, denied his constitutional right to be represented by competent counsel; (2) that the petitioner was denied his constitutional right to have reasonable time to confer with counsel, to examine the charge against him, to procure and subpoena witnesses, to examine the record of the preliminary hearing, and for counsel of record in his behalf to adequately and properly prepare his defense; (3) the court erred in holding that the petitioner was not prevented from prosecuting the writ of error to this court in the original case; and (4) in consideration of the foregoing assignments of error, the petitioner was denied due process of law as provided for by the Fourteenth Amendment to the Constitution of the United States, and denied due process of law as provided for by Article I, section 3, of the Constitution of the State of Nebraska.

At the outset we deem it appropriate to first make the legal distinction between a writ of error and a writ of error coram nobis, which should be borne in mind in the determination of this proceeding in error.

The writ of error is brought for a supposed error in law apparent on the record, and takes the case to a higher tribunal where the question is to be decided and the judgment, sentence, or decree is to be affirmed, modified, or reversed, while the writ of error coram nobis is brought for an alleged error in fact not appearing on the record, and lies to the same court in order that it may correct the error, which it is presumed would not have been committed had the fact in the first instance been brought to its notice. See 3 Am. Jur., Appeal and Error, § 1276, p. 766.

The common-law writ of error coram nobis is not a substitute for the statutory remedy of a writ of error under the Nebraska criminal procedure. See, Carlsen v. State, 129 Neb. 84, 261 N. W. 339, certiorari denied, 293 U. S. 607, 55 S. Ct. 123, 79 L. Ed. 698; Newcomb v. State, 129 Neb. 69, 261 N. W. 348; Swanson v. State, 148

Neb. 155, 26 N. W. 2d 595, certiorari denied, 331 U. S. 863, 67 S. Ct. 1759, 91 L. Ed. 1869.

The purpose of the writ of error coram nobis should be noted. The writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented. See Swanson v. State, *supra.*

The common-law writ of error coram nobis to bring into the record facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment, exists in this state under section 49-101, Comp. St. 1929, now section 49-101, R. S. 1943. See Carlsen v. State, *supra.*

Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ must be denied. See, Swanson v. State, *supra;* Dobbs v. State, 63 Kan. 321, 65 P. 658; 24 C. J. S., Criminal Law, § 1606 (6), p. 154.

The purpose of the writ of error coram nobis is not, and never was, to permit a defendant to retry his case again and again, but, as pointed out in the previously cited authorities, in certain cases it provides a corrective judicial process that the Constitution guarantees shall not be denied. See, Swanson v. State, *supra;* Carlsen v. State, *supra.*

In considering the writ of error coram nobis the court will take cognizance of and consider the entire record of the original trial. See State ex rel. Cutsinger v. Spencer, 219 Ind. 148, 41 N. E. 2d 601.

The proceedings for the writ of error coram nobis are civil in character. See, Newcomb v. State, *supra;* 24 C. J. S., Criminal Law, § 1606, p. 144.

The petitioner for a writ of error coram nobis carries

the burden of proof in a collateral attack on a judgment which he seeks to have declared a nullity. See, Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61; Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 398; Wright v. Johnston, 77 F. Supp. 687.

With the foregoing authorities in mind we proceed to the petitioner's assignments of error heretofore designated Nos. 1, 2, and 3.

In connection with the aforesaid assignments of error the following legal fundamentals should be noted: Article I, section 11, of the Constitution of Nebraska provides: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Section 29-1803, R. S. 1943, provides for the assignment of counsel for an accused charged with a capital offense or an offense punishable by imprisonment in the penitentiary, and for counsel to have access to the prisoner at all reasonable hours.

It has long been the rule in this state that all of the rights guaranteed by Article I, section 11, of the Constitution of Nebraska are personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure. See, McCarty v. Hopkins, 61 Neb. 550, 85 N. W. 540; In re Application of Carper, 144 Neb. 623, 14 N. W. 2d 225; Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353, certiorari denied, 327 U. S. 790, 66 S. Ct. 803, 90 L. Ed. 1016; Kissinger v. State, 147 Neb. 983, 25 N. W. 2d 829.

The record discloses that on April 19, 1935, a complaint was filed in the municipal court of the city of Omaha, Douglas County, Nebraska, containing two

counts, the first of which charged petitioner with first degree murder while attempting to rob one Isadore Perelman on or about the 28th day of February 1934. The second count charged first degree murder on the part of the petitioner by deliberate, premeditated malice by shooting Isadore Perelman with a revolver and as a result thereof he died on March 1, 1934. Since December 10, 1934, the petitioner had been a prisoner in the federal penitentiary at Leavenworth, Kansas, having been committed by the United States District Court at Omaha, Nebraska, for the violation of the National Motor Vehicle Theft Act.

On January 30, 1936, the petitioner, then being a prisoner at the Leavenworth prison, sent a letter to A. C. Anderson, chief of detectives of Omaha, referring to an interview he had had with Anderson on a previous occasion. In this letter the petitioner requested a certified copy of the information filed against him in the district court for Douglas County, Nebraska, and then stated: "* * * before I consent to return to Omaha for trial, you must understand that If I do return to Omaha, That it must be of my own volition, For there is no law under the sun that you could or the State of Nebraska lawfully extradite me as a fugstive (sic) from Justice. First—I am not guilty of the charge and if and when I agree volintary (sic) to return to Nebraska, I will expect an early trial by Jury, Now if you or the agents of the State of Nebraska, meet the above by a written agreement, of which I will approve, you may come down and let me see your Authority or color of law under which you are acting and if agreeable, I will return in custody of federal officers but in no way am I to wave (sic) my constitutional rights, * * *." With a postscript "Please Keep this letter until after my trial."

It will be observed by the foregoing letter that on January 30, 1936, the petitioner was well aware of the nature of the charges filed against him as shown by the

complaint, and in fact sought to dictate the terms by which he would appear and answer the same.

On February 11, 1936, the petitioner was moved from the federal prison at Leavenworth, Kansas, to Douglas County, Nebraska, pursuant to a writ of habeas corpus ad prosequendum, and was taken to the central police station in Omaha where a preliminary hearing was held about 2 o'clock that afternoon. The complaint was read to the petitioner and he entered his plea of not guilty. He testified he requested a continuance for the purpose of procuring counsel.

The county attorney at that time testified that the petitioner made no request for counsel at the preliminary hearing, but that he did orally move to quash the complaint on the ground that he was illegally brought into the state to plead to the charge. He also moved the court to require the county attorney to elect upon which charge of the complaint he would proceed to prosecute, and demurred orally to the complaint on the ground it did not state a crime. These motions and the demurrer were overruled. The petitioner denies he made any such motions and demurrer.

At the preliminary hearing the petitioner cross-examined witnesses, interposed objections to testimony, made a requirement that the chief of detectives testify, and participated generally in the hearing. At the conclusion of the hearing the petitioner was bound over to the district court for trial. At that time he requested the county attorney to send him a transcript of the testimony taken at the hearing, which he received about March 2, 1936. The petitioner further testified that he was assisted by other inmates of the Leavenworth prison in analyzing the transcript of evidence to determine whether or not the same was sufficient to convict him of the charges filed against him.

The foregoing is set forth to disclose the petitioner's acquaintance and knowledge of criminal matters and procedure, which he denies, and which is of importance

in determining this proceeding in error as will appear later in the opinion.

The petitioner contends that there was no medical evidence adduced at the preliminary hearing to show the death of Isadore Perelman or of any other person, and as a consequence thereof he was bound over to the district court on insufficient evidence. The record discloses sufficient and adequate medical evidence was taken at the preliminary hearing to show the death of Isadore Perelman as being caused by a bullet fired from a revolver. The petitioner's contention in such respect is not a proper subject to be determined in a proceeding for writ of error coram nobis.

In any event, a preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of Article I, section 11, of the Constitution. See, Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666; In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85.

After the preliminary hearing the petitioner was returned to the federal penitentiary at Leavenworth, Kansas.

On February 17, 1936, the information was filed in the district court, containing the charges in the same statutory language as the complaint.

Section 29-1802, R. S. 1943, provides for the service of indictment upon the accused. Section 29-1604, R. S. 1943, makes section 29-1802, R. S. 1943, applicable to informations. In compliance with said sections the petitioner was served with a copy of the information by the warden of the Leavenworth penitentiary on February 20, 1936. He was not called upon to answer to the information before one day had elapsed from the time he was served with it. His trial was set for March 16, 1936. It is evident, therefore, the petitioner was informed of the charges filed against him well in advance of trial.

On March 1, 1936, the petitioner wrote a letter to the clerk of the district court for Douglas County, wherein

he informed the clerk that he had sent a list of the witnesses he desired to the presiding judge of the criminal court, and wanted to know if the judge had handed the clerk the list. He also set forth the names of other witnesses whom he wished to have subpoenaed. In this letter he asked the clerk to inform the court that he requested an early trial. On March 6, 1936, the county attorney's office, by letter to the petitioner, advised him: "In accordance with your request, we are setting this case for early trial, and have selected March 16th as the date of your trial. * * * The last time you were in Omaha you advised that you would secure an attorney to represent you in this matter. To date, we have received no communication from any attorney, and are wondering what steps you have taken to obtain legal assistance. If you are unable to procure counsel, the court will appoint the Public Defender to represent you in this matter. The writer suggests that you attempt to secure counsel for the protection of your legal interests."

On March 9, 1936, the public defender was appointed to defend the petitioner. He immediately procured the files and examined the information, awaiting the arrival of the petitioner for trial. On March 11, 1936, the petitioner and his appointed counsel were served with notice that additional names would be endorsed on the back of the information by the State.

It appears that the petitioner arrived at the Douglas County jail shortly after 4 p. m., March 15, 1936. The petitioner testified that at about 11:15 p. m., the night of March 15, 1936, the public defender and his assistant called on him in the jailer's office. They introduced themselves. He had met the public defender some years previous when the public defender, at that time in the general practice of law, assisted in defending the petitioner on a criminal charge. He further testified that the public defender endeavored to persuade him to plead guilty, and indicated that the evidence was sufficient to convict him and in the event of trial and con-

viction he would probably get the death sentence. When the petitioner stated that he would not plead guilty the public defender told him he was going to wash his hands of the affair and would have nothing to do with the case.

The public defender's testimony is in conflict with the petitioner's in such respect. He testified to a conference had with the petitioner shortly after 7 p. m., on March 15, 1936, wherein he informed the petitioner that he and his assistant were to defend him at his trial. The petitioner was cordial at the time and told them not to bother, he was going to handle his own case, and refused to discuss the case or his defense with them. Nothing was said with reference to pleading guilty, or about the death sentence. The public defender's testimony was corroborated by his assistant.

The petitioner further testified that on the morning of the trial, March 16, 1936, he was brought into the district court, the information was read to him, and he entered his plea of not guilty. He did not remember the public defender or his assistant being present, and no other counsel was there to represent him. He orally requested a 24-hour continuance which was refused. When two or three jurymen were called to the jury box the public defender appeared, and one Mr. Baldwin, a lawyer whom he knew but did not employ, came in and sat with him on his side of the counsel table.

The morning of the trial the public defender talked to the presiding judge in chambers and informed the judge that the petitioner was going to represent himself and try his own case. The judge insisted the public defender represent the petitioner, stating that he was not going to have any man go to trial for murder without legal representation. The public defender then requested a continuance to further investigate and prepare for trial. The judge informed him that the petitioner had had sufficient notification of the date of trial, and that the trial would proceed. Thereafter the public

defender asked for a 24-hour continuance for the same purpose, which was denied.

While the trial was in progress the petitioner complained to the trial judge that he was not being properly represented and in his opinion counsel were not doing things that should be done or things that were right as far as their capacities as attorneys required them. He complained in like manner the second day of the trial. Just in what respect counsel were not properly representing him is not shown by the petitioner's testimony. The trial judge informed the petitioner that counsel appointed to defend him were competent, and he would see that they properly represented him.

During the trial the petitioner made suggestions with reference to the examination of the State's witnesses, especially as to identification and what points should be brought out on cross-examination. He was asked by his counsel to take the stand and testify in his own behalf. The petitioner declined to do so, giving as his reason that if he was questioned as to his previous conviction of a felony it would prejudice his case. The petitioner made the closing argument to the jury in his own behalf. In the argument he said he did not know where he was the night the murder was committed, and did not personally care to state where he was. It is obvious his defense was not an alibi, and just what defense he sought to interpose at the trial is still unknown.

Attorney Baldwin testified that he was employed by a friend of the petitioner to report to him on the morning of the trial, with the understanding that the petitioner was to defend himself and have complete charge of his defense, but that he was to assist him if the petitioner desired him to do so. The petitioner requested that he and the public defender stay around during the progress of the trial and be of help, if required.

The petitioner complains that he requested the public defender to subpoena certain witnesses in his behalf which were either suppressed by nonservice or pur-

posely not called, with the exception of one witness who testified that the petitioner had used no aliases since he had known him in 1934.

It appears that the witnesses desired by the petitioner were law enforcement officers of the State of Missouri, the warden of the Nebraska State Penitentiary, a United States Commissioner, and one witness at whose home the petitioner claimed he lived. Efforts from every available source were made to locate this last-mentioned witness, and he could not be found. It is apparent this witness knew little, if anything, about the facts upon which the charges were based. Just what he would have testified to is not shown in the record. It is inconceivable from the petitioner's testimony how any of these witnesses would have been of assistance to him, except that he may have thought their prestige as law enforcement officers might aid him.

On March 18, 1936, the case was submitted to the jury which returned a verdict of guilty as charged. The trial court directed counsel for the defense to file a motion for new trial, which was done by attorney Baldwin in the statutory language within proper time. The petitioner made no request that counsel representing him file a motion for new trial. He upbraided attorney Baldwin for filing the motion. He complains that the motion was insufficient to preserve his legal rights in a proceeding in error.

Upon the overruling of the motion for new trial the petitioner was sentenced to life imprisonment in the Nebraska State Penitentiary.

The sufficiency or insufficiency of a motion for a new trial is not a proper matter to be considered in determining whether or not a writ of error coram nobis should issue. It is a matter properly to be determined in a proceeding in error.

The foregoing facts disclose that the petitioner, for a considerable length of time, was cognizant of the charges filed against him. He had possession of and studied the

transcript of the evidence taken at the preliminary hearing, and advised with other inmates of the Leavenworth prison with reference to the sufficiency of the same to convict him. It is also apparent that he was apprised of and knew what his constitutional rights were with reference to procuring counsel and to have witnesses testify in his behalf. He desired to defend himself, refused to divulge to appointed counsel what defense, if any, he had, and for the most part ignored counsels' efforts to assist him and refused to cooperate with counsel. He demanded an early trial, his request was granted, and he was notified by the county attorney's office the date the trial was set.

In United States ex rel. Thompson v. Nierstheimer, 166 F. 2d 87, certiorari denied, 334 U. S. 850, 68 S. Ct. 1503, 92 L. Ed. 1773, it is said that no standard length of time must elapse before a defendant in a capital case should go to trial. Each case, and the facts and circumstances surrounding it, provides its own yardstick. There must not be a mere sham proceeding or idle ceremony of going through the motions of a trial, and courts should not move so rapidly as to ignore or violate the rights of the defendant to a fair trial. However, courts do not deny due process just because they act expeditiously, and if no witnesses are suggested or information furnished that would possibly lead to some material evidence or witnesses, the mere failure to delay in order to investigate would not be a denial of due process. See, also, State v. Gibson, 229 N. C. 497, 50 S. E. 2d 520.

The defendant complains because of the court's refusal to grant him a continuance. In this proceeding for writ of error coram nobis this question is to be considered only from the viewpoint of whether or not the court in overruling the motions for continuance constituted a denial of the petitioner's constitutional rights.

"An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion

is disclosed by the record." Kerr v. State, 63 Neb. 115, 88 N. W. 240.

In Flannigan v. State, 127 Neb. 640, 256 N. W. 321, certiorari denied, 294 U. S. 725, 55 S. Ct. 640, 79 L. Ed. 1256, it was said: "It is no abuse of discretion for the trial court to refuse defendant a continuance unless it clearly appears that defendant suffered prejudice." See, also, Cornell v. State, 138 Neb. 708, 294 N. W. 851; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, certiorari denied, 323 U. S. 757, 65 S. Ct. 91, 89 L. Ed. 606; Crono v. United States, 59 F. 2d 339.

"Every person accused of crime should be afforded reasonable oportunity to marshal his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated." Hubbard v. State, 65 Neb. 805, 91 N. W. 869. See, also, Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181.

As stated in State v. Lasswell, 133 Wash. 428, 233 P. 928: "One accused of crime has the constitutional right of representation by counsel, and while it is a rule that a motion for a continuance on the alleged ground of insufficient time for counsel to prepare for trial is addressed to the discretion of the trial court, there is often involved in the due consideration of such a motion, as is the case here, another important rule, viz.: 'It is essential that accused show no lack of diligence in endeavoring to employ counsel.' 16 C. J., Criminal Law, p. 483, § 875. 'It must appear that lack of preparation did not arise from defendant's own laches.' 16 C. J., p. 482, § 874."

The overruling of the motions for continuance did not in any manner hinder or burden the petitioner to the extent that there was reasonable ground to believe that the result of the trial might have been different if a motion for continuance had been sustained. The contention of the petitioner that he was hastily brought to trial in violation of his constitutional rights is without merit.

It will be observed from the cited authorities that the question of whether or not there was an abuse of discretion on the part of the trial court in overruling a motion for continuance is a matter properly to be determined by proceedings in a writ of error.

The petitioner takes the position that he was an uneducated man, unacquainted with the procedure in criminal courts, and unable to recognize what steps should be taken to protect his legal interests.

In addition to the evidence previously noted as to the petitioner's acquaintance with criminal matters and procedure, the evidence further discloses the following. According to his testimony at the time of the hearing in the instant case he was past 60 years of age, and had had a third grade education. He had four times been convicted of a felony, and once for violation of parole. The petitioner was charged with criminal offenses other than those of which he had been convicted. He was represented by counsel on at least five occasions as shown by the record, when charged with criminal offenses.

It appears that on July 24, 1928, the petitioner, acting as his own counsel, brought an application for a writ of habeas corpus in which he raised the point that he could not be brought from the State of Missouri to the State of Nebraska to face a charge of violation of parole without extradition proceedings. The petitioner handled the matter himself, without assistance of counsel, and appeared in court in his own behalf.

On June 1, 1934, the petitioner, as defendant in an automobile larceny case in the United States Federal Court, Omaha division, represented himself. He refused to plead guilty to certain counts of the indictment, but selected other counts to which he was willing to plead guilty. He prepared, without assistance of counsel, an appeal to the Circuit Court of Appeals.

Subsequent to the original trial the petitioner, without counsel, carried on numerous and sundry litigation in his own behalf, filing applications for writs of habeas

corpus in the district courts of Nebraska and the United States courts. See, Hawk v. O'Grady, 137 Neb. 639, 290 N. W. 911; Hawk v. O'Grady, 311 U. S. 645, 61 S. Ct. 11, 85 L. Ed. 412; Hawk v. Olson, 130 F. 2d 910; Hawk v. Olson, 317 U. S. 697, 63 S. Ct. 435, 87 L. Ed. 557; Ex parte Henry Hawk, 318 U. S. 746, 63 S. Ct. 979, 87 L. Ed. 1123; Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572; Hawk v. Olson, 145 Neb. 306, 16 N. W. 2d 181; Hawk v. Olson, 324 U. S. 839, 65 S. Ct. 1021, 89 L. Ed. 1402; Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61; Hawk v. Olson, 146 Neb. 875, 22 N. W. 2d 136; Hawk v. Jones, 160 F. 2d 807; Hawk v. Jones, 332 U. S. 779, 68 S. Ct. 44, 92 L. Ed. 363. To set out the pleadings filed by the petitioner as attorney pro se in the above actions, and the progress of the proceedings therein, would unnecessarily lengthen this opinion. The petitioner, in addition, filed certain pleadings in the district court for Douglas County with reference to a proceeding in error which will hereinafter be referred to in another assignment of error.

In addition, the record shows that the petitioner has assisted other inmates of the Nebraska State Penitentiary on at least 40 occasions, in preparing applications for writs of habeas corpus to be filed in the courts, and on occasions given legal advice to inmates on other matters. The record refutes the contention of the petitioner that he was ignorant and unacquainted with the procedure in criminal courts, and unable to recognize what steps should be taken to protect his legal interests or to preserve his constitutional rights.

The petitioner contends that his appointed counsel was ineffective due to lack of time to prepare for trial. The public defender assigned to defend the petitioner, as admitted in the petitioner's brief, was a competent lawyer in criminal matters. As public defender for a period of 16 years he engaged in the defense of those charged with criminal offenses in over one hundred instances, including 15 or 20 first degree murder cases. Attorney

Baldwin had been public defender for a period of eight years and had engaged in at least six murder cases. In addition, the record of the original trial shows that the public defender made proper and consistent objections to testimony of the State's witnesses and extensively cross-examined them on various phases of their testimony. The petitioner complained that the testimony of one of the State's witnesses was false. Upon examination of this witness by the public defender, his previous conviction of a felony was established.

At this point it might be appropriately remarked that the writ of error coram nobis cannot be invoked on the ground that an important witness testified falsely about a material issue in the case. See, Asbell v. State, 62 Kan. 209, 61 P. 690; Dobbs v. State, *supra*. Also, the writ of error coram nobis does not lie to test the credibility of witnesses in the criminal trial, the jury having passed upon same, nor the fact that counsel for the defense might have, or could have, presented the case in a different manner or used different strategy in such presentation.

We continue with the assignment of error now being discussed. The petitioner, with reference to the ineffectiveness of counsel appointed to defend him, cited as the most important case in his brief, Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61, as follows: "We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment."

In further support of this contention Dolen v. State, 148 Neb. 317, 27 N. W. 2d 264, *ante* p. 76, 36 N. W. 2d 566, is

cited to the effect that a reasonable time for the preparation of a defendant's case must be allowed between the assignment of counsel by the court and the time of the trial. Also cited by the petitioner is Spence v. Dowd, 145 F. 2d 451; Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680. The above cases cited by the petitioner on ineffectivenes of defense counsel were not cases wherein the writ of error coram nobis was involved.

The petitioner also relies on the following language appearing in Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572: "Moreover, Nebraska recognizes and employs the common law writ of error coram nobis which, in circumstances in which habeas corpus will not lie, may be issued by the trial court as a remedy for infringement of constitutional right of the defendant in the course of the trial, * * *."

The record discloses that in the original trial the court-appointed counsel gave his best legal efforts to the defense of this petitioner, as likewise did attorney Baldwin, even though the petitioner ignored their services, refused to divulge what defense, if any, he had, and refused to cooperate in any efficient manner with counsel. His court-appointed counsel, under the circumstances, was not ineffective.

As stated in Hawk v. Olson, 326 U. S. 271, 66 S. Ct. 116, 90 L. Ed. 61, where the court was determining the sufficiency of a petition as to whether or not a cause of action in a habeas corpus case was stated: "The evidence may show that the charge was served upon petitioner well in advance of the trial * * * and that he had ample opportunity to consult with counsel and secure any needed witnesses."

If the defendant's defense was not made to his satisfaction, he certainly must have been aware of it at the time and could have availed himself thereof in a motion for new trial. Ineffective presentation of the defense in a criminal case is a recognized ground for new trial if appropriate facts exist. See, Cornwell v. State, 106 Ohio

St. 626, 140 N. E. 363; 16 C. J., Criminal Law, § 2642, p. 1145.

We repeat that an examination of the record does disclose that the petitioner was served with the charges filed against him well in advance of trial and he had ample opportunity to consult with counsel. There is no competent evidence that he at any time endeavored to procure counsel in his own behalf. He was rather impressed with his own ability to try his case, and his part in the trial has heretofore been exemplified. Likewise, he had the opportunity to secure witnesses in his behalf at the State's expense, as heretofore pointed out. There was no denial of due process of law as far as the petitioner was concerned under the facts adduced in this proceeding in error.

In Bute v. Illinois, 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986, in passing upon claims of denial of due process of law contrary to the Fourteenth Amendment in state criminal trials, it was said: "Doubts should be resolved in favor of the integrity, competence and proper performance of their official duties by the judge and the State's attorney. They were state officials lawfully chosen to discharge serious public responsibilities under their oaths of office."

"Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111. See, also, In re Application of Rozgall, *supra*.

The petitioner contends the district court erred in finding that the petitioner herein was guilty of lack of due diligence and culpable negligence in failing to take necessary action to perfect an appeal to the Supreme Court of Nebraska from the verdict and judgment rendered against him.

The record discloses that on April 10, 1936, the petitioner prepared and filed in the district court for Douglas

County, a poverty affidavit requesting that the costs of the transcript and bill of exceptions and all filing fees be paid by the state. Pursuant to the filing of the poverty affidavit an order was made by the trial judge directing the clerk of the district court to prepare the transcript, and the reporter to prepare a bill of exceptions at the cost of the county. On April 10, 1936, the petitioner prepared notice of appeal to the Supreme Court, and prepared and filed a praecipe for transcript. On May 20, 1936, the court reporter wrote the petitioner with reference to the preparation of the bill of exceptions, explaining to him that she had 40 days from the beginning of the term, about May 5th, to prepare the bill of exceptions, which would be ample time. On May 25, 1936, the reporter wrote the petitioner that the bill of exceptions was ready for delivery, and asked him if he wished it sent to him or to his attorney at Superior, Wisconsin. The presumed attorney at Superior, Wisconsin, was one J. J. Cardigan, a former inmate of the Leavenworth penitentiary and an acquaintance of the petitioner.

We are not favored with the testimony of the court reporter because of her death before the hearing in the district court.

On June 9, 1936, the trial judge wrote to J. J. Cardigan, Superior, Wisconsin, replying to Cardigan's letter of June 6, 1936, written to the court reporter. In this letter the judge stated: "* * * I will say that I am of opinion that you and Mr Hawk are going to get yourselves in a situation, if you don't look out, where Hawk will have no appeal to our Supreme Court. To make either a transcript or a bill of exceptions or both, and forward them to you, will not be effective in the matter of preparation of an appeal." The court then explained in some detail the necessary procedure to perfect an appeal by writ of error, and explained fully and completely the time element involved in perfecting the proceedings in error. The judge further requested Cardigan, if he was working

in the interest of the petitioner, to get someone to take care of the matter, stating that he could not expect the court reporter, the county attorney, or himself to perfect this appeal for the petitioner, that no transcript of evidence would be sent to Cardigan, and there was no desire on anyone's part to prevent the petitioner taking an appeal. He further stated: "* * * but we do not want him or any one else to say, if he does not comply with the law, that he has been prevented from doing so by the neglect of any one here, and that is the reason I am writing you this letter today." A copy of this letter was sent to the petitioner, and the trial judge received no response from the petitioner with reference to the letter.

On June 10, 1936, the petitioner filed an application in the district court for Douglas County for extension of time to perfect the appeal, and on June 20, 1936, prepared and filed a motion in the district court for Douglas County for an extension of 60 days time to file transcript and bill of exceptions in the Supreme Court.

The afore-mentioned legal filings prepared by the petitioner without assistance of counsel were as regular in form and language as any competent attorney would prepare them, another instance shown by the record of the familiarity of this petitioner with criminal procedure.

On June 2, 1936, the trial judge, on his own motion, extended the time for preparing the bill of exceptions 40 days commencing from the date of June 11, 1936. Some time after the time for appeal had elapsed, the bill of exceptions was found in the county attorney's office by counsel appointed to represent the petitioner in another matter in the United States District Court.

It will be observed from the foregoing facts that the trial judge made every possible endeavor to assist the petitioner in perfecting appeal by writ of error to the Supreme Court. There is no legal requirement that the bill of exceptions be sent to one not counsel for the petitioner nor shown to represent him.

The petitioner's contention that he was denied the right

to perfect his appeal to this court is not persuasive. He did not desire that a motion for new trial be filed, and abused counsel for filing one in his behalf. He did not request the public defender or his assistant to appeal. To have sent the bill of exceptions to J. J. Cardigan under the circumstances might have been a matter which the petitioner could have taken advantage of in further litigation. He is in no position to complain.

The petitioner, by his own conduct, was guilty of lack of due diligence and culpable negligence in failing to take necessary action to perfect an appeal to this court. The facts do not show that the petitioner was prevented from perfecting his appeal within the time allotted by statute.

The writ of error coram nobis will not lie to vacate a judgment of conviction and secure a retrial of the accused because of his inability, within statutory limits of time, to prepare a record on appeal to this court showing the errors of which complaint was made. Such writ lies only to correct errors of fact, in ignorance or disregard of which the judgment was pronounced. The unvarying test of the writ of error coram nobis is mistake or lack of knowledge of facts inhering in the judgment itself. It has never been granted to relieve from consequences arising subsequently to the judgment. See Collins v. State, 66 Kan. 201, 71 P. 251, 60 L. R. A. 572, 97 Am. S. R. 361.

Other assignments of error are without merit and are not such as may be considered in determining whether a writ of error coram nobis should issue.

Within the legal concept of the writ of error coram nobis, the purpose of the writ and the scope thereof, the facts as hereinbefore set out and authorities cited with reference thereto, and for the reasons given herein, the judgment of the district court in denying the petitioner the writ of error coram nobis is affirmed.

AFFIRMED.

EVERETT SATTERFIELD, APPELLANT, V. JOHN MALLORY, APPELLEE.
39 N. W. 2d 537

Filed November 10, 1949. No. 32641.

Trial. A verdict and judgment which is not sustained in point of fact and is not supported by legal principle may not be allowed to stand.

APPEAL from the district court for Holt County: DAYTON R. MOUNTS, JUDGE. *Affirmed in part, reversed in part, and remanded.*

T. F. Nolan, for appellant.

Evans & Lee, for appellee.

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

YEAGER, J.

The plaintiff and appellant instituted this action against the defendant and appellee on an alleged contract whereby it is claimed that the defendant agreed to pay plaintiff for use and damage to certain lands held by him under an assignment of a school land lease from the Board of Educational Lands and Funds of the State of Nebraska. The amount to be paid was five cents a yard for all gravel removed from the river which ran through the land. The claim was that 8,000 yards had been removed and that plaintiff was entitled to receive in payment $400; that $100 had been paid by check thereby leaving due and owing the amount of $300.

The defendant by his pleadings and evidence admitted the entry into a contractual arrangement but he denied that the contract was for payment for use and damage. His contention is that the contract was for the purchase of gravel for five cents a yard which contract was invalid for the reason that plaintiff did not have a lease of mineral rights and had no right to sell the gravel, a fact which was unknown to defendant at the time the contract

was entered into. Defendant admitted the giving of a check for $100 as part payment on the contract. His further contention is that after ascertaining that plaintiff did not have a lease of mineral rights he, the defendant, obtained a lease thereof and paid the Board of Educational Lands and Funds a royalty of five cents a yard for all gravel removed. The amount removed was 6,620 yards and the total amount paid was $331.

For the alleged payment of $100 to plaintiff the defendant filed a counterclaim.

The action was tried to a jury. The jury found against the plaintiff and returned a verdict in favor of the defendant on his counterclaim for $100. Judgment was entered on the verdict. From the judgment the plaintiff has appealed.

The assignments of error are that the court erred in giving instructions Nos. 5 and 6 and in overruling the motion for a new trial.

For reasons which will become apparent a discussion of the instructions is not essential to the determination upon this appeal.

The propriety of the verdict and judgment on plaintiff's alleged cause of action is not raised by appellant by assignments of error, propositions of law, or argument. The only question argued is the propriety of the judgment in favor of defendant on the counterclaim for $100.

While in his petition plaintiff pleaded that he had received payment of $100 by check the evidence of both parties is conclusive that he did not. The check was received but it never was cashed or even presented for payment. This was well known and was disclosed at the trial. It appears as an exhibit in the bill of exceptions in this case. A tenable theory upon which to base a conclusion under the known facts and circumstances that the giving of this check amounted to the payment of $100 is not advanced in the briefs.

On the facts the issue should have been withdrawn from the jury on a motion for that purpose. No such

motion however having been made it becomes necessary to reverse and remand the case as to the judgment on the counterclaim and to otherwise affirm it.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SCHOOL DISTRICT OF OMAHA, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, APPELLEE, v. ERNEST A. ADAMS, TREASURER EX OFFICIO OF THE SCHOOL DISTRICT OF OMAHA ET AL., APPELLANTS.

39 N W. 2d 550

Filed November 10, 1949. No. 32648.

1. **Schools and School Districts.** The statutory requirement that a school district treasurer shall give a bond is not a duty of the office but rather a required precedent element of qualification for the office, as distinguished from eligibility therefor, and upon failure to have such an official bond executed, approved, and filed as required by law, such office becomes ipso facto vacant, as provided by section 11-115, R. S. 1943.
2. **Officers.** The term of an official statutory bond is not ordinarily measured by annual premium charges but by the fixed term of the public office for which the bond was given, or the term as specifically provided in the bond itself.
3. **Schools and School Districts.** A board of education is a creature of statute, and as such possesses no other powers than those expressly granted by the Legislature.
4. **Statutes.** A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
5. ———. Section 79-2715, R. S. Supp., 1947, is operative prospectively only.
6. **Officers.** In the absence of express statutory authority, no public official or governing body has authority to cancel, substitute, change, or modify an existing official statutory bond, or to release and discharge the surety thereon prior to termination of the trust of the office or the term for which it was given.
7. ———. A statute simply granting an official or governing body prospective authority to exercise a limited discretion and thereby fix the amount of the penalty and approve an official

statutory bond does not by implication authorize such official or body to modify or cancel a bond theretofore validly executed, or to reduce the penalty and pro rata release and discharge the surety prior to its termination.

8. ———. The incorporation of a statutory provision prospectively authorizing an official or governing body to enlarge the penalty of an existing bond or to require an additional bond cumulative in character, which statute omits any reference to authority to make a reduction of the penalty after it had been theretofore fixed as required by statute, does not give any implied authority to do so.

9. **Statutes.** The maxim, expressio unius est exclusio alterius, which is operative in the law as an aid in the determination of legislative intent with reference to statutory grants of power, means that where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Reversed and dismissed.*

Swarr, May, Royce, Smith & Story, and *Robert K. Andersen,* for appellants.

King & Haggart, for appellee.

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

CHAPPELL, J.

This action sought a declaratory judgment construing and applying Chapter 297, Laws of Nebraska, 1947, now section 79-2715, R. S. Supp., 1947, with relation to the bond of the treasurer of the board of education for plaintiff district in Omaha, a city of the metropolitan class, which bond was theretofore duly executed in conformity with section 79-2715, R. S. 1943, prior to amendment of the latter section by the foregoing act.

After hearing upon the merits, the district court entered a decree finding and adjudging the issues generally for plaintiff and against defendants. The decree

found that section 79-2715, R. S. Supp., 1947, was retrospectively operative, thus applicable to the original bond, and empowered the board of education to require a reduction in the penalty thereof during the term for which the original bond was given. The decree ordered and adjudged that defendants should reduce the penalty of the original bond from $500,000 to $200,000, effective January 1, 1948, by execution of a rider to be attached and made a part thereof, and awarded plaintiff a money judgment against defendant Continental Casualty Company for $3,060, with interest from January 1, 1948, which sum represented the pro rata unearned premium upon the reduced penalty for the balance of the term.

Motion for new trial was overruled, and defendants appealed, assigning substantially that the judgment was contrary to law. We sustain the assignment.

There was no dispute about the facts. Defendant Ernest A. Adams, hereinafter generally designated treasurer, was duly elected and qualified as county treasurer of Douglas County for a term of four years, beginning January 9, 1947, the first Thursday after the first Tuesday in January next succeeding his election. Upon election as such, and subsequent qualification for the office, he was concededly ex officio treasurer of the board of education for plaintiff district, hereinafter generally designated as plaintiff. On January 9, 1947, in conformity with section 79-2715, R. S. 1943, and certain other statutes in pari materia therewith, the treasurer as principal, and defendant Continental Casualty Company, as surety, hereinafter generally designated as such, with approval of plaintiff's board of education, executed an official bond payable to plaintiff in the principal sum of $500,000, which bond was duly filed as required by law.

The bond specifically provided: "THE CONDITION OF THIS OBLIGATION IS SUCH, that WHEREAS, the above bounden, ERNEST A. ADAMS, has been elected to the office of TREASURER OF THE SCHOOL DISTRICT OF THE CITY OF OMAHA, in the County of

Douglas, in the State of Nebraska, *for a term of four years, commencing on the 9th day of JANUARY, A. D., 1947 and ending on the 4th day of JANUARY, A. D., 1951, or until his successor in office is duly elected and qualified.*

"NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said ERNEST A. ADAMS shall render a true account of his office and of the duties therein to the proper authorities when required thereby or by law; and shall promptly pay over and deliver to the person or officers entitled thereto, all money and property which may come into his hands by virtue of his said office, and shall faithfully account for all balances of money remaining in his hands *at the termination of his office,* and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers and securities or other property appertaining to his said office, and deliver them to his successor or to any person authorized to receive the same; and if he *shall faithfully and impartially discharge all other duties now or hereafter required of his office, by law; then this obligation shall be void, otherwise to be and remain in full force and effect.*" (Italics supplied.)

In that connection, contrary to plaintiff's contention, any statutory requirement that the treasurer should give a bond would not be a duty of his office, but rather, as hereinafter observed, would be a required precedent element of qualification as distinguished from eligibility for the office in order to avoid a vacancy and permit him to legally hold the office and perform the duties thereof then or thereafter required by law. The conditions and obligations recited in the bond had reference solely to the duties of his office after qualification therefor by execution of the bond.

Concededly, the agreed annual premium charges for the bond were $2,000 for the first year, which sum plaintiff paid the surety when the bond was executed,

and three subsequent annual premiums amounting to $6,000, which were a short time after execution paid in full by plaintiff to the surety at a discount of 15 percent. It will be noted that the term of the treasurer was four years, as provided by statute, and that the term of the bond was specifically for that period, or until his successor in office was duly elected and qualified for the office.

In that regard, the term of an official statutory bond is not ordinarily measured by annual premium charges but by the fixed term of the public office for which the bond was given, or the term as specifically provided in the bond itself. Jaeger Mfg. Co. v Massachusetts Bonding & Ins. Co., 229 Iowa 158, 294 N. W. 268; 9 C. J., Bonds, §§ 73 and 74, p. 44.

Fidelity & Deposit Co. v. Libby, 72 Neb. 850, 101 N. W. 994, relied upon by plaintiff, involved the bond of an appointee whose term was not fixed by statute but revocable at pleasure. Therein also neither the application for the bond nor the bond itself recited any prospective term of the principal's office or the term of the bond, but the surety simply undertook therein to become and remain bound only so long as the agreed annual premium should be paid in advance. The opinion is therefore distinguishable both upon the law and the facts.

When the original bond was executed, section 79-2715, R. S. 1943, insofar as important herein, provided: "He shall give bond, payable to the board of education in an amount equal to the sum that may be in his possession at any one time of moneys belonging to or under the control of the board of education, but such sum shall not be less than the maximum sum that may be in his possession at any time of moneys belonging to or under the control of the board of education, and the bond shall be signed by one or more surety companies of recognized responsibility. The cost of the bond shall be paid by the school district."

The foregoing section, as amended by what is now section 79-2715, R. S. Supp., 1947, was approved May

24, 1947, and became effective 90 days thereafter. The amendment imposed new duties upon the treasurer of the same general character as those theretofore imposed, and insofar as important here, provided: "He shall give bond, payable to the board of education in such amount as may be required of him by the board of education, in no event to be less than two hundred thousand dollars, * * *. Such bond shall be signed by one or more surety companies of recognized responsibility, to be approved by the board of education. The cost of the bond shall be paid by the school district. Such bond may be enlarged at any time the board of education may deem an enlargement or additional bond necessary."

It will be observed that the original bond was comprehensive of both the foregoing sections.

On October 20, 1947, assuming and contending that the statute as amended was operative retrospectively and by its terms and provisions gave it power and authority to do so, plaintiff's board of education adopted a resolution, the effect of which was to request that defendants submit for its approval a new bond in the reduced penal sum of $200,000, found by it to be sufficient, conditioned therein according to the statute as amended, which new bond upon approval thereof should be substituted for the original theretofore in force and effect, and that said original bond should then be cancelled.

On October 22, 1947, the attorney for the board of education wrote a letter to the local agent for defendant surety, referring to the resolution and requesting such agent to ascertain the rate on such a new bond to be thus substituted and the pro rata amount of the unearned premium that would be due and payable to plaintiff on cancellation of the original, insofar as it affected future defaults. It also suggested that if a reduction in the penal amount of the original bond by its amendment, to include the reduced penalty and the purportedly new statutory duties imposed upon the treasurer would effect the same

saving to the school district, then that procedure would be satisfactory.

Defendants refused to comply with the request to reduce the penalty of the original bond, either by substitution of a new bond and cancellation of the original, or by amendment of the original. This was done upon the premise that the statute as amended was operative only prospectively, and that neither its provisions nor the provisions of any other statute gave the board of education any retrospective authority, actual or implied, to reduce the penalty or cancel the original bond or release and discharge the surety before final termination of the contractual term, and that to hold otherwise would contravene Article I, section 10, Constitution of the United States, and Article I, section 16, Constitution of Nebraska, by impairing the obligation of contract.

Defendants also refused to incorporate in the original bond, by amendment or otherwise, as conditions or obligations thereof, the new duties set forth in the amended statute, upon the premise that the provisions of the original bond were all inclusive thereof, not only by virtue of controlling applicable law but also because of the general and specific language appearing therein, particularly that part requiring the treasurer to "faithfully and impartially discharge all other duties now or hereafter required of his office, by law; * * *."

In the light of the foregoing, the surety also refused to refund plaintiff $3,060 premiums already paid on the original bond for the full four-year term, which sum represented the pro rata portion of the unearned premium on the bond at the reduced penalty rate from January 1, 1948, to the end of the term.

No accounting was ever had by or demanded of the treasurer and the bank balance, representing moneys belonging to or under the control of the board of education, was $526,546.25 for October 1947. Thereafter, throughout 1947 and 1948, such balances were substantially larger for several months, and they were never

less than $318,454.96. During August, September, and October of 1948, they substantially exceeded a million dollars each month. In that regard, it must be borne in mind that a statutory official bond covers not only loss of public funds but also the faithful performance of all the duties imposed upon the officer by law. Liability for the latter may far exceed the former. Contrary to plaintiff's contention, the fact that bank deposits are or may be protected by a depository law is of no consequence in a determination of the issues presented.

The issues in this case are to be decided upon the basis of what the Legislature did do and not what it could have done. As we view it, this court is simply required to interpret and apply a clear and unambiguous statute.

Concededly, the Legislature by amendment imposed new duties of the same general character upon the office of the treasurer, to be performed in the future, and thereby included new conditions and obligations in the original bond itself, not only by virtue of the general language but by specific language used therein, as well as upon legal principles. See Stearns on Suretyship (2d ed.), § 152, p. 253. The trial court evidently took that view, and since no complaint is made here upon that question, it does not require further discussion.

Concededly also, the amendment gave plaintiff the prospective right and power to enlarge the penalty or require an additional cumulative bond at any time the board of education deemed it necessary to protect the public. However, plaintiff made no such demands. Rather, without attacking the sufficiency of either the penalty, the surety, or the validity of the original bond, plaintiff claimed the restrospective right, power, and authority under the statute as amended to change or modify the original bond during its term, by reducing the penalty, thereby pro rata releasing and discharging the surety from its liability upon the original for the balance of the term, and recover back pro rata the unearned premium for that period in order solely to effect a saving

for plaintiff. Defendants contended that the statute, as amended, gave the plaintiff no such authority. We sustain that contention.

Plaintiff relies upon a statement appearing in 46 C. J., Officers, § 94, p. 962, reciting what the Legislature had the power to do with relation to official bonds. Ex parte Buckley, 53 Ala. 42, the only supporting case cited in the note, involved a statute specifying the qualification of sureties on official bonds, which qualifications had not theretofore been specifically defined, and provided a comprehensive remedy by which freeholders could test the sufficiency of such sureties. In the opinion the court did use tutorial language with relation to what the Legislature could do, but in finally deciding what the Legislature did do, as we must in the case at bar, it was said: "This statute impairs no vested right, creates no new obligation, imposes no new duty, attaches no new disability, in respect to a past transaction, or arising out of a past consideration. It simply provides a remedy to secure the performance of a pre-existing duty. The officers nominated in it were under the obligation of executing an official bond with sufficient sureties. This duty is not enlarged—it remains as declared by existing law. Neither the penalty, condition, nor obligation of the bond, is altered. * * * The whole field of operation of the statute is the future." In the light of the circumstances presented here, and the provisions of the statute involved, that opinion lends no support to plaintiff's contentions.

It should be pointed out that a board of education is a creature of statute, and as such possesses no other powers than those expressly granted by the Legislature. Schulz v. Dixon County, 134 Neb. 549, 279 N. W. 179, 119 A. L. R. 1294; American Surety Co. v. School District, 117 Neb. 6, 219 N. W. 583.

In that regard, plaintiff relied in part upon section 79-2704, R. S. 1943, which provides: "The affairs of the school district created by this act shall be conducted exclusively by the board of education, *except as otherwise*

provided by this act." (Italics supplied.) Evidently, however, plaintiff overlooked the exception provided therein, which has application here.

Plaintiff also relies in part upon Gaddis v. School District, 92 Neb. 701, 139 N. W. 280, which is clearly distinguishable both upon the law and the facts. That opinion involved the powers of the board of education "to select school sites and erect school buildings," with "money derived from taxation," in the light not only of section 79-2704, R. S. 1943, but also other sections of the statute which specifically gave the board of education the power to purchase, hold, and sell personal and real estate and granted such board " 'exclusive control of the same (all property of the district) for all purposes herein contemplated.' "

Section 79-2715, R. S. 1943, simply required that the treasurer should give a bond payable to the board of education in a factually determinable amount, signed by one or more surety companies of recognized responsibility. The treasurer tendered such a bond, containing appropriate conditions and obligations, which was approved by the board of education on January 6, 1947, and filed as required by law on January 9, 1947, as a necessary prerequisite qualification for the office. See Chapter 11, p. 370, R. S. 1943, and the 1947 Supplement thereto.

To discuss the separate applicable sections of the aforecited statutes would serve no purpose. It is sufficient for us to say they provide that a school district treasurer, as an officer specifically enumerated, and as any person elected or appointed to any office requiring a bond, must qualify for the office by filing a bond within the time required by law, or "his office shall thereupon ipso facto become vacant." §§ 11-101, 11-103, 11-105, 11-107, and 11-115, R. S. 1943, and § 11-119, R. S. Supp., 1947. See, also, section 79-404, R. S. 1943, as bearing upon the intent of the Legislature with reference to qualifications for the office of school district treasurers by filing a bond.

The requirement that a school district treasurer shall

furnish and file a bond could not be said to be a mere administrative duty of the office, as argued by plaintiff. It is not the board of education but the statutes which require a bond and fix the school district treasurer's manner of qualification for the office. No authority cited by plaintiff holds otherwise, under statutes similar to our own.

In that regard, Frans v. Young, 30 Neb. 360, 46 N. W. 528, 27 Am. S. R. 412, relied upon by plaintiff, involved simply the question of whether or not a school district moderator was required by statute to take an oath and file a written acceptance as a qualification for the office. When read in its true light, that opinion is authority for the conclusion that unless an elected school district treasurer files a qualifying bond as required by law, his office ipso facto becomes vacant.

It is well established in this jurisdiction that a legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. War Finance Corporation v. Thornton, 118 Neb. 797, 226 N. W. 454; Tynon v. Bliss, 121 Neb. 80, 236 N. W. 184. See, also, 59 C. J., Statutes, § 692, p. 1159; 50 Am. Jur., Statutes, § 478, p. 494. Neither the original statute, nor the statute as amended, nor the title thereof, nor any other related statute, contains any provision, express or implied, from which this court could conclude that the Legislature intended the amendment to operate retrospectively, thereby permitting plaintiff to reduce the penalty and modify or cancel the original bond, or release and discharge the surety pro rata prior to completion of the treasurer's four-year term. We conclude that the statute as amended operated only prospectively.

The general rule applicable here is that, in the absence of express statutory authority, no public official or governing body has the right, power, or authority to cancel, substitute, change, or modify an existing official statutory bond, or to release and discharge the surety thereon

prior to termination of the trust of the office or the term for which it was given. As stated in 46 C. J., Officers, § 414, p. 1074: "An official bond is not satisfied by its cancellation by an unauthorized officer; and as the officer to whom a bond is given takes no beneficial interest but only a legal interest, he may not, except as prescribed by law, release or discharge the obligation of an official bond." See, also, Stearns on Suretyship (2d ed.), § 151, p. 252; Lawrence v. American Surety Co., 263 Mich. 586, 249 N. W. 3, 88 A. L. R. 535; Fidelity & Deposit Co. v. Fleming, 132 N. C. 332, 43 S. E. 899; Aetna Casualty Co. v. Board of Supervisors, 160 Va. 11, 168 S. E. 617; Fidelity & Deposit Co. v. Callahan, 98 Kan. 547, 158 P. 658; Sullivan v. State ex rel. Langsdale, 121 Ind. 342, 23 N. E. 150.

Also, in that connection, a statute simply granting an official or governing body prospective authority to exercise a limited discretion and thereby fix the amount of the penalty and approve an official statutory bond does not by implication authorize such official or body to modify or cancel a theretofore validly executed bond or to reduce the penalty and pro rata or otherwise release and discharge the surety prior to its termination. Sullivan v. State ex rel. Langsdale, *supra;* Fidelity & Deposit Co. v. Callahan, *supra;* Fidelity & Deposit Co. v. Fleming, *supra;* First Nat. Bank v. Moon, 243 Mich. 124, 219 N. W. 625.

By analogy, neither would incorporation of a statutory provision prospectively authorizing such official or body to enlarge the penalty of an existing bond or to require an additional bond cumulative in character, which statute omitted any reference to authority to make a reduction of the penalty after it had been theretofore fixed as required by statute, give any implied authority to do so.

Under the circumstances presented here, both of the foregoing propositions of law clearly come within and are controlled primarily by the maxim, expressio unius est exclusio alterius, which, when operative in the law

as an aid in the determination of legislative intent with reference to statutory grants of power, means that where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention. 59 C. J., Statutes, § 582, p. 984; 50 Am. Jur., Statutes, § 244, p. 238, § 429, p. 450; Rogers v. National Surety Co., 116 Neb. 170, 216 N. W. 182.

Since we have decided that the section as amended was intended to operate and did operate prospectively only, no constitutional question is involved, and it will not be discussed.

We conclude that the decree of the trial court was contrary to law, and for the reasons heretofore stated, the judgment should be and hereby is reversed and the action is dismissed.

REVERSED AND DISMISSED.

JOSEPH E. DODGE, BY ERNEST L. DODGE, HIS SON AND NEXT FRIEND, APPELLANT, V. JOHN J. GALUSHA ET AL., APPELLEES.
39 N. W. 2d 539

Filed November 10, 1949. No. 32663.

1. **Appeal and Error.** Except where jurisdiction is involved, this court will consider on appeal only questions which have been presented to and passed upon by the trial court.
2. **Vendor and Purchaser.** In the ordinary contract for the sale of real estate, equity will not regard time as of the essence, but it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances.
3. **Contracts.** Unless waived or excused, a tender of performance under such a contract must be upon conditions for which there is a foundation in the contractual relation between the parties.
4. **Specific Performance.** Where time is of the essence of such a

contract, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused.

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

Perry & Perry, for appellant.

Wade Stevens, for appellees.

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

CHAPPELL, J.

This was an action in equity to obtain specific performance of an oral contract to convey real estate. Defendants filed an answer and cross-petition, in which they sought dismissal of plaintiff's action and to recover reasonable rental value of the property for a designated period. After hearing upon the merits, the trial court entered a decree dismissing plaintiff's petition and dismissing defendants' cross-petition.

With regard to plaintiff's action, the decree found that plaintiff and defendant, John J. Galusha, sometimes known as Jack Galusha, and hereinafter generally designated as defendant, had entered into a contract substantially as claimed by plaintiff, but that time was of the essence of the contract, and plaintiff, having failed to perform within such time, was not entitled to specific performance. Defendants did not file a motion for new trial or cross-appeal.

Plaintiff's motion for new trial was overruled by the trial court, and he appealed, assigning substantially that: (1) Defendants did not plead a breach or default by plaintiff; and (2) that the judgment was contrary to law and the evidence. We conclude that plaintiff's assignments should not be sustained.

The first assignment is without merit primarily because an examination of the answer and cross-petition discloses that defendants not only denied generally but

specifically pleaded non-performance by plaintiff, and set forth the facts which constituted such breach under the terms and conditions of the contract. In any event, the record discloses that plaintiff did not attack defendants' answer and cross-petition in any manner in the trial court, but rather tried the case on the issues decided in the decree. In that situation, the applicable rule is that except where jurisdiction is involved, this court will consider on appeal only questions which have been presented to and passed upon by the trial court. Badura v. Lyons, 147 Neb. 442, 23 N. W. 2d 678.

Defendants Susie Galusha and Nell P. Galusha were the wife and mother of defendant John J. Galusha. The relevant evidence upon material issues was without dispute. Plaintiff, an elderly man not in the best of health, owned a residence property in Marion. He was and had been in possession thereof during all times here involved. Defendant bid in the aforesaid property for $1,700 at a tax foreclosure sale on April 5, 1948, and thereafter obtained a sheriff's deed on May 21, 1948. On April 6, 1948, defendant mortgaged the property to Nell P. Galusha to secure a promissory note in the sum of $1,200, payable April 6, 1953, with interest at four percent.

In October 1948, defendant employed counsel to obtain possession of the property from plaintiff. In that connection, he subsequently filed a forcible entry and detainer action in the county court, which was decided on the merits November 10, 1948. On that date defendant also filed an application in the original tax foreclosure proceeding, seeking a writ of assistance. In the meantime, plaintiff's son, upon learning of the litigation in which his father had become involved, employed counsel for plaintiff. On November 10, 1948, such counsel filed a motion in the district court to vacate and set aside the original tax foreclosure decree, the confirmation of sale thereunder, and for a new trial.

While the foregoing matters were respectively pend-

ing or not yet enforced, plaintiff, his son, defendant, and their respective counsel, entered into negotiations for settlement. The result thereof was that plaintiff was temporarily left in possession, and an oral contract was made, whereby defendant agreed to sell the property to plaintiff upon receipt of $2,000 cash, which money was to be left at the First National Bank of McCook, to be there available and payable to defendant on or before December 22, 1948, and when the money was there for defendant, he was to then tender a deed to the property, together with a release of the $1,200 mortgage. Otherwise, if plaintiff did not so make such sum available and payable to defendant on or before December 22, 1948, as aforesaid, then it was agreed that a writ of assistance should issue on that date. The county judge and district judge were both informed thereof by the parties or their counsel, and had knowledge of the terms and conditions of the contract.

In the light of such knowledge, and in conformity with the contract, the district court signed and filed a journal entry on December 4, 1948, overruling plaintiff's motion, and sustaining defendants' application for a writ of assistance. In that regard, such journal entry provided in part: "and, that said parties have agreed and stipulated that Writ of Assistance be issued herein, as provided by law, in favor of said Jack Galusha for said premises, on December 22, 1948.

"IT IS THEREFORE ORDERED, CONSIDERED, ADJUDGED AND DECREED by this court that the findings herein are made a part of this judgment, and that Writ of Assistance be issued in favor of Jack Galusha for possession of the above described real estate and against the defendant Joseph E. Dodge (plaintiff herein) on December 22, 1948."

Thereafter, on December 4, 1948, defendants' attorney authoritatively wrote and sent a letter to plaintiff's attorney, which read in part: "Enclosed is a copy of the Journal Entry which the Court entered herein this day.

It definitely provides that no Writ of Assistance be issued until the 22nd of this month, before which time Mr. Galusha will sell this property upon receipt of $2000.00 cash. * * * This agreement is definite and the Court was informed of it, but the court did not consider it proper to include it in the Journal Entry."

On December 8, 1948, in response thereto, plaintiff's attorney wrote and sent plaintiff the following letter: "We are in receipt of a journal entry in the above matter which we inclose herewith. The arrangement to give you until December 22, 1948, was made under the direction of your son Ernest, who was in the office at the time and directed the telephone conversation.

"This means that you must complete your arrangements for repurchase of this property from Jack Galusha on or before December 22, 1948. We hope you will succeed in doing this, but if not, you certainly must understand from the copy of the journal entry inclosed that a writ of assistance will issue on December 22nd next to put you out of possession and Mr. Galusha in possession.

"We have done all we can do for you in this matter under the existing circumstances. We are forwarding Charles E. McCarl, attorney for Galusha, a copy of this letter."

Without dispute, the contract was made by the parties as aforesaid. Defendant knew at or about the time the contract was made that plaintiff and his son were required to raise the money to complete the transaction within the time prescribed, by obtaining loans upon insurance policies and the property itself, and defendant told them that he would cooperate with them. We find no evidence in the record that defendant did not do so.

Plaintiff negotiated and arranged to obtain two loans. One was for $700 upon the son's insurance policies. The other was for $1,300 upon the property itself. The proceeds of the first were obtained by plaintiff and left with the bank on December 22, 1948. The proceeds of

the other loan, and a mortgage on the property, executed by plaintiff to secure payment thereof, were also left with the bank on December 22, 1948. Without dispute, however, the mortgage was not to be delivered to the mortgagee and such proceeds were not to be paid to plaintiff or to be available and payable to either plaintiff or defendant until, as instructed by the loaner, the bank had received from plaintiff an abstract of title with legal opinion thereon showing title approved by the bank. Defendant gave the bank no instructions whatever, and took no part in that transaction.

Such abstract was not even ordered by plaintiff until after December 22, 1948. It was not certified until January 19, 1949. A legal opinion thereon, addressed to plaintiff and approving title, was not completed until January 22, 1949, and neither the abstract nor opinion was delivered to the bank until January 23, 1949. That was the first date upon which the $2,000 became available and payable to either plaintiff or defendant. It will be observed that such date was more than a month after the date upon which plaintiff was required to perform under the specific terms and conditions of the agreement.

In that situation, on December 22, 1948, a writ of assistance was issued by the district court as provided in the contract and in conformity with the trial court's stipulated journal entry of December 4, 1948. Thereafter, defendant refused to perform, and on February 9, 1949, plaintiff filed this action.

We are unable to find in the record any evidence justifying the application of estoppel, or that defendant in any manner or by any act, excused plaintiff's delay, or caused his default, or waived performance by plaintiff within the time prescribed, or repudiated the contract prior to the time for plaintiff's performance.

We are required primarily to decide whether or not time was of the essence of the contract under the foregoing circumstances, because if it was, then plaintiff, having failed to perform or tender complete performance

within the time, would not be entitled to specific performance.

In that connection, as said in Restatement, Contracts, § 276 (e), p. 407: "In a suit for specific performance of a contract for the sale or purchase of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money or otherwise, unless

"(i) the contract expressly states that performance at or within a given time is essential, * * *."

This court only recently held: "In the ordinary contract for the sale of land, equity does not regard time as of the essence, though it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances.

"If it appears that it was the intention to make time of the essence, it will be so regarded." Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301.

In Whiteman v. Perkins, 56 Neb. 181, 76 N. W. 547, it was said: "In Pomeroy, Contracts, page 462, section 390, it is said on this subject, and numerous cases cited in support of the statement: 'It is now thoroughly established that the intention of the parties must govern, and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, the time of completion or of performance, or of complying with the terms, will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary; but any clause will have the effect which clearly and absolutely provides that the contract is to be void if the fulfillment is not within the prescribed time.'

"In the decision of the case of Missouri R., F. S. & G. R. Co. v. Brickley, 21 Kan. 276, opinion by Brewer, J., it was stated: 'While in agreements for the sale of real estate the time of payment is not ordinarily of the essence

of the contract, yet, by express stipulation, the parties may make it so, and, when so made, such stipulation is, like all other stipulations of the contract, to be respected and enforced by all courts, those of equity as well as those of law.'

"This court in Morgan v. Bergen, 3 Neb. 209, gave recognition and approval to the principle on which the doctrine just stated is based when it said: 'Parties may make time the essence of the contract, so that if there be a default at the day, without any just excuse and without any waiver afterwards, the court will not interfere to help the party in default.' (See, also, Langan v. Thummel, 24 Neb. 265; Patterson v. Murphy, 41 Neb. 818; Brown v. Ulrich, 48 Neb. 409; White v. Atlas Lumber Co., 49 Neb. 82. We further cite Phelps v. Illinois C. R. Co., 63 Ill. 468; 2 Warvelle, Vendors pp. 819, 830; 2 Beach, Equity Jurisprudence, sec. 592; Martin v. Morgan, 25 Pac. Rep. (Cal.) 350; Coughran v. Bigelow, 9 Utah 266, 34 Pac. Rep. 51; Axford v. Thomas, 28 Atl. Rep. (Pa.) 443; Miller v. Hughes, 63 N. W. Rep. (Ia.) 680; Ralph v. Lomer, 28 Pac. Rep. (Wash.) 760; Foot v. Bush, 69 N. W. Rep. (Ia.) 874; Higbie v. Farr, 28 Minn. 439.)

"The tender pleaded in the answer, if sufficient in other respects, was not made until subsequent to the forfeiture and suit brought to enforce it, and was ineffectual. (Ralph v. Lomer, *supra.*)"

Thereafter, in Jewett v. Black, 60 Neb. 173, 82 N. W. 375, this court said: "It is now firmly established everywhere that time may be made the essence of a contract. And it will be so regarded, even in equity, if it affirmatively and clearly appear that the parties intended that time should be essential. In 3 Pomeroy, Equity Jurisprudence (2d ed.), sec. 1408, it is said: 'Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day.' No particular form of words is necessary to express the intention of the parties. If they have clearly indicated their purpose that the con-

tract shall be void if not performed within the prescribed time, that is sufficient. It is the business of the courts to enforce agreements actually made and not to make new ones, or relieve parties from obligations which they have deliberately assumed. Between the plaintiff and Sanford it was expressly stipulated that time should be of the essence of the contract, not, of course, by the use of these very words, but by the employment of terms almost as explicit. Morgan v. Bergen, 3 Nebr., 209; Langan v. Thummel, 24 Nebr., 265; Brown v. Ulrich, 48 Nebr., 409; White v. Atlas Lumber Co., 49 Nebr., 82; Whiteman v. Perkins, 56 Nebr., 181; Kimball v. Tooke, 70 Ill., 553; Barnard v. Lee, 97 Mass., 92; Cheney v. Libby, 134 U. S., 68. The result of this conclusion, which we reach with great reluctance, is, that Sanford's contract was forfeited upon his failure to make the payment which became due January 1, 1892."

As stated in 55 Am. Jur., Vendor and Purchaser, § 114, p. 590: "If the agreement is that the vendor will convey provided that the purchaser shall on a certain day pay a specified sum, time is deemed of the essence of the agreement and the payment of the sum on such day is a condition precedent to the creation of any right in the purchaser to the performance of the agreement. It has also been held that where the purchaser deposits the purchase price in a bank under an agreement made at the time with the vendor that he shall receive it upon delivery by him to the bank of the instruments of title named in the conditions of deposit within a specified time, the vendor is entitled to receive it only on compliance with such conditions within such time, as time is of the essence of the contract. It is generally held that a provision authorizing the vendor to declare a forfeiture of the rights of the purchaser on his default in making the payments stipulated for renders time of the essence of the contract, and a court of equity cannot relieve the purchaser of the effect of a forfeiture for such cause if promptly asserted by the vendor." See, also, 58 C. J., Specific Performance,

§ 356, p. 1090, § 362, p. 1094, and § 376, p. 1102; 49 Am. Jur., Specific Performance, § 42, p. 56.

In that connection, in 52 Am. Jur., Tender, § 24, p. 231, it is said: "It is the universal rule that a tender upon condition for which there is no foundation in the contractual relation between the parties is ineffective, or, as sometimes expressed, a tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his rights. * * * A tender of money which is not, at the time being, the debtor's to tender, the property therein being in another, is conditional, and ineffectual to constitute a tender."

In Brown v. Ulrich, 48 Neb. 409, 67 N. W. 168, this court held: "Parties to a contract for the sale of land may make time of its essence by a distinct provision to that effect in the contract; and where they have done so, a court of equity will refuse to enforce specific performance in favor of a party who has been in default, unless strict performance has been waived. Morgan v. Bergen, 3 Neb., 209, followed." See, also, Rossbach v. Micks, 89 Neb. 821, 132 N. W. 526, 42 L. R. A. N. S. 444; 58 C. J., Specific Performance, § 355, p. 1089.

In Gilbert v. Union Pacific R. R. Co., 79 Neb. 160, 112 N. W. 359, it was held: "Where a contract for the sale of real estate provides that time and punctuality are material and essential ingredients in the contract, and that non-payment of an instalment of the purchase price shall forfeit the purchaser's rights therein, and that the vendor shall thereupon have the right to take possession of the property, such default of itself operates as a forfeiture, and the vendor is not required to give notice to the purchaser." See, also, 49 Am. Jur., Specific Performance, § 145, p. 168.

In the light of the foregoing authorities and the circumstances appearing in the record before us, we conclude that time was of the essence of the contract, and that plaintiff, having failed to perform within the time, was not entitled to specific performance.

For the reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

MARCELLA W. CHRISTOFFERSEN, APPELLEE, v. EDWIN L. CHRISTOFFERSEN, APPELLANT.
39 N. W. 2d 535

Filed November 10, 1949. No. 32658.

1. **Divorce.** The amount awarded in a divorce case for support of an infant child of the parties should be based upon existing facts, definite in amount and time of payment, and should not depend upon uncertain or speculative contingencies.
2. ———. In determining provision to be made in a divorce case for support of an infant child of the parties, their status and situation and all the attendant circumstances should be considered, and an amount fixed in accordance with the best judgment of the court.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded with directions. Motion to strike supplemental transcripts denied.*

Spear, Lamme & Flory, for appellant.

Richards & Schafersman, for appellee.

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

BOSLAUGH, J.

This is an action for divorce by appellee against appellant on the ground of extreme cruelty.

The parties were married September 20, 1941, and are the parents of one child born July 24, 1945. The decree granted the appellee a divorce; one-half of all of the property of the parties, including the bank account, as permanent alimony; the custody of the child; and fixed

child support at $70 a month when appellant earned $175 a month, and when he earned a less amount, $50 a month, commencing on February 19, 1949, and continuing until the child is 21 years of age, payable semimonthly to the clerk of the court.

Appellant offered no opposition to the granting of a divorce, the custody of the child, or the division of the property, and expressed his desire to furnish support for his son within the limits of his ability. The part of the decree relating to divorce, custody of the child, and permanent alimony to plaintiff is not questioned by this appeal. The part of the decree dealing with child support is the sole matter presented for review in this court.

The amount fixed for the care of the infant son of the parties is wholly and exclusively child support, as distinguished from alimony or support for appellee. The record makes this clear. The trial court repeatedly gave it this specific designation and status. The court had the power to provide the appellee an amount for her support in addition to the award of money and property made to her as permanent alimony, but it did not do so. Saum v. Saum, 144 Neb. 842, 14 N. W. 2d 844; Graham v. Graham, 135 Neb. 761, 284 N. W. 280; § 42-318, R. S. Supp., 1947.

The decree provides child support on a sliding scale, the sum payable depending upon the amount of the earnings of appellant. The amount is not fixed and certain, but is made to depend upon the future earnings of appellant, and these may frequently fluctuate. In the event of disagreement of the parties as to the fact, the court would be the only resort, on numerous occasions, to adjudicate the fact which will fix the amount appellant should pay to perform the decree on the subject of child support. Support money, when allowed, should be certain and definite, based upon present conditions, and not made to depend upon uncertain and speculative contingencies or hypothetical earnings or income. Procedure has been provided for the revision and modification

of such orders based upon the situation existing and made at the time of the trial, if the circumstances of the parties change or it shall be to the best interests of the children. § 42-312, R. S. 1943. The practice adopted by the district court in this case is disapproved.

It is objected by appellant that the amount of the award for child support is excessive. No fixed rule has been, or can be established to govern in cases of this kind. In instances where somewhat similar facts to those in this case existed, larger amounts of child support have been granted, and in other, lesser amounts. The question in each case must be decided on its facts. Generally the status, character, and situation of the parties and all the attendant circumstances must be considered, and the amount determined in accordance with the best judgment and sound discretion of the court. In this case the ages of the parties are respectively 28 and 40 years; appellee is in good health; appellant is not; because of a lung condition he has been advised by doctors to avoid dust and construction work; and he is not physically able to handle heavy machines. Appellee attended high school, and the training received by appellant was apparently less. When they were married she was working in a cafe dipping chocolate, and he was employed part time on the farm of his mother as a common laborer, and had no money or property. He had no training or experience in the operation of heavy equipment or machinery. He was first employed as such at the Mead Ordnance Plant commencing in 1942, and continued in construction work, with many interruptions for considerable periods of time, until about November of 1948. He received various amounts as wages, the largest total was $4,800 during the year 1947. In 1948 he earned about $2,300. During that year he also raised about 70 head of pigs. Appellee worked part of the time after the marriage. Their property and bank account were in the names of both. At the time of the

divorce the property they had was 26 pigs, a trailer subject to a mortgage, a 1936 Chevrolet coupé, household furnishings, and a bank balance of about $200. This was divided equally between the parties, except the household furnishings were assigned to appellee, and appellant kept the automobile. During the war many machinery operators were trained, and the demand for them has decreased. Their wages were considered large, but their expenses were also considerable. Appellant had been unemployed and unable to get employment since December of 1948. He had made application for, and received, one check for unemployment insurance. The infant son of the parties is slightly less than four and a half years of age, and has a defect in his feet that requires his shoes to be altered to accommodate the malformation and some medical assistance in an effort to correct it. He and his mother are living with her parents at an expense of $10 a week for board and room.

The amount of child support allowed is excessive under the circumstances of this case. The part of the decree fixing the amount thereof should be reversed with directions to the trial court to order $40 a month as support for the infant son of the parties, commencing on February 19, 1949, the date fixed in the decree, until he is of legal age or until the further order of the court, as provided by law in reference thereto. Counsel for appellee is allowed $100 for services in this court, and costs, except for supplemental transcripts, are taxed to appellant.

The motion of appellant for an order striking from the files of the court the two supplemental transcripts filed in this case and submitted at the time of the argument should be denied. These contain nothing pertinent, helpful or proper to be considered in reference to the sole matter presented for review in this case. They only encumber the record and burden the court. The

clerk should be, and is, instructed to tax the costs of the two supplemental transcripts to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.
MOTION TO STRIKE SUPPLEMENTAL TRANSCRIPTS DENIED.

HENRY A. SWANSON, APPELLANT, V. JAMES M. JONES, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.
39 N. W. 2d 557

Filed November 10, 1949. No. 32683.

1. **Habeas Corpus.** If the facts well pleaded in a petition for a writ of habeas corpus are insufficient to entitle the petitioner to the relief sought, it is the duty of the court to refuse to issue a writ.
2. ———. The sufficiency of a petition to support a writ of habeas corpus may be determined by the court before a writ is issued, and if it is not sufficient to warrant a discharge of the person alleged to be illegally restrained of his liberty, a writ may be denied.
3. ———. The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it.
4. ———. Habeas corpus is a collateral, not a direct proceeding when regarded as a method of attack of a judgment imposing a sentence for a crime, and facts, as distinguished from legal conclusions, are required to be alleged to negative the legal force and effect of the judicial record.
5. ———. To obtain a release from a sentence and commitment for a crime by habeas corpus, the sentence must be void.
6. ———. Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court.
7. **Criminal Law.** The failure to give a preliminary examination to a person charged with a crime is not a jurisdictional defect and is waived if not complained of before a plea of not guilty to the charge is made in the district court.
8. **Habeas Corpus.** The remedy of habeas corpus is not available in the absence of a statute authorizing it for the purpose of inquiring into the legality of a particular form, manner, or place

of confinement executively or administratively imposed upon a prisoner lawfully in custody in an authorized place under a valid sentence and commitment.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Henry A. Swanson, pro se, for appellant.

James H. Anderson, Attorney General, and *Walter E. Nolte,* for appellee.

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

BOSLAUGH, J.

The district court for Lancaster County found that the petition of appellant for a writ of habeas corpus did not allege sufficient facts to justify the issuance of a writ, and entered a judgment of dismissal. This is an appeal from that adjudication.

The petition is the only pleading in this case. It was the right and duty of the court to deny the petition and dismiss the case if the facts well pleaded therein, when accepted and considered as true, were insufficient to entitle appellant to a writ of habeas corpus. In re Application of Dunn, 150 Neb. 669, 35 N. W. 2d 673; Jackson v. Olson, 146 Neb. 885, 22 N. W. 2d 124, 165 A. L. R. 932; Alexander v. O'Grady, 137 Neb. 645, 290 N. W. 718, certiorari denied, 311 U. S. 682, 85 L. Ed. 439, 61 S. Ct. 59. The sufficiency of the allegations of a petition to support a writ of habeas corpus may be examined and determined by the court before a writ is issued or a pleading made by the person charged with the unlawful detention, and if they are not sufficient to require a discharge of the petitioner, a writ may be denied. McAvoy v. Jones, 149 Neb. 613, 31 N. W. 2d 740; Alexander v. O'Grady, *supra.* Such a writ is not demandable of course, but legal cause therefor must be shown as a prerequisite of judicial action favorable to petitioner. In re Application of Dunn, *supra.*

Appellant alleges that he did not have a lawful preliminary hearing, as required by law, because the acting county judge of the county court of Dawson County who presided at the hearing in that court on a charge that appellant had committed first degree murder was a brother and partner in the practice at law of W. M. Cook, who about a week after appellant was bound over to the district court for trial was appointed to and did assist the county attorney in the trial of the case in the district court; that there was no indictment of appellant by a grand jury, and the filing of an information is by law prohibited until there has been a lawful preliminary hearing of the charge against the accused; that he is unlawfully imprisoned and restrained of his liberty by appellee in the Nebraska State Penitentiary without due process of law on a conviction for first degree murder in a court without jurisdiction, and he was tried and convicted with such expedition as to deprive him of reasonable preparation for his defense, effective assistance of counsel, the presentation of his defense on the trial, and a fair trial; that after appellant was charged and taken into custody on October 25, 1939, he employed (A. J.) Shafer and (Dora) Nelson of Holdrege to represent him, and his father, without his knowledge, engaged "Attorney McNerny" (Bernard McNeny of Red Cloud) to defend him, and when Shafer learned this he withdrew; that McNeny was disabled by sickness for three weeks prior to November 11, 1939, and died November 14, 1939, the day before the commencement of the trial of appellant in the district court; that the information was filed and served on November 10, 1939; that three days afterwards appellant made application for a postponement of the time of trial for at least six weeks because of the sickness of his counsel, Mr. McNeny, and the necessity of time to prepare for trial; that the application for continuance was denied and the case set for trial commencing November 15, 1939; that appellant was deprived of his constitutional right to a fair trial, his

right to counsel, his right to effective assistance of competent counsel, and time and opportunity for preparation for trial as required by due process of, and equality before, the law guaranteed by the Constitution of the United States and the laws of Nebraska; that when appellant was put on trial, less than three weeks after the charge was first made against him, under the circumstances, he had no lawyer in "any practical sense"; that Miss Nelson was not qualified, experienced, or competent, and did nothing to defend him; that (L. A.) Sprague was a son-in-law of Mr. McNeny, had been busy with his sickness and death, did not know appellant, was unprepared for trial, had no consultation with appellant, was not acquainted with the case, did not know the people involved or the witnesses, and elected to defend on the claim of insanity of appellant when he was not insane, instead of self-defense; that William A. Stewart, Jr., appeared at the trial, said he was engaged by Sprague, had not been paid as promised, and that was about all the connection he had with the case; that appellant was held in jail without bail, and was not responsible for the tangle of circumstances, but he was put on trial for a capital offense less than three weeks after the charge was filed, and deprived of any preparation or effective representation; and that he paid an attorney the expense of an appeal, thought it had been had and denied until 1945 when he learned nothing was done to obtain a review of his case by this court.

A transcript of the proceedings had in the prosecution of appellant, attached to and made a part of the petition, shows the charge was filed against him in the county court on October 25, 1939, and after conferring with one of his attorneys he appeared the next day in that court, pleaded not guilty, and preliminary hearing was set for six days later. Two days before that date he appeared by his attorneys, McNeny & Sprague, and Shafer & Nelson, and obtained a postponement thereof, until November 9, 1939, when hearing was had and he was

bound over to the district court for trial. Information was filed and served on the 10th of November 1939, and three days thereafter appellant by motion supported by affidavits sought a postponement of the trial of the case for at least six weeks on the ground that his counsel, Bernard McNeny, who had been employed to defend him, had taken ill and would be unable to appear for that period, and preparation for the defense of the case would require the time requested. A postponement was denied, the case set for trial on November 15, 1939, commenced on that date, concluded six days later, resulting in a verdict of guilty of murder in the first degree, and a judgment and sentence that appellant be confined in the Nebraska State Penitentiary for the period of his natural life. The confinement from which he seeks release is by virtue of that sentence.

Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment imposing a sentence for a crime, and because of this, facts, as distinguished from legal conclusions, are required to be alleged by the petitioner to negative the legal force and effect of the judicial record, including the presumptions of validity and regularity which the terms thereof invoke. Hulbert v. Fenton, 115 Neb. 818, 215 N. W. 104; Alexander v. O'Grady, *supra*. Persons convicted of crime for which they stand committed are excepted from those entitled to the benefit of a statute of this state on the subject of habeas corpus. § 29-2801, R. S. 1943. The available issue ordinarily upon an application for a writ of habeas corpus by a prisoner detained by virtue of a verdict, sentence, and commitment in a criminal action is the validity thereof. It has often been affirmed by this court that to obtain release from a sentence by habeas corpus, it must be void, and that it may not be availed of to discharge a prisoner from a sentence of penal servitude, if the court imposing the sentence had jurisdiction of the offense and of the person of the defendant, and the sentence was within the

power of the court. Iron Bear v. Jones, 149 Neb. 651, 32 N. W. 2d 125; In re Application of Dunn, *supra;* Jackson v. Olson, *supra;* Alexander v. O'Grady, *supra.* The record made a part of the petition of appellant clearly and conclusively shows that the court which imposed the sentence on appellant had jurisdiction of the offense and of his person, that the sentence was fixed by the verdict of the jury, and was within the power of the court. § 28-401, R. S. 1943. The petition herein tendered no issue as to any of these. Implicit in his petition are the elements which make unavailable the remedy he seeks.

The appellant appeared with his counsel at the time set for trial; did not renew or interpose any objection or any additional reason for not then proceeding with the trial; had and accepted the services of one or more (had a total of five) attorneys at each part of the proceedings from the time of his first appearance in county court until his conviction and sentence; and made no objection or complaint to the court as to his representation or the action or omission of his counsel. The attorneys for appellant were not furnished by the State, and it was not responsible for their selection, the quality of their service, or any error in their judgment. The State has no power or duty to assure a defendant charged with a crime that he has the ablest counsel, or to guarantee him that his counsel will please him or obtain a favorable result. Appellant did not ask the State to provide him legal counsel, and he can obtain no relief now on the claim that he was not properly defended. Alexander v. O'Grady, *supra;* Jackson v. Olson, *supra.*

Appellant asserts that he did not have a lawful preliminary hearing, because thereof the law prohibited the filing of an information charging him with a crime in the district court, and the court was without jurisdiction to try and sentence him. § 29-1607, R. S. 1943. The claimed defect in the preliminary examination is the alleged disqualification of E. A. Cook, Jr., acting

county judge who presided, because of his relationship to his brother and partner, W. M. Cook, who assisted in the prosecution of the case in the district court. The record shows the first connection of W. M. Cook with the case was four days after the preliminary examination was had. No objection was made by the defendant that he had not had a lawful preliminary hearing before he made his plea of not guilty in the district court, and any failure in this regard was waived. The omission to accord a preliminary examination to a person charged with crime is a mere defect, is not jurisdictional, and may be and is waived if not complained of before making a plea of not guilty. It is too late after verdict to raise the objection. Wilson v. State, 150 Neb. 436, 34 N. W. 2d 880; Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666.

Appellant complains vigorously and bitterly of the fact that he was detained for about three weeks in the isolation room of the penitentiary hospital and transferred from there against his will and without cause to and kept in the Hastings State Hospital for the insane for about three months and returned to the penitentiary. This contributes nothing to the right to have the remedy of habeas corpus. That remedy is not available, in the absence of statute authorizing it, for the purpose of inquiring into the legality of a particular form, manner, or place of confinement executively or administratively imposed upon a prisoner lawfully in custody in an authorized place under a valid sentence and commitment. The placing of a convict according to his classification, as sick or well, dangerous or peaceful, sane or insane, is a detail of prison management with which the court may not interfere. In re Application of Dunn, *supra*.

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

AFFIRMED.

HERBERT KUNKEL, APPELLANT, v. CHARLES M. COHAGEN, DOING BUSINESS UNDER THE TRADE NAME OF COHAGEN TRANSFER AND STORAGE COMPANY, APPELLEE.
39 N. W. 2d 609

Filed November 18, 1949. No. 32642.

1. **Appeal and Error.** Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness.
2. ———. An assignment of error directed to the rejection of offered testimony may be disregarded on appeal, if the places in the record where the offer of proof and the challenged ruling may be found are not pointed out in appellant's brief.
3. **Damages.** The reasonable value of the use of machinery for commercial purposes is the reasonable net rental value upon the market at the place in question of the machine involved or machinery of like capacity and performance, the lessee bearing all such expenses as he would have to bear in the operation of his own machine.
4. ———. Where the evidence shows that a similar machine could not be rented in the market, or that a rental value cannot be established, then the owner of the machine may rely on proof of loss of profits to establish the reasonable value of the loss of use.
5. **Appeal and Error.** This court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong.

APPEAL from the district court for Lincoln County: J. LEONARD TEWELL, JUDGE. *Affirmed.*

S. S. Diedrichs, for appellant.

Crosby & Crosby, and *Baskins & Baskins,* for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought the recovery of damages resulting from an accident to a combine while being transported by defendant. Issues were made and trial had. Plaintiff recovered judgment. Plaintiff appeals for

reasons hereinafter stated. We affirm the judgment of the trial court.

Plaintiff purchased the combine in 1946, and at that time became its third owner. It had been extensively used prior to its purchase. Plaintiff used it for harvesting for hire the season of 1946 and the beginning of the 1947 season. He engaged the defendant to transport the machine from Kansas to Lincoln County for a charge of $60, which was paid. While being so transported on either July 30 or July 31, 1947, an accident occurred causing substantial damage to the combine. After the accident the machine was repaired and on August 17, plaintiff started with it to North Dakota where it was sold on August 20, 1947.

Plaintiff sued for damages, alleging that the fair market value of the combine prior to the accident was $5,000, and that as a result of the damages it was absolutely worthless, and sought a recovery of $5,000. Plaintiff further alleged that at the time of the accident he had a contract to cut wheat for a period of 26 days and that the net profits from the operation would have been $200 per day, and sued for loss of earnings in the sum of $5,200, or a total of $10,200. The defendant moved to strike the allegations of the petition with reference to loss of earnings on the ground that they did not plead any proper measure of damages. The trial court overruled the motion. So far as material here, the answer was a general denial.

The trial court instructed the jury that if it found for the plaintiff it should render judgment for the difference between the reasonable market value of the combine immediately before and immediately after the accident. The court told the jury it could consider among other things the time and expense it would reasonably take to repair the combine; that evidence had been introduced relative to the price per acre being paid for the harvest of grain by a combine at the time of such injury, and as to profits that reasonably could have been made by the

use of such combine for the harvest of grain; and that the jury could not compute the amount of the plaintiff's recovery from such profits, either partially or wholly, but it could take into consideration what profits the evidence showed could reasonably have been made from the use of such combine in making a determination of the reasonable market value of said combine, both before and after its injury.

The jury returned a verdict for $1,218, which included, under the court's instructions, interest at six percent for one year and four months.

Plaintiff's first contention here is that the trial court erred in refusing to allow the admission of evidence of anticipated profits.

Rules 8 a 2 (6) and (7) of this court require a statement of facts with appropriate reference to the record. Plaintiff makes a general assignment of error in refusing the admission of evidence without specific reference to the record. By way of argument plaintiff makes the same general charge referring by citation to only one specific refusal to admit evidence on an offer of proof. As to that the record shows that almost at the close of his case-in-chief plaintiff, as his own witness, offered to prove that at the time he engaged defendant to transport the combine he had contracted with one Thompson for cutting one-half of 500 acres of grain at a price of $8 per acre; that he was able to cut some 25 acres of grain per day; that his expenses would be about $10 a day; and that he was prevented from realizing profits in the amount of $1,900 to $2,000 on the contract by reason of the damage to the machine. The trial court denied the admission of the evidence offered. The record shows that prior thereto, over general objections and objections that it was not the proper measure of damages, plaintiff had testified to all the facts contained in the offer, excluding the computation of profits and that Thompson, over general objections as to competency, had testified in corroboration. The record further shows that the

offer was made because plaintiff seemed in doubt as to the prior admission of the evidence. Under these circumstances there was no prejudicial error in the trial court's ruling. The rule is: "Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness." Gugelman v. Kansas City Life Ins. Co., 137 Neb. 411, 289 N. W. 842.

The rule is: "An assignment of error directed to the rejection of offered testimony may be disregarded on appeal, if the places in the record where the offer of proof and the challenged ruling may be found are not pointed out in appellant's brief." Whitney v. Broeder, 94 Neb. 305, 143 N. W. 228. We are not required to search the record to find the other rejections of evidence about which plaintiff complains. Parenthetically it may be pointed out that the record shows that about the time the Thompson cutting was completed, plaintiff took his combine to North Dakota and sold it and was thereafter unable to profit from its use, and that other claimed profits were speculative, remote, and contingent.

Plaintiff's next contention is that the trial court erred in not submitting to the jury his right to recover for loss of profits separate and apart from his right to recover the difference in the value of the combine immediately before and after the injury.

Plaintiff relies upon the rule that a party may recover for gains prevented as well as for losses sustained when such damages not only are certain but are the natural and probable result of the wrong suffered. Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842.

We are not here concerned with the applicability of that rule but rather with the question as to whether or not plaintiff has produced evidence that entitles him to the benefit of that rule in any event.

We are dealing here with a situation where there was damage to and not the total destruction of a machine

used for commercial purposes. The reasonable value of the use of machinery for commercial purposes is the reasonable net rental value upon the market at the place in question of the machine involved or machinery of like capacity and performance, the lessee bearing all such expenses as he would have to bear in the operation of his own machine. Southern Ry. in Kentucky v. Kentucky Grocery Co., 166 Ky. 94, 178 S. W. 1162; A. Mortellaro & Co. v. Atlantic Coast Line R. R. Co., 91 Fla. 230, 107 So. 528; Conley v. Kansas City Rys. Co. (Mo. App.), 259 S. W. 153; Webb-North Motor Co. v. Ross (Tex. Civ. App.), 42 S. W. 2d 1086; Jellum v. Grays Harbor Fuel Co., 160 Wash. 585, 295 P. 939; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937; Hanson v. Hall, 202 Minn. 381, 279 N. W. 227. Such evidence more accurately and fairly shows the value of the use than would loss of profits during the period reasonably required to repair the damaged machine. Knaus Truck Lines v. Commercial Freight Lines, 238 Iowa 1356, 29 N. W. 2d 204.

Where the evidence shows that a similar machine could not be rented in the market, or that a rental value cannot be established, then the owner of the machine may rely on proof of loss of profits to establish the reasonable value of the loss of use. Hanson v. Hall, *supra;* The Conqueror, *supra;* Conley v. Kansas City Rys. Co., *supra;* Francischini v. McMullen, 6 N. J. Misc. 736, 142 A. 651; Trout Auto Livery Co. v. People's Gas L. & C. Co., 168 Ill. App. 56; Cincinnati Traction Co. v. Feldkamp, 19 Ohio App. 421; Sellari v. Palermo, 188 Misc. 1057, 70 N. Y. S. 2d 554; Jellum v. Grays Harbor Fuel Co., *supra;* Wilson & Co. v. Sims, 250 Ala. 414, 34 S. 2d 689.

Here there is a complete absence of any evidence as to whether or not combines could be rented, or their rental value, or any showing that plaintiff undertook to rent. It necessarily follows that plaintiff has not established the right of recovery which he seeks.

Finally plaintiff claims that the jury's verdict was

grossly inadequate and the result of a compromise. Plaintiff's evidence shows that he had bought the combine in a competitive sellers' market for $3,500 in 1946, and in addition paid a fee of $100 to a third party. One of plaintiff's expert witnesses fixed the reasonable market value of the combine just before the accident at $3,500 to $5,000. The extent of the damage to the combine is in serious dispute. Plaintiff testified that the machine was in perfect shape before the accident, although later he admitted that the engine was in need of immediate repair, which seems to have been made thereafter at a cost of $50 to $60. It is undisputed by his evidence that plaintiff spent not to exceed $98 in repairing parts damaged in the accident. This does not include the value of his own labor which is not shown. Although plaintiff testified that after the accident the combine was worth absolutely nothing but the value of the engine and the "junk price," yet, after having repaired it, plaintiff sold it for $2,500 in a competitive sellers' market. The purchaser testified that he was well satisfied with the performance of the combine during an extended period of use.

Although there was other evidence as to a greater value before and lesser value after the accident, the fact remains that the jury could have found from this evidence that the difference in the market value before and after the accident was $1,000. If the jury added to that figure, as the instruction permitted, the greatest amount testified to for repairs, the total would have been $1,098. Adding $30 for some undisclosed reason to that figure, a total of $1,128 is had. Computing interest as the court instructed brings the total to $1,218.24, or 24¢ more than the jury's verdict.

The rule is: "This court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong." Keyser v. Allen, 149 Neb. 449, 31 N. W. 2d 309.

Clearly the verdict of the jury is supported by the evidence and is not clearly wrong. Plaintiff cannot complain that the jury awarded greater damages than the evidence required. The verdict will not be disturbed.

The judgment of the trial court is affirmed.

AFFIRMED.

LEROY D. TRUMBLEY, APPELLEE, V. BYRON K. MOORE ET AL., APPELLANTS.
39 N. W. 2d 613

Filed November 18, 1949. No. 32639.

1. **Negligence.** 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.
2. **Negligence: Automobiles.** Where a pedestrian crossing a street between intersections in violation of a city ordinance looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he can avoid injury to himself, it usually presents a case for a jury.
3. ———: ———. However, unless some reasonable excuse is shown which is consistent with the facts established, one who is obligated to keep a lookout for vehicles or persons favored over him is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery.
4. **Negligence.** A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a situation involves questions of comparative negligence and not those of the last clear chance doctrine.
5. ———. A person with impaired vision is required to use greater care for his own safety than one not so afflicted in order to attain the standard of care which the law requires.

APPEAL from the district court for Lancaster County: HARRY ANKENY, JUDGE. *Reversed and dismissed.*

Davis, Stubbs & Healey, and *Cline, Williams & Wright,* for appellants.

Lloyd E. Chapman, for appellee.

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

CARTER, J.

This is an action for the recovery of damages for personal injuries resulting to plaintiff when he was struck by an automobile driven by the defendant Franklin C. Hamer. The jury returned a verdict for the plaintiff against both defendants Hamer and Moore, and each defendant appeals.

The plaintiff was walking across Sixteenth Street between O and N Streets in Lincoln at the time he was struck by the Hamer car. The plaintiff was not using a pedestrian's crosswalk, but was jaywalking across Sixteenth Street from a point just south of the alley on the west side of the street in a diagonal direction to the southeast.

The evidence shows that the traveled portion of the street was 50 feet in width; that it was paved, curbed, and guttered; and that the center of the street was marked with a center line. Plaintiff says that he started across Sixteenth Street midway in the block at a pace described by him as an ordinary gait. He testifies that he looked both to the north and to the south three or four times before he reached the point where the accident occurred and that he did not see any car approaching from the north. Plaintiff testifies to a congenital defect of vision which materially reduced the efficiency of his left eye. Plaintiff testifies that as he arrived in the center of the street he was struck from the north by the Hamer car and knocked to the pavement, thereby suffering the injuries for which suit is brought. The record shows that at the time of the accident the left wheels of the Hamer car were approximately one foot to the east of the center line of the street. The evidence shows that the plaintiff was struck by the right fender and headlight of the Hamer car. Plaintiff was

lying on the west side of the center line after the accident. Plaintiff testifies that he was on the east side of the center line at the time he was struck. All eye witnesses and the physical facts demonstrate, however, that he was west of the center line of the street when he was hit, although the left wheels of the Hamer car were east of the center line.

It is the contention of the plaintiff that the defendant Byron K. Moore was jointly liable for the injuries sustained by the plaintiff. In this respect the evidence shows that Moore was engaged in the business of selling automotive parts. His place of business was on the west side of Sixteenth Street south of the alley between O and N Streets. In front of his place of business and immediately south of the alley there was a curb cut and driveway into his place of business. It was the custom of Moore to drive his automobile into this drive and park his car inside the curb line of Sixteenth Street.

On the date of the accident and shortly before its occurrence Moore backed his car into the street and headed north on the left side of the street, intending to cross to the east side thereof as soon as traffic permitted. Defendant Hamer testifies that as Moore came north, he, Hamer, was obliged to turn across the center line to avoid him and this accounts for having the left wheels of his car over the center line at the time of the collision. The evidence establishes that the Hamer car traveled not to exceed four feet after the accident. There is no other evidence of speed. There is no evidence that Hamer did not keep a proper lookout or that he did not have his car under control other than the fact he was one foot over the center line of the street.

The point of the accident was about 15 feet south of the south side of the alley. Hamer testifies that he had driven about ten feet with his left wheels to the east of the center line at the time of the accident. He testifies also that he was watching a bus approaching from the south which was traveling near the center line of

the street. Hamer testifies that he did not sound his horn for the reason that plaintiff stepped in front of his car so suddenly that he had no opportunity to do so.

Moore testifies that as he turned his car north, he was traveling on the left-hand side of the street with the intention of crossing to the east side as soon as traffic permitted. He proceeded 30 to 40 feet north of the alley when he heard the collision. He then backed his car into his driveway, a distance of 55 or 60 feet.

Plaintiff testifies that as he reached the west curb of Sixteenth Street the Moore car was a little past the south edge of the alley headed north. He says he looked north several times before he reached the center of the street and did not see the Hamer car. When he reached the center of the street he again looked north and saw the Moore car approximately half way between the alley and O Street. He saw no car between himself and the Moore car. The evidence conclusively establishes that the Hamer car was south of the Moore car when plaintiff last looked to the north. The Hamer car was traveling at a reasonable rate of speed immediately prior to the accident, otherwise it could not have been stopped within a distance of four feet. There is no evidence in the record that Hamer was driving at an unreasonable rate of speed. It was utterly impossible for the Hamer car to travel from the point where plaintiff last saw the Moore car and strike the plaintiff in the manner testified to by him. The evidence shows conclusively that the Hamer car was south of the Moore car at one or more times that plaintiff looked to the north.

The pavement was dry and visibility was good. No conditions existed which could possibly excuse plaintiff for failing to see the Hamer car. The evidence conclusively establishes that plaintiff did not look to the north or that he failed to see the Hamer car which was in plain sight.

Certain sections of ordinance No. 3787 of the city of

Lincoln were offered in evidence. Section 720 of such ordinance fixes the maximum speed of travel in the congested district at 15 miles an hour; and section 106 places the location of the accident within the congested district. Section 722 provides that no vehicle shall be driven, operated, parked, or stopped in a careless, reckless, or negligent manner as to endanger life, limb, person, or property. Section 1401 declares that it shall be unlawful for any pedestrian to cross any street at a place other than a crosswalk, or to cross any street intersection diagonally. In addition to the foregoing sections of the ordinance which were offered in evidence, section 39-751, R. S. 1943, provides in part that every pedestrian crossing a highway within a business or residential district at any point other than a pedestrian crossing, crosswalk, or intersection shall yield the right-of-way to vehicles upon the highway.

This court has held many times and is committed to the rule that the violation of a statute or ordinance regulating traffic does not constitute negligence as a matter of law, but is evidence of negligence to be considered by the jury in connection with all the circumstances shown by the evidence. Consequently, the mere fact that a pedestrian walks across a street between intersections contrary to ordinance or statute is not of itself negligence sufficient to defeat a recovery. But one who does so is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64. While one who crosses a street between intersections in direct violation of a statute or ordinance is guilty of negligence in so doing, it does not necessarily follow that it is such negligence as would bar a recovery as a matter of law because it might still be for the jury to determine the extent that his negligence contributed to his injury or whether the driver of the car should have seen him in time to avoid the accident. But one

who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. Where such person crosses the street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see and proceeds irrespective of that fact, the situation usually presents a question for the court. Where he looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented. But the foregoing rule does not mean that a mere statement by the injured person that he looked in the direction from which he was struck is sufficient of itself to insure a consideration of his case by a jury. It must be sufficiently consistent with the circumstances and facts shown by the evidence to present a question of fact for the jury to decide.

It is elementary that one who attempts to cross a street between intersections without looking is guilty of such negligence as would 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. The decisions of this court have consistently held to this rule. Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36; Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501.

Under the evidence produced in the case before us, plaintiff asserts that he looked to the north several times before reaching the center of the street. There is no evidence of speed on the part of the Hamer car, in fact excessive speed is negatived by the physical facts and the uncontroverted evidence. There is no evidence that the Hamer car was not under control in the sense that

the law requires. It was stopped within four feet after plaintiff was struck, a fact indicating that the driver was alert and acted in a prompt manner. See De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235. It is true that the left wheels of the Hamer car were over the center line, but there is nothing to indicate that this was the proximate cause of plaintiff's injury. The proximate cause of the injury was the attempt of plaintiff to cross the street between intersections without looking, or if he did look, in not seeing that which was in plain sight. The pavement was dry and visibility was good. The evidence reveals nothing which would excuse plaintiff's failure to see the Hamer car and respect the right of way that it had. A right-of-way means nothing unless persons obliged to respect it are required to see an approaching favored car that is in plain sight. Plaintiff was negligent in attempting to cross the street between intersections as he did. Negligence on the part of the defendant Hamer is not shown by this record. Under such circumstances plaintiff's own negligence is the proximate cause of the accident and there is nothing for a jury to determine. The trial court should have directed a verdict for the defendants.

It is urged, however, that the doctrine of the last clear chance is applicable. We think not. The negligence of the plaintiff was continuous and active to the very time of the accident. The last clear chance doctrine has no application under such circumstances. Whitehouse v. Thompson, 150 Neb. 370, 34 N. W. 2d 385; Carter v. Zdan, *ante* p. 185, 36 N. W. 2d 781.

Plaintiff offers as an excuse for his not seeing the Hamer car the fact that he had defective vision. Such a disability places upon him the necessity for exercising greater care. The rule is that a person afflicted with a physical disability is required to exercise greater care for his own safety than one not disabled, in order to attain the standard of the ordinary prudent man which the law has established for everyone. Reynolds v.

Omaha & C. B. St. Ry. Co., 108 Neb. 26, 187 N. W. 92.

We conclude that the trial court erred in submitting the case to the jury. Plaintiff's own negligence, under the facts shown, precludes a recovery on his part as a matter of law. The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

GERALD ELLIOTT, APPELLEE, V. SWIFT & COMPANY, A CORPORATION, APPELLANT.
39 N. W. 2d 617

Filed November 18, 1949. No. 32638.

1. **Negligence.** In negligence cases, the burden of proof is upon plaintiff to show by a preponderance of the evidence that an accident was proximately caused by some negligent act charged, directly attributable to defendant, and to support a verdict, negligence must be so established, either by direct proof or by physical facts or circumstances, of sufficient weight from which a reasonable inference of the same may arise.
2. ———. If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except insofar as the same may appear in evidence adduced for plaintiff.
3. **Automobiles: Negligence.** 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 a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored 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.
4. **Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for

the trial court to instruct the jury to return a verdict for defendant.

5. **Witnesses.** An expert or other witness with such knowledge and experience as to qualify him to form a reasonably intelligent judgment may state his opinion as to the amount and extent of damages sustained, where he details the elements of damage or the items on which the estimate thereof is based.
6. **Witnesses: Appeal and Error.** Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse.
7. **Evidence.** It is not error to refuse to admit into evidence a deposition in its entirety when the witness giving the testimony incorporated therein is present in court and is extensively cross-examined on the material, competent, and relevant questions and answers contained in the deposition and admits that he testified as the deposition discloses he did, and where other subject matter contained in the deposition is in the record.

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

Dryden, Jensen & Dier, for appellant.

Blackledge & Sidner, for appellee.

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

MESSMORE, J.

This is an action at law to recover for personal injuries and property damage resulting from a collision between the plaintiff's automobile traveling east and defendant's truck traveling north at an intersection of a graveled road and a dirt road located in the southeast corner of Section 22, Divide Township, Buffalo County, Nebraska. Upon trial to a jury plaintiff was awarded a verdict of $1,267.35, and the jury found against the defendant on its counterclaim. Judgment was rendered on the verdict. Motion for new trial and motion for judgment notwithstanding the verdict were overruled. Defendant appeals:

For convenience the parties will be referred to as originally designated in the district court.

The theory of the plaintiff's case, as shown by his petition, charged defendant's driver with negligence in that he operated the truck at a high and excessive rate of speed, failed to keep a proper lookout, failed to yield the right-of-way to plaintiff's vehicle at the intersection after the plaintiff had entered first therein and was approximately halfway across the same, and failed to have the defendant's truck under proper control to prevent it from running into and against the plaintiff's automobile.

The defendant, for answer, denied generally the allegations of the plaintiff's petition and affirmatively alleged that the plaintiff was guilty of contributory negligence which proximately resulted in the damage to the plaintiff as alleged in his petition. By cross-petition the defendant charged the plaintiff with negligence in that the plaintiff drove his automobile at a high and excessive rate of speed greater than was reasonable and prudent under the circumstances and conditions at the time, that the plaintiff failed to maintain a proper lookout, failed to yield the right-of-way at the intersection to the defendant, and failed to maintain proper control of his car to prevent the same from running into and against the defendant's truck.

The plaintiff's reply to the defendant's answer and counterclaim was in effect a general denial.

The record discloses that the plaintiff was the owner of a 1941 Chevrolet coupé. On the morning of November 6, 1948, he was driving the same en route to his brother's home. The car was in good mechanical condition. The day was clear and the highway dry. He proceeded east on a graveled highway designated as the "east-and-west" road, which is not a marked highway, at a rate of speed of from 30 to 35 miles an hour. He had driven over this road on many occasions. He was familiar with what is referred to as the "north-and-south" dirt road and with the intersection where the two roads cross. There were no stop signs at the intersection in question. In ap-

proaching the intersection from the west there is a down grade about 30 feet before the intersection is reached. The highway west of this point is level for about half a mile. When he approached the intersection and was about 75 feet west of it, he looked first to the right or south, then to the left or north. He saw no vehicle approaching from the south on the north-and-south road. About 10 to 15 rods south of the intersection there was a down grade referred to as a "swale" 5 or 6 feet deep, which has a tendency to conceal a car which may be at that point, to some extent. Failing to see a vehicle approaching from the south or north, he proceeded into the intersection and looked both to the north and south and saw no vehicle approaching from the south. He slowed his speed a little. When he had proceeded halfway into the intersection with the back part of his car just over the center part of the intersection, he looked through a small window on the side of his car and at that time saw the truck ready to collide with his automobile. He did not know it was approaching until that instant. It was toward the east side of the intersection as it was approaching north.

The front part of the truck struck the plaintiff's automobile just ahead of the back right fender. The car was in the southeast part of the intersection at the time. The sun was in the southeast and at an angle which interfered with his vision to the south to some extent. As he proceeded into the intersection he could see through the intersection to the east without difficulty, and testified that he was in the intersection first.

The defendant's driver testified that he was employed by the defendant and used one of its trucks, a 1946 ton-and-one-half Chevrolet truck, for the purpose of picking up produce, and was doing so on the morning the accident occurred. He had driven over the north-and-south road and was familiar with the intersection. He approached the intersection from the south at a speed of about 30 miles an hour. When he was 150 yards south of the

intersection and south of the swale, he looked to the west and saw no car approaching the intersection from that direction. He then looked to the east, turned back, and the collision occurred. The car which came from the west was right in front of him. He was about in the center of the intersection, driving on the east side. He further testified that there was no place on the north-and-south road where a car would be completely concealed from a car coming from the west, unless it would be as indicated previously; and that his truck measured 11 feet from the ground to the top. After striking the plaintiff's automobile which went ahead of the truck into the northeast corner of the intersection, the truck tipped over on its right side, turned around and faced south in the northeast corner of the intersection. The Chevrolet car, after the accident, was close to and east of the truck, also facing south. It did not turn over.

The accident caused the plaintiff's head to go through the windshield, and when his car came to a halt the door was pushed out and he fell to the ground on his feet. He described various cuts on his head and face.

The plaintiff testified the damage to his car consisted of the following: The right door was caved in a foot or a foot and a half into the car; the front seat was disconnected from the frame, broken off, and pushed out through the door; the back fender on the right side was smashed in; the gears and the transmission were damaged; the right back wheel was out of line with the right front wheel; and the windshield was broken and the glass shattered.

The damage to the truck was mostly on the front end. The frame was broken on both sides where the spring shackles fasten on, and the headlights were broken.

A witness who lived within 400 or 500 feet from the scene of the accident testified that he did not see the accident but heard the crash, and arrived at that point 30 minutes after the accident happened. He made some inspection of the intersection and observed tracks or skid

marks. Referring to the place in the intersection where the accident occurred, he testified it would be east of the center of the intersection and, with relation to the east-and-west line, on the south side thereof. He further testified that approaching the intersection from the west to the east at a distance of 100 feet there is a little incline and west of that incline it is practically level for half a mile. From the south approaching north to the intersection there is a little hill, and approximately 20 rods south of the intersection there is a swale which was about 6 to 10 feet lower than the road in the intersection. He observed the position of the vehicles in the northeast corner of the intersection and the damage to each, and testified with reference thereto substantially as the other witnesses heretofore set out.

A deputy sheriff testified that he arrived at the scene of the accident at 8 a. m., very shortly after it occurred, and saw the position of the automobile and truck after the accident. Neither vehicle had been moved. He described the location of them as the other witnesses described it, and testified that from his observation there was nothing to obstruct the vision of a driver coming from the south looking to the west, nor any obstruction to the vision of a driver coming from the west proceeding east. He testified that the plaintiff told him he did not see the truck approaching from the south, and that the sun was in his eyes as he came over the little incline in approaching the intersection. There was debris and glass located at the center of the intersection. He observed slide marks for a distance of 40 feet, starting at the south side of the intersection to where the truck came to a stop in the northeast corner thereof. These marks, with relation to the north-and-south road, were in the center of the intersection from all directions, and they went in a straight line toward the northeast corner. As the truck slid in a northeasterly direction it turned around and came to a stop facing south.

The defendant's first assignment of error is that the

plaintiff was guilty of negligence more than slight and sufficient to bar his recovery as a matter of law, and that the trial court erred in overruling a motion for directed verdict at the close of the plaintiff's case and at the close of all of the evidence.

Defendant argues that its driver, in approaching the intersection from the right, had the right-of-way; that there is no evidence that the plaintiff entered the intersection first, and none from which inferences can be drawn; and that the plaintiff was negligent in entering the intersection with knowledge that a truck was approaching and not watching for it.

The rules in this state are that 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. See, Gorman v. Dalgas, *ante* p. 1, 36 N. W. 2d 561; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

Section 39-728, 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.*" (Emphasis supplied.)

That the defendant's driver was on the right of the plaintiff's car when each was approaching the intersection is not in dispute. However, in view of the rules heretofore set out and the latter sentence in the right-

of-way statute, we cannot under the evidence before us find as a matter of law that the defendant had the right-of-way as it would have us do. Since the evidence warranted a reasonable inference that the plaintiff entered the intersection first, he had the right-of-way over the defendant, and whether the defendant negligently violated that right was a question for the jury to decide under appropriate instructions by the trial court. See, Showers v. Jones Co., 126 Neb. 604, 253 N. W. 902; Meyer v. Platte Valley Construction Co., 147 Neb. 860, 25 N. W. 2d 412.

The law is well established in this jurisdiction that, where the evidence is such that reasonable minds might draw different conclusions therefrom, the questions of negligence and contributory negligence are for the jury. See, Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175; Meyer v. Platte Valley Construction Co., *supra*.

The defendant further argues that from the evidence it would appear that when the sun was in the plaintiff's eyes he should have slowed down or stopped, or looked in a position where by looking he could see, thereby doing, under the circumstances, what a reasonable and prudent man would have done, and by failing to do so, such negligence on plaintiff's part bars his recovery.

In this connection defendant cites Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446, and other cases to the effect that the existence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility, are not to be deemed intervening causes, but rather conditions which impose upon the drivers of automobiles the duty to protect the public by the exercise of care commensurate with such surrounding circumstances.

We conclude that, under the facts as heretofore set out, the question was for the jury as to whether or not the plaintiff continued to exercise the care of a reasonable

and prudent person under similar circumstances.

The defendant contends the trial court erred in permitting the plaintiff to testify as to the value of repairs and the cost of the same.

The record discloses that after the accident the plaintiff's automobile was taken to a garageman. An estimate was given, and destroyed. The garageman was unable to testify due to illness. The plaintiff testified that he had driven and owned automobiles since he was 18 years of age, or for a period of 12 years, and that at different times he had purchased repairs for automobiles and had a general knowledge as to the approximate cost of parts and repairs. After the accident he personally examined his automobile, and testified in detail as to the damage. He was asked as to the fair and reasonable value of replacement and restoration as a result of the damage, and gave as his opinion that it would cost $600 to repair his car. He testified that the fair and reasonable value of his automobile before the accident was $1,300.

The defendant moved to strike all of the evidence of the plaintiff with reference to damage to his vehicle for the reason that no sufficient foundation was laid for the introduction thereof as to the values of repairs. This motion was overruled.

"An expert or other witness with such knowledge and experience as to qualify him to form a reasonably intelligent judgment may state his opinion as to the amount and extent of damages sustained, at least where he details the elements of damage or the items on which the estimate is based, the rule being that the best evidence of which the subject will admit is receivable, * * *." 32 C. J. S., Evidence, § 447, p. 77.

Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse. See 32 C. J. S., Evidence, § 458, p. 99.

In Folken v. Union P. R. R. Co., 122 Neb. 193, 239 N.

W. 831, the court held: "In an action for damages on account of injury to personal property, the owner thereof is qualified by reason of that relationship to give his estimate of its value." See, also, Cox v. Greenlease-Lied Motors, 134 Neb. 1, 277 N. W. 819.

The expert called by the defendant, who testified with reference to the repairs and the value thereof necessary to put the defendant's truck in the same condition as before the accident, also testified to certain items that would be required to repair the plaintiff's automobile, and gave an estimate of approximately $250.

The trial court did not commit prejudicial error in admitting the testimony of the plaintiff as to the value of repairs and the cost of the same.

The defendant assigns as error the ruling of the trial court in refusing to admit into evidence the deposition of the plaintiff taken prior to trial, arguing that the deposition was admissible for the purpose of impeachment and admissions against interest, and for the purpose of showing that the plaintiff understood the questions and answers at the time the deposition was taken.

The record discloses that upon an extensive cross-examination of the plaintiff each and every relevant and competent question and answer contained in the deposition was propounded to him, and he admitted the truth of the answers. The matters referred to as impeachment or admissions against interest are that the plaintiff did not slacken his speed as he approached the intersection, and that in the deposition he stated that the sun was bright, penetrated through the windshield and placed him in a position where he could not see to the south where the defendant's truck was approaching the highway. He admitted he made the answers. The other matters which might disclose some inconsistency in his testimony need not be related. Suffice it is to say that the jury had the benefit of all of this evidence given by the plaintiff in the deposition and his evidence at the trial. Under the circumstances this testimony went to

the credibility of this plaintiff, upon which the jury passed. To have received the deposition in evidence would have unnecessarily encumbered the record, and the court's refusal to admit it under the circumstances does not constitute prejudicial error.

For the reasons given herein, judgment on the verdict is affirmed.

AFFIRMED.

RICHARD LEE, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, APPELLEE.
39 N. W. 2d 574

Filed November 18, 1949. No. 32682.

1. **Waters: Drains.** It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty.
2. ———: ———. Upper riparian owner constructing and maintaining artificial structure affecting flow of waters for temporary purpose advantageous to it is not obligated by lapse of time to maintain structure and conditions produced thereby though incidentally benefiting lower owners.

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

Edward E. Carr, for appellant.

F. J. Schroeder, J. W. Weingarten, and *W. P. Loomis,* for appellee.

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

WENKE, J.

Richard Lee brought this action in the district court for Frontier County against the Chicago, Burlington & Quincy Railroad Company. The purpose of the action is to enjoin the defendant from changing the flow of water

in a drainage area where such drainage area is crossed by defendant's right-of-way. From a decree dismissing his petition and enjoining him from interfering in any way with the drainage of the water on or across defendant's right-of-way, the plaintiff has perfected this appeal.

The lands herein involved are a part of Section 5, Township 8 North, Range 29 West, of the 6th P. M., in Frontier County, Nebraska. Since 1936 these lands have been occupied by the appellant. In 1887 appellee built its track on a 100-foot right-of-way it had acquired across Section 5. This right-of-way crosses Section 5 in a southeasterly to northwesterly direction. After these lands were separated by this right-of-way a private roadway or crossing was provided across the track for the convenience of the occupants thereof. This was done in order that they might travel from one side of the track to the other. This private drive or roadway is located at a point where the right-of-way crosses a draw extending from a drainage area located to the southwest thereof. The area drained covers about 10 acres. The draw does not have a regular flow of water but only flows after a rain or from melting snows. As the water from this drainage area approaches the right-of-way from the southwest it is divided by higher ground and, as a result, flows to the right-of-way in separate draws. After the two draws reach the right-of-way, the higher ground in the center begins to disappear and, at a point just northeast of the rails, does so completely. At this point, before the right-of-way was constructed, the water from these two draws naturally converged and then flowed northeast onto appellant's land and into Medicine Creek, as the natural drainage of this whole area is to the northeast. Medicine Creek is a small stream that flows from the northwest to the southeast and, in Section 5, lies generally to the northeast of appellee's right-of-way.

For many years after it had constructed its right-of-way the only drainage appellee provided for the purpose

of carrying off the water coming down these two draws was a 24-inch tube located under the right-of-way just northwest of the private drive, which drive is located on the higher ground that separates the draws as they approach the track. It also appears that up until 1935 a culvert was maintained southwest of the track under the private drive. However, this culvert under the private drive was abandoned about 1935 and thereafter allowed to fill up so that the water coming down the southeast draw, which is southeast of the private drive, was carried into a cut ditch along the track and then emptied into an opening under the track in another draw some 600 to 700 feet to the southeast. The track to the southeast of this draw passes through a cut and in this cut are cut ditches along both sides of the track. These cut ditches are located at the edge of the roadway at the foot of the ballast. They were placed there for the purpose of carrying off all water falling on the track in order to keep the right-of-way and ballast dry. This is the ditch through which, after the culvert under the private drive was abandoned, the appellee flowed the water coming down the southeast draw.

In 1946 and 1947, because of excessive flood waters which the tube under the track was unable to carry, the track on both sides of the private drive became flooded. As a result thereof the appellee, in the fall of 1948, placed an additional 24-inch tube under the track near the other tube which is located just northwest of the private drive. It also placed a tube under the private drive at a point about 12 feet southwest of the track. This latter tube is intended to carry to the northwest the water coming down the southeast draw and cause it to flow under the track by means of the two tubes already referred to.

It is this construction, particularly the tube under the private drive, that appellant seeks to enjoin, and with which the trial court enjoined the appellant from interfering.

When appellee constructed its right-of-way the natural

flow of the water in both draws was from the southwest to the northeast and eventually into Medicine Creek. We said in this regard: "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty." Crummel v. Nemaha County, 118 Neb. 355, 224 N. W. 864. See, also, Leaders v. Sarpy County, 134 Neb. 817, 279 N. W. 809. This duty gives the party obligated thereby the right to do so.

It appears that before appellee's roadbed was built the water coming down the separate draws would converge before it reached the lands of the appellant that lie immediately northeast of appellee's right-of-way. However, appellee, by constructing a culvert under the private drive and carrying the water coming down the southeast draw to the northwest on the southwest side of the track, will divert this water on its right-of-way by joining it with the water coming down the northwest draw before instead of after it passes the track. It will then flow under the track and to the northeast onto the lands occupied by appellant. If the water had been permitted to flow naturally all of it would have joined in one body while on the lands now within the right-of-way and then flowed as one body onto the lands occupied by appellant northeast thereof. We do not see that it can be material to the appellant how the water that reaches his lands is handled by the appellee while flowing on its right-of-way as long as it is returned to a point of natural flow before it reaches his lands and enters thereon, provided it does so in the same manner as if its flow had in no way been interfered with. See Conn v. Chicago, B. & Q. R. R. Co., 88 Neb. 732, 130 N. W. 563, and Keifer v. Stanley, 111 Neb. 822, 198 N. W. 144.

Since the appellee not only had the duty but the right to provide for the passage of this water through its right-of-way the only question remaining is, are the facts and circumstances such that the appellant obtained a pre-

scriptive right to require appellee to continue to flow the water coming down the southeast draw into its cut ditch and then along its track to a point some 600 to 700 feet to the southeast and from there into an opening under its right-of-way? In this respect the facts show that since 1935, and up until the change was made in the fall of 1948 when the two tubes previously referred to were installed, the appellee has caused the water in the southeast draw to flow to the southeast along its track in its cut ditch located on the southwest side thereof and then to empty into another draw at a point in another drain area which has already been referred to.

The question involved under this situation is not new in this state and has been decided adversely to the appellant's contention in Mitchell Drainage District v. Farmers Irrigation District, 127 Neb. 484, 256 N. W. 15. Therein we said: "Upper riparian owner constructing and maintaining artificial structure affecting flow of waters for temporary purpose advantageous to it is not obligated by lapse of time to maintain structure and conditions produced thereby though incidentally benefiting lower owners." We therein quoted with approval from 3 Farnham, Waters and Water Rights, pp. 2402, 2403, as follows: "The fact that the exercise of the easement is of advantage to the owner of the servient estate will give him no right to insist on the exercise of the easement on the part of the dominant owner. An easement exists for the benefit of the dominant estate alone, and the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment." Therein we went on to say: "While the weight of recent authority supports the proposition that no reciprocal right accrues to the servient estate simply from adverse user for the prescriptive period, rights may acrue to the servient estate from estoppel, dedication or acquiescence." None of these are here evidenced. For like or similar holdings, see Hinkle v. Chicago, R. I. & P. Ry. Co., 208 Iowa 1366, 227 N. W. 419; Branch v. City of Altus,

195 Okl. 625, 159 P. 2d 1021; and Drainage District No. 2 v. City of Everett, 171 Wash. 471, 18 P. 2d 53, 88 A. L. R. 123.

Our conclusion is, under the facts and circumstances as evidenced by the record, that no right accrued to appellant by reason of the fact that appellee caused the waters coming down the southeast draw to flow southeast in its cut ditch along the track even though such diversion was allowed to continue for a period of more than ten years.

In view of our holding herein we find the decree entered by the trial court to be correct and the same is affirmed.

AFFIRMED.

IN RE APPLICATION OF E. C. IVERSON, STATE FIRE MARSHAL, FOR THE CONDEMNATION OF A BUILDING. E. C. IVERSON, STATE FIRE MARSHAL, APPELLEE, V. L. O. KEEDICK, APPELLANT.

39 N. W. 2d 797

Filed November 23, 1949. No. 32659.

1. **Equity.** In cases arising under section 81-513, R. S. 1943, where the State Fire Marshal by order directs the destruction, repair, or alteration of any building and issues are made as provided in section 81-517, R. S. 1943, the hearing, determination, and judgment based thereon had in the district court constitute a trial in equity.
2. **Appeal and Error: Equity.** On appeal to this court the review is by trial de novo as in equity.
3. **Buildings.** Where repairs or alterations can be made lawfully upon a building so as to eliminate the special dangers, arising from its location and condition, to surrounding property and to persons, such repairs or alterations should be ordered rather than ordering the destruction of the building.
4. ———. The State Fire Marshal has the right under the alternative provisions of section 81-513, R. S. 1943, to rest his order upon a requirement that the building be destroyed. However, when he does so, and the order is resisted, he has the

burden of proving that destruction is a necessity to meet the requirements of the statute.

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

Martin & Davis, for appellant.

James H. Anderson, Attorney General, *Homer L. Kyle,* and *L. M. Clinton,* for appellee.

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

SIMMONS, C. J.

In this action the State Fire Marshal sought the demolition of a frame building located in the city of Sidney. Objections were filed by the owner and trial had in the district court. The court decreed compliance with the order of the State Fire Marshal. The owner appeals. We reverse the judgment of the trial court.

For convenience the State Fire Marshal will be referred to herein as the plaintiff, and the owner of the property as the defendant.

Pursuant to the provisions of section 81-513, R. S. 1943, the plaintiff on April 17, 1948, issued to the defendant the following order: "By reason of age, Delapidated (sic) condition, rotted sills, rotted floors & joists, defective and inadequate exits. Because of these hazardous conditions, this building is especially susceptible to fire and endangering life, limb and adjoining property. This building is herewith condemned. This building must be taken down and premises cleaned up. If this order is not complied with within the time specified, complaint will be filed with the District Court and legal action taken to enforce this order."

A copy of the order was filed with the clerk of the district court. Thereafter plaintiff filed a petition alleging that he had issued and served the order for the condemnation and demolition of the building, and prayed

for a decree enforcing the order. Thereafter the defendant filed his objections pursuant to section 81-517, R. S. 1943, wherein he denied generally. He further answered that the order was indefinite and uncertain in its allegations and moved the court to require plaintiff to amend his order to set out what the term "dilapidated condition" included and what portions of the premises were in a dilapidated condition so as to render it susceptible to fire and dangerous to life, limb, and adjoining property, to set forth specifically in what respect the exits were defective and inadequate, and to amend the order so as to designate specifically what repairs or alterations could be made as an alternative to the demolition of the building. Defendant further alleged two previous orders requiring repairs and alterations which he alleged were made and approved by plaintiff, and pleaded an estoppel to order demolition without an opportunity to make additional repairs and alterations as were required.

The court overruled the motion and gave leave to file amended objections. Amended objections were made which, excepting for the motions, were substantially the same as before. Defendant prayed for dismissal and equitable relief.

Trial was had resulting in a finding by the court generally for the plaintiff, and "That the property involved is a two story building about 80' x 30'-50' on the North side of Lots 1, 2, 3 and 4 in Block 20, Original Town of Sidney and that certain other buildings located on said lots were not sought to be declared fire hazards by the State Fire Marshal; that said building is at least 75 years old; that by reason of rotted sills, plates and joists, the building has settled so that walls and floors are out of line; that all outside portions of the wall covered by wood show excessive decay and rotting; that the roof is out of repair; that by reason of the foregoing facts the building is found to be in a dilapidated condition and is especially liable to fire; that said building is within

the fire limits of the City of Sidney, located in a populous portion of the business district and is endangering life, limb and other buildings and property in the vicinity; that the order of the State Fire Marshall is reasonable and should be sustained." The court by decree sustained the order of the plaintiff and ordered defendant to comply therewith.

Defendant does not contend that the building in its present condition is not a fire hazard and is not dangerous to the life and limb of its occupants and surrounding buildings.

Defendant presents two contentions on appeal:

"(1) The court erred in refusing to require the State Fire Marshal to amend the order of condemnation by specifically designating what repairs or alterations could be made upon said premises so as to conform to the reasonable demands of the State Fire Marshal instead of and as an alternative for the demolishment of said premises.

"(2) The court erred in sustaining the order of condemnation providing for the demolishment of said building."

The plaintiff's position is that the order was reasonable and proper, and that in the absence of a showing that there has been an abuse of discretion, the court will not interfere with the order.

It is apparent that the trial court acted on the premise that it was reviewing a finding and determination of an administrative tribunal rather than making an independent determination of facts based on issues presented and applying the law to those issues and facts.

The question then is, what is the nature of the hearing in the district court under the statute here involved?

In State v. Keller, 108 Neb. 742, 189 N. W. 374, 25 A. L. R. 115, we had for determination the question of the constitutionality of a provision of the then existing statute dealing with this general subject matter. In the course of that opinion we said: "In order that the

decision of the fire marshal or a board exercising quasi-judicial authority should be conclusive on the question of whether or not a nuisance exists, a notice and a hearing to the party interested is essential. * * * If this were not true, all property would be at the uncontrolled will of temporary administrative authorities, exercising, not judicial powers, but purely executive powers. * * * The findings of an officer, based on his judgment that a thing constitutes a nuisance, cannot be conclusive when there has been no notice and hearing provided by statute, * * *." That opinion was filed June 12, 1922. In 1925, the Legislature repealed the then existing statutes and enacted the statute here involved. Laws 1925, ch. 183, p. 479.

Section 81-513, R. S. 1943, authorizes the State Fire Marshal to condemn and by order direct the destruction, repair, or alteration of any building or structure which by reason of age, dilapidated condition, defective chimneys, defective electric wiring, gas connections, heating apparatus, or other defect, is so situated as to endanger life or limb or other buildings or property in the vicinity.

Section 81-515, R. S. 1943, provides that the order shall be in writing, shall recite the grounds therefor, shall be filed in the office of the clerk of the district court of the county where the building to be altered, repaired, or demolished is situated, and that all further proceedings for the enforcement of the order shall be had in that court. Section 81-516, R. S. 1943, provides for service.

Section 81-517, R. S. 1943, provides that the owner or lessee may file objections in the form of an answer denying the existence of any of the facts recited in the order which he desires to controvert. It provides for affirmation of the order and directions to enforce by the court in case of a default. Where answer is made, it directs that the court "shall hear and determine the issues so raised and give judgment thereon as herein provided."

Section 81-518, R. S. 1943, provides that "If upon such trial the order shall be sustained, judgment shall be given accordingly, and fixing a time within which the building shall be altered, destroyed or repaired, as the case may be, in compliance with such order, but otherwise the court shall annul and set aside the order of condemnation."

Section 81-519, R. S. 1943, provides that if the owner shall fail to comply with the order, then the State Fire Marshal shall proceed in accordance with the order. It provides for a report to the court of expenses paid and proceeds received, and an examination and allowance of the report by the court. It provides for a method of collection of any balance due above salvage receipts and a payment to the owner if the amount received as salvage exceeds expenses incurred.

It appears clearly from the statutes cited that the investigation and determination of the State Fire Marshal upon which his order is based are ex parte. The first hearing in the nature of a determination of issues is the one had in the district court if the owner of the property elects to challenge that ex parte order. There the owner is entitled to a determination of the issues made by the order and his objections. It is a "trial" of those issues and not a review of the proceedings and order of the State Fire Marshal.

Although the provisions of section 81-518, R. S. 1943, quoted above, when standing alone, might be construed to limit the judgment of the court either to sustain or set aside the order of the State Fire Marshal, yet the statutes when considered in their several provisions do not justify that construction. The legislative policy contemplates that the owner shall have a trial and a determination on the merits in the district court. Although the statute does not so define the proceeding, it appears that the powers conferred upon the court are those which are generally classed as equitable, as distinguished from actions at law.

Accordingly, we hold that the hearing and determination of issues and judgment based thereon provided in section 81-517, R. S. 1943, constitute a trial in equity. Such a holding is consistent with the act and the requirements of due process. See, New Hampshire Fire Ins. Co. v. Murray, 105 F. 2d 212; Foster v. Goodpaster, 290 Ky. 410, 161 S. W. 2d 626, 140 A. L. R. 1044; Crossman v. City of Galveston, 112 Tex. 303, 247 S. W. 810, 26 A. L. R. 1210; State v. Keller, *supra.*

It follows that our review here is by trial de novo as in equity consistent with our established procedures and the legislative policy set out in section 25-1925, R. S. 1943. It follows that plaintiff's contention that the question in the trial court and here is whether or not there has been shown an abuse of discretion on the part of the plaintiff cannot be sustained.

This brings us to defendant's contentions that the trial court erred in refusing to require the plaintiff to amend the order so as to designate specifically what alterations or repairs should be made to the building so as to remove the hazards which the statute condemns, as an alternative to its destruction, and that the court erred in sustaining the order of the plaintiff.

We are not here dealing with the rule that applies in emergency situations. The remedy of total destruction of property under the police power without compensation is a drastic one. The existence of that power is not here challenged. The challenge goes to the necessity. The necessity for the total destruction of the building must clearly appear.

Section 81-513, R. S. 1943, clearly contemplates an order for repair, alteration, or destruction as alternatives. Other sections of the act show the same distinction. When the police power is exerted against property it is ordinarily to regulate its use, not to destroy it. Destruction is a last resort. The applicable rule is that where repairs or alterations can be made lawfully upon a building so as to eliminate the special dangers, arising

from its location and condition, to surrounding property and to persons, such repairs or alterations should be ordered rather than ordering the destruction of the building. York v. Hargadine, 142 Minn. 219, 171 N. W. 773, 3 A. L. R. 1627; State Fire Marshal v. Fitzpatrick, 149 Minn. 203, 183 N. W. 141; State Fire Marshal v. Sherman, 201 Minn. 594, 277 N. W. 249; State ex rel. Brooks v. Cook, 84 Mont. 478, 276 P. 958; Foster v. Goodpaster, *supra;* Smith v. Lippman, 222 Ind. 261, 53 N. E. 2d 157.

The plaintiff had the right, under the alternative provisions of section 81-513, R. S. 1943, to elect to rest his order upon a requirement that the building be destroyed. It follows that the trial court did not err in refusing to require plaintiff to amend the order so as to provide for the alternatives of repair or alteration. However, having rested his order on the premise of the necessity of destruction of the building, plaintiff had the burden of proving that necessity.

This brings us to a review of the evidence as to whether or not it establishes that destruction of the building is the only remedy to meet the requirements of the statute.

The original building was constructed about 1873 in what is now the business district of Sidney. Since that time additions and changes have been made. In the main it is a two-story structure with a partial basement. The building, originally of wood, has some brick veneer and stucco on the sides facing the street and old lumber siding in the rear. The roof is partly of wooden shingles, partly tin, and partly tar paper. The evidence is that there are rotted sills and about ten percent of the floor joists in the first floor are rotted. There are decayed joists and studding elsewhere in the building. There is some unevenness in the floors. At least one chimney is in bad repair. Likewise a part of the foundation on one side has deteriorated so as to require replacement. Plaster is off and laths are loose in places because of leaks in the roof which the evidence indicates have been

repaired. There are two wooden fire escapes and one steel fire escape on the outside. The latter is not adequate because of the absence of a platform and a hand rail, and it is located close to a frame structure. One of the wooden escapes is in good condition; the other is not. The building is occupied as a hotel, with a cafe on the main floor.

Plaintiff's witnesses, particularly the expert witnesses, testify that these defects can be repaired or removed by alterations. They base their conclusion that the building cannot be repaired upon the cost of the repairs in relation to the value of the building, and in particular upon the cost of putting the building in first-class condition, including items not necessary so far as the hazards under the statute are concerned.

There is other evidence which goes to the conclusion of the plaintiff as to the reparability of the building.

In 1943, the plaintiff, then deputy fire marshal, inspected the building and issued an order concerning it as follows: "If this building is to be occupied as above listed the structural conditions makes it necessary that the following corrections be made (1) Place building in good structural repair using fire proof material (2) Have a competent electrician over haul Electric wiring according to National Electric Code. (3) Install fire proof fire escape one on the south west corner and one on the southeast corner of Building. If the above corrections are not made the building must be taken down to eleminate (sic) the fire hazard to both life and property."

It appears that nothing was done by the defendant as a result of that order, nor were statutory steps taken to enforce it. The evidence shows that recognition was given to war conditions then existing. Again in November 1946, the plaintiff, by a deputy, issued a like order. No statutory proceedings were brought to enforce it. Following that, some structural repairs were

made, the building was rewired at a cost of over $1,800, and the one steel fire escape was installed.

The plaintiff and his deputy did not follow up to see what was done under these orders but left it to the local fire chief to determine and report whether or not the order was being obeyed. A witness for defendant testified that following the extensive repairs made after the 1946 order was issued, the local fire chief approved what had been done. That testimony is not denied. Then came the inspection of 1948 upon which the present order is based. The evidence also is that, save for normal depreciation, the building is in no worse condition than it was in 1943 and 1946 when the repair orders were issued. It has been bettered by the repairs made. Testifying for the plaintiff, the deputy who issued the 1946 order stated that because of shortage of materials and his belief that the owner would comply with the order, they "played ball" with him, but now they are through.

The defendant testified that he desired to repair the building to meet the requirements of the law. The cost of those repairs is not an element for consideration or determination of the plaintiff.

The evidence sustains only one conclusion, and that is that the building can be repaired and altered so as to conform to the requirements of the statute.

It follows that the plaintiff has not met the burden of proving that the extreme remedy of destruction of the building is required and that the trial court erred in sustaining the order. Accordingly, the order is annulled and set aside.

However, in view of the conceded condition of the building and the necessity for alterations and repairs in order to comply with the requirements of the statute, we do not direct a dismissal.

The judgment is reversed and the cause remanded with directions to permit the plaintiff, if he so elects, to amend his order so as to set out the repairs and altera-

tions that he deems necessary to meet the requirements of the statute. If the plaintiff so elects, then the defendant, if he so elects, is to be permitted to file his answer and objections, and upon the issues so made a trial de novo is to be had and the issues determined and the remedies followed, according to the procedure herein outlined.

If the plaintiff elects not to amend the order, then the action is to be dismissed at his costs. If he elects to amend, then all costs to that time are to be taxed to the plaintiff and subsequent costs are to abide the result.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF MARY WAHL, DECEASED. WILLIAM UHLIG, EXECUTOR OF THE ESTATE OF MARY WAHL, DECEASED, APPELLANT, V. GUY WAHL, APPELLEE.
39 N. W. 2d 783

Filed November 23, 1949. No. 32622.

1. **Wills.** The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If the testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will.
2. ———. The burden is on the proponent of a will to prove the execution of the will and the testamentary capacity of the testator. However, in a will contest if the proponent makes a prima facie case as to testamentary capacity it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of going ahead and proving testamentary capacity by a preponderance of the evidence devolves upon the proponent.
3. **Appeal and Error: Wills.** A defeated litigant in a will contest is not entitled to a trial de novo on appeal from the judgment of the trial court. The existence of an issue of fact in such a contest is determined by this court by the sufficiency of the evidence to sustain a verdict of the jury.
4. **Appeal and Error: Trial.** In testing the sufficiency of evidence to support the verdict it will be considered in the light most

favorable to the successful party, any controverted fact will be resolved in his favor, and he will be given the advantage of any inferences that can reasonably be deduced therefrom.

5. **Witnesses.** A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based.
6. **Wills: Witnesses.** It must appear that a witness, lay or expert, in giving his opinion as to mental capacity of a testator to make a will had in mind the quality of mental capacity essential to the making of a valid will.
7. **Wills.** Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred.
8. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same.

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

John H. Wiltse and *F. A. Hebenstreit,* for appellant.

Jean B. Cain and *Paul P. Chaney,* for appellee.

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

MESSMORE, J.

This is a will contest in which an instrument purported to be the last will and testament of Mary Wahl, deceased, and a codicil thereto, are involved. The will and codicil were admitted to probate in the county court over objections of the contestant, the son and only heir at law of Mary Wahl. From the decree of probate, contestant appealed to the district court.

To the petition for probate of the will and codicil in the district court, the contestant filed objections in part

as follows: That at the time the will and codicil thereto were made and executed, the testatrix was mentally incompetent to make and execute such instruments for the reason that when the same were made and executed her mind was impaired to the extent that she was incompetent of understanding, realizing, or appreciating what disposition she had made of her property therein, and did not understand or comprehend the meaning or effect of the disposition of her property; that by reason of her mental condition at that time she falsely imagined that contestant was antagonistic and unfriendly to her, and, as a result, she formed a prejudice against him based entirely upon false premises and without reason; and that said instruments were the direct result of such insane delusions, and would not have been made had she been of sound mind.

At the close of contestant's case and at the close of all of the evidence, the proponent moved for a directed verdict, which was overruled. The jury returned a verdict finding that the will offered for probate was not the last will and testament of Mary Wahl, deceased, and the codicil was not a codicil thereto. Upon the overruling of the motion for new trial and judgment notwithstanding the verdict, the proponent appeals.

The proponent assigns as error the trial court's submission to the jury of testamentary capacity. The first question to determine is the sufficiency of the evidence to warrant submission of the case to the jury on the issue of testamentary capacity.

The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If the testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will. See, In re Estate of Laflin, 108 Neb. 298, 187 N. W. 885; In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284; In re Estate of Kaiser, 150

Neb. 295, 34 N. W. 2d 366; In re Estate of Hunter, *ante* p. 704, 39 N. W. 2d 418.

In the instant case the proponent made a prima facie case in substance as follows: The attorney who drafted the will and codicil in question had known the testatrix for a number of years. He transacted business first with her in 1939. At the time the will was drafted, August 16, 1940, the testatrix, without benefit of memorandum, designated her property, its location in the house, her real estate, and the disposition to be made of the property. On October 25, 1940, when the codicil was made and executed, she knew the changes she desired to make in her will. On the dates of the making and execution of the instruments she was mentally competent to make the same. Other witnesses who had an acquaintance with her and witnessed the instruments testified to her mental competency to make the same upon the dates upon which they were made.

If the proponent makes a prima facie case as to testamentary capacity, it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of going ahead and proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. See, In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75; In re Estate of Hunter, *supra.*

A defeated litigant in a will contest is not entitled to a trial de novo on appeal from the judgment of the trial court. An issue of fact in such a contest is determined in this court by the sufficiency of the evidence to sustain the verdict of the jury, and in testing the sufficiency thereof to support the verdict it will be considered in the light most favorable to the successful party, any controverted fact will be resolved in his favor, and he will be given the advantage of any inferences that can reasonably be deduced therefrom. See, In re Estate of Kerr, 117 Neb. 630, 222 N. W. 63; In re Estate of Hunter, *supra.*

The record discloses that from and after the death of her husband on January 4, 1940, her son having moved to California in January 1920, the testatrix lived alone in Falls City, Nebraska, where she had been a resident for more than 60 years prior to her death March 24, 1948, at which time she was approximately 81 years of age. Her death occurred in the Lincoln State Hospital. The will in question contained bequests to certain friends and acquaintances of personal property located in her home. She devised her home and certain personal property situated therein to a nurse employed by her physician. She bequeathed to her son one dollar, for reasons personal to herself and which she stated need not be set forth or explained in the will. The residue of her estate was given, under certain conditions, to be used by officials of her church. The codicil changed the bequest to the son to the amount of $200, for reasons personal to herself which were not explained in the will, and a change was made with reference to the residue of the estate to the church.

The contestant's evidence disclosed that Guy Wahl, testatrix's son, lived with his parents except when he was on construction work. His mother never approved of the girls with whom he kept company. After he was married in Atchison, Kansas, he brought his wife home to visit his parents. His mother would not speak to his wife. This marriage resulted in a separation. The son left his parent's home in 1920, moving to California, as he stated, to live his own life and go with whom he pleased. He was married the second time in California to a former resident of Falls City of whom his mother did not approve. In 1923, the mother visited the son in California. She did not approve of nor speak to his wife any more than she could help. She stayed about six weeks, and then returned home. In December of 1925, at the son's request, his parents visited him. He proposed to make a home for them if they liked the country, and to eventually build a home for them on a commercial

acreage which he owned. However, after spending the winter, his parents returned home. In October of 1926, the mother went to California and stayed with friends. The son testified he visited his mother at her friend's home while she was in California on this visit. This was the last time he saw his mother. One of the purposes of her visit was to collect the sum of $200 which the son owed her and was evidenced by a note which he paid when due. She claimed that he closed the door in her face and would not let her into the house.

After the return of the mother to her home, the son wrote jointly to his parents and received no response from his mother. He wrote to his father up until the time his father became ill. Upon the death of his father he received a telegram from neighbors and friends informing him of the death. He was unable to attend the funeral due to lack of time. After his father's funeral he wrote to his mother and received no response from her. He made an effort to ascertain the condition of her health, and was advised of her condition by others.

On July 25, 1942, Mary Wahl was committed to the Lincoln State Hospital. At that time she was approximately 75 years of age. The doctor's report reflects that she was suffering from delusions of persecution, was highly nervous and erratic, and that her mental condition had become progressively worse in the last 20 years.

Before her commitment to the state hospital she would complain that her telephone rang constantly when in truth and in fact, based upon her complaints, the telephone number had been plugged, which would require removal of the plug to call her.

A neighbor who lived next door to Mary Wahl in June 1942, testified that she would come to her home in the nighttime, stand at the foot of her bed, frighten her and the children, and then run; that she put rat poison on slices of potato to poison this witness's chickens, and sprinkled blackberry bushes with powder, causing the berries to be removed for fear that strangers might get

ahold of them; that Mary Wahl would come "around" on the front walk at night and throw a flashlight beam into the house and frighten people; that children were afraid of her; that she threatened to cut the curls off of this witness's little daughter; and that she threatened to kill this witness over the blackberry episode. After these affairs Mary Wahl would put her arms around this witness, be remorseful, and declare that she did not know why she did such things.

Another witness testified that the testatrix remarked that she was not going to the hospital to see her husband when he was confined there by illness because he did not want her to come.

Another close neighbor who had known Mary Wahl for 22 years testified that she would see her three or four times a day. She would often repeat the same things that she had told this witness just 30 minutes previous; she would come to this witness's home during the daytime and awaken her husband who worked nights; and that on occasions when she went to town she would forget her key and lock herself out of her home. She told this witness she did not like her son or her husband, and that she tore up letters written by her son so that her husband could not see them. She loaned this witness crutches when she had a broken leg and came after them when they had been used a short time and took them back, but continued to visit this witness as usual. She threatened to shoot a neighbor boy, and a gun was taken from her. She objected to food being furnished by a neighbor to her husband because she thought he was being treated too kindly.

This brings us to the expert testimony offered by the contestants. In this connection it might be remarked that it is not medical soundness of mind that governs, but testamentary capacity as legally defined.

"It is said that less mental faculty is required to execute a will than to enter into any other legal instrument; that the testator's property was his own, he had the

power to do with it as he chose, and while he may have had delusions, that does not of itself constitute incapacity, for a delusion affects testamentary capacity only when it enters into and controls its exercise." In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181.

The question of testamentary capacity relates exclusively to the time when the will was made, and although competent evidence of testator's condition of mind long before, closely approaching, and shortly after the time of its execution is admissible, it is received only to assist in revealing his state of mind at that time, and the jury should be so instructed. See In re Estate of Woodward, *supra.*

A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based. It must appear that a witness, lay or expert, in giving his opinion as to mental capacity of a testator to make a will had in mind the quality of mental capacity essential to the making of a valid will. An expert witness will be permitted to give his opinion as to mental capacity if it is predicated on a proper and sufficient foundation. The opinion of a medical expert must be predicated on one or more of the following, examination and observation of the person who is the subject of the inquiry, examination and history, or supposed facts of which there is evidence. See In re Estate of Witte, 145 Neb. 295, 16 N. W. 2d 203, on rehearing, 145 Neb. 305, 17 N. W. 2d 477.

Dr. Spradling, associated with the state hospital, testified that he was acquainted with Mary Wahl; that she was committed to the hospital on the first occasion on January 21, 1934, from Lancaster County, having been transferred from a privately owned hospital for mental diseases; and that he examined her with the assistance of others to ascertain her physical and mental

condition, and diagnosed her case as cerebral arteriosclerosis, which is a sclerosis or hardening or the blood vessels of the brain with a consequent destruction of portions of the brain resulting in an organic mental destruction or deterioration. He testified that she was paroled to her husband on March 28, 1934, and discharged on March 31, 1935. A parole or discharge does not signify that the patient has recovered. She was readmitted to the hospital in July 1942, from Richardson County. This witness supervised the examination of her at that time and diagnosed her condition as cerebral arteriosclerosis as previously, except that she was more seriously involved than formerly. She was paroled from the hospital on September 27, 1942, to her physician, and was returned by him to the hospital on October 13, 1942, where she was again examined, and her mental condition was found to be the same. Between the dates of January 21, 1934, and March 28, 1934, she was severely involved with a very evident mental illness. Her memory was faulty at times; she was unable to recognize those with whom she was intimate; she did not know her physician or attending nurses; and she failed to recognize them, even those who took care of her continuously. She was unable to remember time, and spoke of matters that were remote and of the past as though the events had happened yesterday. She was not amenable to suggestions. She would fly into rages with the doctors and nurses, and even assault them. She was quite variable. At other times her personality would change to being jocular or playful. She was definitely paranoiacal. She had delusions of persecution, thought that she was being done an injustice by her friends and the doctors and nurses. This witness further testified that cerebral arteriosclerosis is a result of a chronic condition and advancing age which gets progressively worse in time. Upon her readmission her condition was noteworthy. She had become untidy in dress and had a more pronounced manifestation of all

the symptoms with reference to the mental disease with which she was suffering.

After the hypothetical question which included facts as heretofore set out, the doctor testified that on August 16, 1940, and on October 25, 1940, the dates on which the will and codicil in question were made and executed, Mary Wahl was mentally ill, insane, and mentally incompetent to make a will or codicil thereto.

A doctor connected with a private mental hospital testified that he became acquainted with Mary Wahl on December 9, 1933, when she was brought to the hospital by her husband. She remained there until she was sent to the state hospital January 21, 1934. This doctor testified in a degree of exactitude with the testimony of Dr. Spradling as to the diagnosis of the mental disease of Mary Wahl, and gave as his opinion that she was mentally incompetent to make a will and codicil at the time when such instruments were made and executed.

The record discloses that the evidence was sufficient, under the rules heretofore announced, to warrant the experts in giving their opinions on the testamentary capacity of Mary Wahl at the time the will and codicil were made and executed.

The proponent's case-in-chief consisted of a number of witnesses such as a hardware merchant, a bank employee, a druggist, a storekeeper, a miller, and friends and acquaintances of Mary Wahl. Their testimony was to the effect that she was able to keep house, do her own cooking, was tidy in dress, able to buy and strike a good bargain, and had continuation of thought in the manner of transacting business. Some of these witnesses believed her to be eccentric, odd, or queer. They testified as to the foregoing at about the time the will and codicil thereto were made and executed. Neighbors and friends who had known her testified as to their visits with her, her trip to California to collect the $200 from her son, and her complaint that her son had locked her out of his home.

In 1942, prior to her recommitment to the state hospital, she purchased a lot. The attorney who made the deed and who had been acquainted with her for years testified that she was competent to make the deed. The surveyor who surveyed the lot to determine the boundary testified that she knew with some degree of exactitude where the boundary line was. His wife, who was present at the time of the survey and conversed with her, likewise testified that she was mentally competent. A young man who had worked for her at times in 1940, running errands and doing yard work, testified that she knew what she wanted done, and was competent.

Dr. Gillispie, who attended Mary Wahl on several occasions from 1936, testified as to her physical condition, and that on August 16, 1940, she was suffering with bladder cystitis. He testified that he observed her at the office, and treated her. As to the foundation for testifying as to her mental capacity on August 16, 1940, and October 25, 1940, his conception was that a person must know the value and extent of their property and to whom they wish to make distribution. He testified that in his opinion she possessed good mental capacity and was capable of making the will and codicil on the dates in question.

Dr. Shepherd testified that arteriosclerosis is a degenerative disease of the vessels. When asked if a mild form of arteriosclerosis in a person beyond middle age would affect the mentality of the person, his answer was: "Not unless the principle amount of your disease was in the brain." He was asked the question as to the ability of such a person to transact business such as buying necessary food and other equipment for the home, doing her own housework and cooking, and he answered: "Without more evidence you couldn't say she was in an advanced stage of arteriosclerosis." He further testified that the cerebral arteriosclerosis picture is that of an individual whose mentality begins to deteriorate; first a loss of memory is noticeable for recent

events, loss of tidiness, inability to transact or conduct business as previously, and a change in personality. These matters come on gradually. The extreme end is perfect senility.

It appears that later the attorney who had drawn the deed, then in the capacity of city attorney, went with the chief of police to Mary Wahl's home. She was in a state of excitement and, as he described it, "she was wild." He immediately wrote to her son in California about her condition and instituted the proceedings to have her sent to the state hospital.

It is impossible to set forth all the evidence in the opinion, however, the foregoing constitutes the relevant and material evidence which was submitted to the jury.

It is true that no right of a citizen is more valued and more assured by law than the power to dispose of his property by will. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to the restrictions which are imposed by statute. A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein, nor does it put any obstacles in the way of the aged or infirm in making disposition of their property by will, provided only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument. See, In re Estate of Bose, 136 Neb. 156, 285 N. W. 319; In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513; In re Estate of Scoville, *supra*.

Unjust, unreasonable, or unnatural provisions of a will are matters for consideration by jury as evidence tending to throw light on testamentary capacity. See, In re Estate of Kerr, *supra;* In re Estate of Bose, *supra*.

"An insane delusion such as will affect testamentary capacity is an idea or belief which has no basis in fact or reason and to which the testator adheres against reason and evidence, or, in other words, it may be stated to be a belief in a state of facts that does not exist and

which no rational person would believe to exist." 68 C. J., Wills, § 30, p. 433.

"Another form of insane delusion is a dislike for natural objects of testator's bounty, or repulsion for them, often based on an erroneous belief that such persons have been guilty of misconduct. If this belief is not based on evidence and can not be removed by evidence, it may amount to an insane delusion." 1 Page on Wills (Lifetime ed.), § 146, p. 299.

Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred. See, McClary v. Stull, 44 Neb. 175, 62 N. W. 501; In re Estate of Kerr, *supra;* In re Estate of Frederick, 83 Neb. 318, 119 N. W. 667, on rehearing, 83 Neb. 321, 120 N. W. 1131.

An individual does not lack testamentary capacity because he holds an unjust prejudice or belief generally regarded as peculiar and unsound. A peculiar belief however may be material in connection with other circumstances in determining the question of mental capacity.

In the instant case the evidence discloses that the testatrix had formed more than an unjust prejudice or belief generally regarded as peculiar and unsound against her son. She developed toward him an unnatural, irrational, and unreasonable feeling evidenced by her feeling against girls whom she despised because of her extreme jealousy and fear that they would prevent and deprive her of the companionship of her son. This hostility toward the son was caused by a weakened and distorted mind with reference to him. The evidence in such respect was sufficient from which a jury might find that the testatrix was afflicted with an insane delusion which controlled her actions and rendered her insensible to the ties of blood and kindred, and prevented the exer-

cise by her of rational judgment touching disposition of her property.

Where evidence relating to mental capacity to make a will is conflicting, the issues of fact are questions for the jury. See, In re Estate of Kerr, *supra;* In re Estate of Hunter, *supra.*

In view of the evidence and the foregoing decisions, we conclude that the question of the testamentary capacity of Mary Wahl was a question for the jury to determine.

The proponent contends the trial court erred in refusing to permit the proponent to use additional witnesses for the purpose of showing testamentary capacity of the testatrix at the time the will and codicil were made. It appears from the record that 25 or more witnesses testified for the proponent with reference to the ability of the testatrix to transact business, to care and provide for her home, and with respect to her personal appearance before and at the time when the will and codicil were made and executed. Apparently there were additional witnesses present who might have testified to the same effect.

The law provides, in this state, that the trial court may exercise a reasonable discretion in limiting the number of witnesses to testify to a matter not in dispute, or to facts collateral to the main issue. See, Cate v. State, 80 Neb. 611, 114 N. W. 942; Biester v. State, 65 Neb. 276, 91 N. W. 416.

The proponent contends that the evidence to be given by the witnesses who did not testify would have gone to the main, essential issue involved in this case, that is, to testamentary capacity, and under such circumstances the trial court was not privileged to use a reasonable degree of discretion in limiting the number of such witnesses. The record fails to disclose that proponent made any offer of proof as to what these witnesses would have testified to had they been called to do so, which places this court in a position so that it cannot discern

what the testimony would have been, in the absence of the offer of proof.

Proponent relies upon Conlee v. Taylor, 153 Tenn. 507, 285 S. W. 35, 48 A. L. R. 940. In the cited case the trial court limited the number of witnesses who would testify as to the testamentary capacity of the testator. Counsel for the proponent made an offer of proof as to what these witnesses would testify to if permitted to do so, which is not true in the instant case.

In view of the state of the record we find no prejudicial error as contended for by proponent.

The proponent predicates error upon the trial court's refusal to admit evidence of a previous will made by the testatrix in 1939. Nebraska cases hold that former wills made by a testator are admissible in evidence if they were made at a time when the competency of the testator was unchallenged. The purpose of admitting a former will is to show that the testator had a constant and abiding scheme for the distribution and disposition of his property, and thus tends to refute a charge of a want of testamentary capacity. See, Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A L. R. 949; 57 Am. Jur., Wills, § 126, p. 118.

In the instant case the attorney who drew the will was called to testify that he had made a will for the testatrix in December 1939. He was asked whether he could recall what disposition she had made of her property, to which there was proper objection, and it was sustained. The same witness was recalled and the same question was asked, to which objection was made and sustained. The offer of proof was that in the former will the testatrix gave her home to her husband, and that practically all of the same legatees named in the will in question were also named in the will of 1939. The offer of proof was objected to and sustained.

The evidence for the contestant discloses that he challenged the testamentary capacity of the testatrix beginning in 1933, and at no time admitted that she

possessed testamentary capacity. There was no evidence to show what happened to the original will made in 1939, or whether or not it was lost or destroyed. There was evidence of an office copy of the will, but it was not offered nor a foundation laid for its admissibility. Under the circumstances we find no prejudicial error in denying the admission of the previous will in evidence.

The proponent contends the trial court erred in refusing certain instructions offered by him, and in giving certain instructions on the trial court's own motion. We have examined the instructions and the following authorities are applicable to the instructions given in the instant case.

Instructions are to be considered together, to the end that they may be properly understood, and when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. See, Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444; Pauli v. State, *ante* p. 385, 37 N. W. 2d 717.

A judgment will not be set aside because a more accurate statement of the law might have been made than that contained in certain instructions, when from a consideration of the instructions as a whole no prejudicial error appears. See Wright v. Cameron, 148 Neb. 292, 27 N. W. 2d 226.

We find no prejudicial error in the instructions given by the trial court.

The proponent contends the trial court committed prejudicial error in making certain remarks in the presence of the jury concerning evidence to be offered on testamentary capacity. The record reflects that after a number of witnesses had testified on behalf of the proponent on testamentary capacity, the trial court, upon objection of contestant's counsel, informed him that the court had gone into the matter with proponent's counsel, and then directed proponent's counsel to proceed with the examination of the witness. On another occa-

sion the court remarked that this was probably the last witness of proponent on the subject of testamentary capacity, and sustained the objection of the contestant's counsel on the ground that the evidence was cumulative. Under the circumstances we find no prejudicial error in the remarks so made by the trial court.

Other assignments of error are without merit.

For the reasons given herein, judgment entered on the verdict is affirmed.

AFFIRMED.

A. J. HEUSSER, APPELLEE, V. SADIE MCATEE ET AL., APPELLANTS.
39 N. W. 2d 802

Filed November 23, 1949. No. 32665.

1. **Juries: Trial.** It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict, decide the weight to be given the testimony of the various witnesses.
2. **Trial: Appeal and Error.** Where a law action is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong.
3. **Trial.** Where there is a direct conflict in the evidence relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and admissible for consideration of the jury.
4. **Interest: Trial.** Where from the verdict and pleadings it appears that if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and include such interest in the judgment.
5. **Pleading.** Where defendant in an answer traversed by plaintiff, pleads an affirmative defense not consistent with and provable under the general issue, or pleads facts in confession and avoidance of plaintiff's cause of action, the burden of proof is upon him to establish the same by a preponderance of the evidence.
6. ———. Where defendant by answer pleads a set-off or coun-

terclaim, or seeks affirmative relief by cross-petition traversed by plaintiff, the burden is upon him to prove the allegations set forth therein by a preponderance of the evidence.

7. **Master and Servant.** A master is not liable for damages for conversion of property by or criminal acts of the servant not within the scope of his employment, and not expressly or impliedly authorized by the master, unless such acts are subsequently ratified by him.

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

J. E. Willits, for appellants.

Stiner, Boslaugh & Stiner, for appellee.

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

CHAPPELL, J.

Plaintiff, a general contractor and builder, brought this action upon an open unsettled account to recover the reasonable value of labor and materials furnished defendants at their request for the purpose of constructing, improving, and repairing a house located upon their property. Defendants, in an answer and cross-petition traversed by plaintiff, denied generally and alleged that plaintiff orally agreed to do the work and furnish the materials for a lesser stipulated price. They also alleged that the work had not been done in a satisfactory and workmanlike manner, and that plaintiff and his workmen had appropriated specific articles of property belonging to defendants. They prayed for the recovery of damages and the denial of any recovery by plaintiff.

Upon trial to a jury, plaintiff was awarded a verdict for $589.67, the exact amount claimed by plaintiff to have been the reasonable value of the labor and materials furnished. Thereafter, the trial court added interest upon that amount at 6 percent from November 10, 1946, a date "six months from the date of the last item" of the unsettled account, in conformity with section 45-104, R.

S. 1943, as prayed by plaintiff, and entered judgment upon the verdict for $669.31.

Defendants' motion for new trial was overruled, and they appealed, assigning substantially: (1) That the verdict and judgment were contrary to law and the evidence; (2) that the trial court erred in admitting exhibit 7 over defendants' objections; (3) in computing interest on the verdict and including it in the judgment; and (4) in giving instructions Nos. 2, 3, 4, and 6. We conclude that the assignments should not be sustained.

We first turn to the sufficiency of the evidence to sustain the judgment, and in that regard do not deem it necessary to set out the evidence at length. An examination of the record discloses competent oral evidence adduced in plaintiff's behalf, supported by his labor and material records made at or about the time, together with other exhibits received in evidence, from which it could be reasonably concluded that: The labor was performed and the materials were furnished at the specific request of defendants; that it was performed in a satisfactory and workmanlike manner; and that the reasonable value of the labor and materials furnished was $589.67, as alleged in plaintiff's petition.

On the other hand, the record discloses competent evidence adduced in defendants' behalf from which it could be reasonably concluded that plaintiff had agreed to do the work and furnish the materials for $410, and that the work had not been done in a satisfactory and workmanlike manner, from which defendants suffered damages.

Thus it will be observed that the evidence was directly in conflict upon the primary dispute, that is, upon the amount and method by which plaintiff was to be paid and the quality of the work done.

As an elementary proposition, it is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict, to decide the weight to be given the testimony of the various witnesses. Arman v.

Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723.

It is also generally the rule that in a law action where the case is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757; In re Estate of Renter, 148 Neb. 776, 29 N. W. 2d 466.

In the light of the foregoing, we conclude that the evidence was amply sufficient to sustain the verdict and judgment, and that unless some other assignment has merit, the judgment should be affirmed.

Defendants contended that exhibit 7 was erroneously admitted in rebuttal over objection that it was "incompetent, irrelevant, immaterial and no proper foundation laid." In that regard, plaintiff's charge for putting a cement floor in defendants' basement, as testified by him and verified by his material record, together with itemized statements theretofore rendered defendants and received in evidence, included an item of $28.50 paid by him for 38 sacks of cement. One of the defendants had testified that out of 40 sacks of cement delivered on the job, only 28 had been used, and 12 had been returned for credit. Exhibit 7, given and signed by the manager of the Yost Lumber Company, showed that 40 sacks of cement were delivered to plaintiff upon the particular job April 6, 1946, that only 2 were returned on that same date, and that plaintiff had on April 17, 1946, paid $28.50 for the 38 sacks used.

As foundation for admission of the exhibit, plaintiff testified that he bought the cement from Yost Lumber Company for a basement floor in defendants' house, and that exhibit 7 was the statement which plaintiff received for it. Plaintiff also testified that it included all the cement purchased, and showed a credit for the cement returned; that all the materials were used at the address therein designated, on defendants' job; and that all the

cement not used on that job was returned on the same date as shown by the exhibit.

Exhibit 7, having been received and retained by plaintiff as an account stated, prima facie established his liability to the Yost Lumber Company for the materials furnished by it and used on defendants' premises. Missouri P. Ry. Co. v. Palmer, 55 Neb. 559, 76 N. W. 169. If, as plaintiff contended, he was requested by defendants to purchase the materials for them, and did so, then they would be liable therefor.

Further, it will be noted that the aforesaid testimony of plaintiff and defendants was directly in conflict. Therefore, the exhibit was corroborative of plaintiff's former testimony as tending to support its consistency and reasonableness, and whether or not it was admissible for that purpose rested largely in the discretion of the trial court. As stated in 70 C. J., Witnesses, § 1368, p. 1180: "Considerable latitude must necessarily be allowed in the admission of corroborative evidence; and whether such testimony should be received rests largely in the discretion of the trial court. It is permissible to strengthen a witness' testimony by evidence of matters showing its consistency and reasonableness, and tending to indicate that the facts probably were as stated by the witness, although the evidence does not, in and of itself, tend to establish such facts." See, also, a statement in 1 Elliott, Evidence, § 144, p. 199, of like import, approved in In re Estate of House, 145 Neb. 670, 17 N. W. 2d 883.

The applicable rule is that: " 'Where there is a direct conflict in the evidence of the witnesses relating to a material issue in the case, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury.' Shepherd v. Lincoln Traction Co., 79 Neb. 834." Bowers v. Pixley, 111 Neb. 698, 197 N. W. 410. See, also, Falkinburg v. Prudential Ins. Co., 132 Neb. 831, 273 N. W. 478. We conclude that the admission of exhibit

7 by the trial court was not prejudicially erroneous.

Plaintiff's petition alleged that the fair and reasonable value of the labor and materials furnished was $589.67, and attached thereto was an itemized statement showing that the last item was furnished on or before May 10, 1946. There was no dispute about when the labor and materials were furnished. Concededly, the last item was furnished before May 10, 1946. The prayer of plaintiff's petition was for judgment against defendants for $589.67, with interest at 6 percent from November 10, 1946.

The jury was instructed, in effect, that if it found for plaintiff on his cause of action, to allow him the reasonable value of the labor and materials which it found he had furnished defendants. It was not instructed to compute or add any interest in arriving at the amount of the verdict. Thus, as will be readily observed, the jury awarded plaintiff $589.67 upon the unsettled account, which was for the full amount in every respect allegedly due him for the labor and materials furnished, without adding any interest. In the instant case, the verdict responded directly to the issues in the case and fully conformed to the instructions of the court.

Section 45-104, R. S. 1943, specifically provides in part: "Unsettled accounts between parties shall bear interest after six months from the date of the last item thereof." Since the date of the last item was without dispute on or before May 10, 1946, plaintiff was without question entitled to recover interest at 6 percent from November 10, 1946, as provided in the foregoing statute.

In Calnon v. Fidelity-Phenix Fire Ins. Co., 114 Neb. 194, 206 N. W. 765, this court held: "Where, from the verdict and the pleadings, as in this case, it appears that, if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and cover the amount of interest in the judgment."

In Swygert v. Platte Valley Public Power and Irrigation Dist., 133 Neb. 194, 274 N. W. 492, citing Calnon

v. Fidelity-Phenix Fire Ins. Co., *supra,* this court said: "Where the law requires interest not included in a verdict, the court may make the computation and include the amount in the judgment."

In Blum v. Truelsen, 136 Neb. 896, 287 N. W. 782, followed in 139 Neb. 282, 297 N. W. 136, it was said: "This court has held that, when the jury fail to add interest in the verdict returned, the court may make the proper computation and include the amount of the interest in the judgment, without any amendment of the verdict whatsoever."

Also, in Bank of Axtell v. Johnson, 125 Neb. 154, 249 N. W. 302, this court held: "The trial court should either amend the verdict or calculate interest and cover the amount thereof in the judgment, where it appears from the pleadings and verdict that plaintiff is entitled to interest and the jury have omitted it from their verdict."

We conclude that the trial court did not err in computing and adding interest to the verdict in entering its judgment.

An examination of instruction No. 2 discloses that it related primarily to plaintiff's alleged cause of action and the burden imposed upon him to prove three certain defined elements before he could recover. The instruction did not place any burden of proof upon defendants except with relation to the affirmative contractual plea in avoidance of plaintiff's cause of action set forth in their answer and denied by plaintiff. As hereinafter observed, the burden in that matter was imposed by law upon defendants. The instruction was not prejudicially erroneous.

Instruction No. 3 related to the cause of action alleged in defendants' cross-petition, praying for damages from plaintiff, which plaintiff had traversed by general denial. In that connection, instruction No. 3 told the jury in effect that the burden of proof was upon defendants to establish two certain designated material allegations of

their cross-petition before they could recover damages from plaintiff. The instruction was not prejudicially erroneous.

In Citizens National Bank v. Rawley, 131 Neb. 10, 267 N. W. 151, it was held: "Where a defendant pleads a set-off or counter-claim, as in this case, which is denied, the burden of proving it is upon him."

In Fitzsimmons v. Gilmore, 134 Neb. 200, 278 N. W. 262, this court approved the statement that: " 'Where a defendant pleads an affirmative defense or sets up in his answer facts in avoidance, the burden of proof is upon him. So, too, the burden of proving allegations in a cross-bill necessary to entitle defendant to affirmative relief rests upon him to the same extent as if he had brought an original action.' 22 C. J. 74." The foregoing rule must be read in connection with the distinction made in Umberger v. Sankey, *ante* p. 488, 38 N. W. 2d 21. See, also, 20 Am. Jur., Evidence, § 137, p. 142; 31 C. J. S., Evidence, § 104, p. 713.

In that connection, instruction No. 4 was simply an elaboration or clarification of instructions Nos. 2 and 3, and when considered therewith, together with all the other instructions, as we are required to do, instruction No. 4 did not in any manner erroneously place a burden of proof upon defendants prejudicial to their rights.

Instruction No. 6 related to defendants' allegations that plaintiff and his workmen appropriated three designated items of the total value of $17.92, property of defendants. The instruction in effect told the jury to disregard those items because there was no competent evidence in the record to sustain the allegation. With that in mind, we have examined the record and find no competent evidence that plaintiff took the items or any of them, or knew that any of his employees took them, or that plaintiff expressly or impliedly authorized any of his employees to take them, or that it was done within the scope of their employment or that such acts, if committed, were subsequently ratified by plaintiff.

In that connection, the general rule is that: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488.

As aptly stated in 39 C. J., Master and Servant, § 1489, p. 1294: "But it is well settled that the master is not liable in damages for criminal acts of the servant not within the scope of his employment, and not authorized or sanctioned by him, such as larceny, * * * unless the criminal act is subsequently ratified by the master." See, also, 57 C. J. S., Master and Servant, § 573, p. 322. The same rule applies to conversion. 39 C. J., Master and Servant, § 1497, p. 1299; 57 C. J. S., Master and Servant, § 575, p. 332. Cases cited in the notes supporting the foregoing statements and conclusions are too numerous to cite herein. We conclude that instruction No. 6 was not prejudicially erroneous.

We find no error in the record prejudicial to defendants, and for the reasons heretofore stated, conclude that the judgment should be and it hereby is affirmed.

AFFIRMED.

IN RE APPLICATION OF AIRLINE GROUND SERVICE, INC. AIRLINE GROUND SERVICE, INC., COMPLAINANT AND APPELLEE, V. CHECKER CAB COMPANY ET AL., RESPONDENTS AND APPELLANTS, AND AIRPORT COMMISSION, A PUBLIC BODY, INTERVENER AND APPELLANT.

39 N. W. 2d 809

Filed December 1, 1949. No. 32723.

1. **Appeal and Error.** The Legislature may properly specify the nature of the orders subject to review in setting up a special appellate proceeding.
2. **Public Service Commissions: Appeal and Error.** By the enactment of section 75-405, R. S. 1943, the Legislature provided that any order of the Nebraska State Railway Commission upon which there has been a hearing before the commission is reviewable for the purpose of securing its reversal, vacation, or modification.
3. ———: ———. Consequently any order of the commission is reviewable which meets the conditions set forth in such section and which involves a justiciable issue that is decisive of some subject matter of which the commission has jurisdiction and the power to enforce against any party to the proceeding.
4. ———: ———. Where the railway commission assumes jurisdiction of the subject matter and issues a cease and desist order after a hearing, such order is reviewable under the provisions of section 75-405, R. S. 1943, even though the order was labeled a temporary or interim order.
5. ———: ———. In determining whether an order is reviewable it is the content and not the form which is the controlling factor.

APPEAL from the Nebraska State Railway Commission: *Order dismissing appeal vacated and motion to dismiss overruled.*

Kennedy, Holland, DeLacy & Svoboda, Swensen, Viren & Turner, Frost, Peasinger & Meyers, Edward Sklenicka, and *Edward F. Fogarty,* for appellants.

Pilcher & Haney, for appellee.

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

CARTER, J.

This action was commenced by the filing of a complaint

before the Nebraska State Railway Commission. After the issues were made and a hearing had, the railway commission entered an interim order which in effect sustained the contentions of the complainant on a temporary basis pending a final determination of the issues by the commission. Respondents perfected an appeal to this court. Complainant thereupon filed a motion in this court to dismiss the appeal for the reason that the order appealed from was not a final order. The motion of the complainant was sustained and the appeal dismissed. Respondents filed a motion for a rehearing. Briefs were filed and oral arguments had. We are now called upon to review the correctness of our previous ruling in dismissing the appeal.

The Airline Ground Service, Inc., hereafter referred to as the complainant, filed a complaint before the railway commission against Yellow Cab, Inc., Checker Cab Company, and Safeway Cabs, Inc., hereafter referred to as respondents, alleging that respondents have created a monopoly in the taxicab business in Omaha, and in the furtherance thereof they have jointly employed and maintained at the Omaha Municipal Airport starters, agents, dispatchers, and recruiters to the detriment of the public and the complainant. Answers were filed by the respondents and a petition in intervention was filed by the airport commission of Omaha. The railway commission referred the case to an examiner, who heard all the evidence and examined all the exhibits introduced into the record. The examiner reported his conclusions of law and fact to the commission. The commission on July 16, 1949, entered its interim order in which it is stated that a transcript of the evidence cannot be obtained before August 15, 1949, and, asserting the existence of an emergency, upon due consideration of the portion of the transcript of the evidence which was available, along with the examiner's report and recommendation, the exceptions thereto, and the oral arguments and briefs filed, directed the respondents to forthwith cease and

desist the use of starters, recruiters, or agents at the Omaha Municipal Airport, either directly or indirectly. From this order an appeal was taken to this court. The question before us is whether we correctly determined that the interim order was not an appealable order.

The controlling statute governing an appeal from the railway commission in a case such as we have before us provides: "If any railway company, common carrier, or any other person or persons affected thereby, shall be dissatisfied with the decision of the State Railway Commission affirming, revising, annulling or modifying any rate or rates complained of in the original schedule, or any subsequent schedule, which may be the subject of investigation, or with the decision of the commission with reference to any rate, classification, rule, charge, order, act or regulation made or adopted by them upon which there has been a hearing before the commission, except as otherwise expressly provided for herein, such dissatisfied railway company, common carrier, person or persons affected may institute proceedings in the Supreme Court of Nebraska to reverse, vacate or modify the order complained of; Provided, however, the time for appeal from the orders and rulings of the commission to the Supreme Court shall be limited to three months." § 75-405, R. S. 1943.

The procedure to be followed in perfecting an appeal under the provisions of section 75-405 is governed by the same provisions in force with reference to appeals from the district court except as otherwise specifically provided. § 75-406, R. S. 1943. It is the contention of the respondents that this section of the statutes provides the manner of perfecting an appeal but does not control the effect of section 75-405 as to the kind of an order from which an appeal can be taken.

The complaint filed in the case before us was brought under the provisions of section 75-411, R. S. 1943. It is then provided by section 75-416, R. S. 1943, as follows: "The order or orders provided for in sections 75-412,

75-413 and 75-415 shall be in force and effect from and after the date fixed by the State Railway Commission, and shall so remain until annulled, modified or revised by the commission, or until finally adjudged to be unreasonable and unjust in a court of competent jurisdiction, and no further hearing need be had before the commission with reference to the order or orders; Provided, if the railway company, common carrier, person or persons affected by the order or orders shall commence any proceeding or proceedings, as hereinbefore provided, affecting any decision, rule or order of the commission, such order or orders shall be held in abeyance until finally determined in such court."

It is fundamental of course that the form of an order or the label placed upon it does not determine its character. It is the substance of the order which is controlling in determining its nature. In Columbia Broadcasting System v. United States of America, 316 U. S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563, the court held: "The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, * * *."

Whether the order before us is reviewable must be determined from Chapter 75, R. S. 1943. The appeal sections of the act are special and control general statutory provisions. The language of section 75-405 to the effect that the decision of the commission with reference to any order made or adopted by them upon which there has been a hearing before the commission is that which affords the right of appeal in the instant case if such right does in fact exist.

Complainant contends that the words "any rate, classification, rule, charge, order, act or regulation" contained in section 75-405 should be interpreted to mean only final orders. The Legislature clearly did not limit

the right of review to final orders but has conferred the right and limited its exercise to any order upon which there has been a hearing before the commission for the purpose of securing the reversal, vacation, or modification thereof. That the Legislature may properly provide for the review of any order in setting up a special appellate proceeding must be conceded. To fail to give effect to the plain legislative intent would constitute an amendment of the act by the judicial rather than the legislative process.

This does not mean that a procedural or interlocutory order is reviewable. It simply means that any order meeting the conditions set forth in section 75-405 is reviewable, which involves a justiciable issue that is decisive of some subject matter of which the commission has jurisdiction and the power to enforce against any party to the proceeding. Under the provisions of section 75-416 the order takes effect from the time prescribed and continues in force for the time specified unless the order is annulled, revised, or modified by the commission, or set aside by a court of competent jurisdiction. This affords convincing proof that an interlocutory or procedural order incident merely to the natural course of the proceedings does not constitute the subject matter of the proceeding and is not therefore reviewable.

In the case before us the so-called interim order decided that the commission had jurisdiction of the subject matter of the complaint. It also decided that the public interest and the rights of the complainant required that a cease and desist order be granted prohibiting the use of starters, dispatchers, and agents at the Omaha Municipal Airport. The so-called interim order had the same effect upon the rights of respondents as any other cease and desist order which is limited as to its period of duration. The effect of the order also denies the claimed jurisdiction of the airport commission of Omaha. It is not a temporary or interim order in fact. Its effect is to determine justiciable issues properly before it.

Under such a situation it falls within the designation of "any rate, classification, rule, charge, order, act or regulation" upon which there has been a hearing before the commission dealing with the subject matter of the proceeding as distinguished from an interlocutory or procedural order. It is therefore an appealable order under the special appeal provisions of section 75-405.

We think this interpretation is consistent with other provisions of the act. If the interpretation thus made is not the correct one, it could well result in an administrative tyranny over common carriers by the use of temporary or interim orders. Irreparable damage could well result from unreasonable and arbitrary orders, transitory in character, if a review as to their legality cannot be had before they are placed in effect. The railway commission has not been granted equitable powers. Neither can it do by asserting an emergency what it otherwise cannot do. The act, construed as a whole, does not contemplate that the commission shall exercise such powers without a right of review. We find nothing in the act specifically granting any such authority and, it being special legislation, unless it is there found it does not exist. Consequently, we are required to take one of two positions; either the so-called interim order is wholly void or it is subject to review by this court. We think the Legislature has indicated by section 75-405 that it intended the latter position to obtain and we so hold.

It is urged, however, that this court should not permit an appeal until the whole case has been finally concluded. It is the general rule that this court will not hear a case piecemeal. Cozad Ditch Co. v. Central Nebraska Public Power & Irrigation District, 132 Neb. 547, 272 N. W. 560. But this rule is not grounded on the premise that there can be but one appealable order in a case. It is a rule of efficiency and expedition. Surely no one could logically contend that the ruling of the commission to the effect that it had jurisdiction of the subject matter of the proceeding, standing alone, would

not be a final as well as an appealable order. This court has in effect so said in the case of Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N. W. 855. We there permitted the question of jurisdiction to be determined, even though the case had not been heard on the merits. Appellees point out that the fragmentation of this case was the result of a stipulation of the parties. While this is true, the case is authority for the proposition that a determination of a justiciable issue is an appealable order, even though a full and complete hearing on the merits has not been had. No one contends that a nonreviewable order can be made reviewable by stipulation of the parties.

Our former order dismissing the appeal is therefore vacated and the motion to dismiss the appeal for the reason that the order appealed from is not reviewable is overruled.

ORDER DISMISSING APPEAL VACATED AND MOTION TO DISMISS OVERRULED.

ANDREW SOHLER, APPELLEE, V. PETER CHRISTENSEN, APPELLANT.
39 N. W. 2d 837

Filed December 1, 1949. No. 32653.

1. **Trial.** An instruction will not be held to be prejudicially erroneous because of a harmless imperfection which cannot be said to have confused or misled the jury to the prejudice of the party complaining.
2. **Vendor and Purchaser: Brokers.** Where one contracts as owner with a broker or agent for the sale of real estate he may not defend an action for commission for sale thereof on the ground that he had no interest in the real estate.
3. **Trial.** Where a request for a directed verdict has been made at the close of all the evidence and overruled the court is empowered by section 25-1315.02, R. R. S. 1943, to set aside the verdict and enter judgment in accordance with the motion.

4. ———. In a case where there are special findings of fact which findings are inconsistent with the general verdict the former controls the latter and the court may render judgment accordingly.
5. ———. To entitle a party to a judgment on special findings of a jury, where the general verdict is against him, the findings must establish all of the ultimate facts from which his right to a judgment results as a necessary legal conclusion.
6. ———. The propriety of a trial court in vacating a verdict and rendering judgment in conformity with a motion for a directed verdict made at the close of the evidence depends upon whether or not the party moving was at the time entitled to judgment in accordance with the motion.

APPEAL from the district court for Cedar County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Clarence E. Haley, for appellant.

Charles E. McDermott and *George W. Leamer,* for appellee.

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

YEAGER, J.

This is an action by Andrew Sohler, plaintiff and appellee, against Peter Christensen, defendant and appellant, for the recovery of $800 stipulated commission claimed by plaintiff to be due from defendant as commission earned on a written contract for the sale of certain real estate in Cedar County, Nebraska.

Plaintiff contends that pursuant to the contract he procured a purchaser who was ready, willing, and able to purchase the real estate but that the defendant failed and refused to perform and thus the commission became due and owing.

The defense to the action is that defendant was not the owner of the real estate hence the contract for the commission is invalid and unenforceable; and further that though he signed the instrument sued upon it was altered after he signed it and that because thereof it is

invalid as a basis for the action. Alteration was denied by plaintiff.

The case was tried to a jury. On the trial the issues of fact tendered by plaintiff were fully sustained by evidence. No detail of consequence of this evidence was denied or otherwise contravened except that the defendant disputed in an unimportant particular the date of the execution of the contract.

He however affirmatively contended that the contract had been altered after it was executed. He testified that in case plaintiff made a sale the down payment was to have been $5,000 whereas the amount appearing in the contract was $4,000. He said that this amount did not appear in the contract at the time it was signed. He testified also that the contract when signed provided that the contract was for a period of thirty days and that it had been altered so as to make the contract binding for a period of forty days and thereafter until five days' notice was given in writing. He further showed, and this is not in dispute, that he had no title to the real estate but that title at the time was in his wife.

At the conclusion of the evidence the plaintiff moved for a directed verdict in his favor. This motion was overruled, whereupon the case was submitted to the jury on the evidence and instructions of the court.

The instructions defined the issues tendered by the plaintiff. No error is predicated on this definition of issues.

The instructions also presented to the jury the question of whether or not the contract had been altered. The jury was informed by the instructions that the fact that title to the real estate was not in the defendant was not a defense to plaintiff's cause of action.

Along with the general instructions the court by specific instruction required of the jury a special finding on the question of whether or not the contract had been altered.

The jury returned a general verdict in favor of defend-

ant and a special verdict finding that the contract had not been altered.

On the same day but after the verdicts were returned the plaintiff filed a motion for judgment in his favor in accordance with the prayer of his petition.

The motion which is in terms a motion for judgment notwithstanding the verdict was sustained and judgment was accordingly entered. The judgment was for $800 together with interest and costs.

The defendant thereupon filed a motion for new trial which was overruled. From this judgment and the order overruling the motion for new trial the defendant has appealed.

The assignments of error are numerous but all of them do not require consideration. Only those that require consideration herein will be noted.

Instruction No. 12 is the one which is the basis for the special finding on whether or not the contract had been altered. The instruction is objected to on the ground that it is confusing. It is not contended that a clear instruction would have been improper.

An examination of the instruction discloses that it does contain error but none of which the defendant may be heard to complain. The instruction submits specially the question of whether or not the contract had been altered. The burden of proof of alteration was placed properly on the defendant, and of this there is no complaint. Later in the instruction the burden appears to be shifted to the plaintiff to prove by a preponderance of the evidence that the contract was not altered. It is difficult to see how a party may be heard to complain of an instruction the tendency of which is to lessen his burden but in nowise to increase it. In Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322, it was said: "An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice

of the party complaining." See, also, Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462.

It was by instruction No. 7 the jury was told that the fact that the defendant did not have title to the land was no defense to the action. Of this instruction complaint is made. No complaint in this respect is justified.

Section 36-107, R. S. 1943, provides: "Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." The source of this section is Chapter 57 of the Laws of 1897.

In Valerius v. Luhring, 87 Neb. 425, 127 N. W. 112, in interpretation and application of this provision, it was said: "The defendant then entered into a written contract with the plaintiffs as owner of the lands described, and we think that he cannot now be heard to say that he had no interest in the lands and no interest in the contract which he made. If he had sufficient interest in the land to enter into such a contract, we think he is the owner of the land within the meaning of the statute. The object of the statute is to prevent fraud in such transactions. It is not the purpose of the statute to define what shall constitute ownership. It was intended to prevent fraud, and should not be made an instrument to enable the parties thereto to perpetrate fraud on each other."

What was said in that case is equally applicable here.

The remaining pertinent assignments of error deal with the propriety of the action of the court in sustaining the motion for judgment notwithstanding the verdict and in entering judgment in favor of plaintiff.

Section 25-1315.02, R. R. S. 1943, provides that whenever a motion for a directed verdict made at the close of all the evidence is denied, the party who has moved for the directed verdict may move to have the verdict

and judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. In such case the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

In application of this provision this court has said that where a request for a directed verdict at the close of all of the evidence has been made and overruled, the court may set aside the verdict and enter judgment in accordance with the motion. In re Estate of Farr, 150 Neb. 67, 33 N. W. 2d 454; Patrick v. Union Central Life Ins. Co., 150 Neb. 201, 33 N. W. 2d 537. In re Estate of Farr was reversed in a later opinion but this principle was not disturbed.

On the evidence the plaintiff was entitled to a judgment in his favor on his cause of action, subject only to the finding of the jury on the question of whether or not the contract had been altered. The jury by its special verdict specifically found that it had not. The effect of this was to say that the general verdict was wrong and that the plaintiff was entitled to a verdict in his favor on his cause of action.

Section 25-1120, R. S. 1943, provides: "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." See, Culbertson Irrigating & Water Power Co. v. Olander, 51 Neb. 539, 71 N. W. 298, and Story v. Sramek, 108 Neb. 440, 187 N. W. 881.

Under the rule laid down in section 25-1120, R. S. 1943, and the supporting decisions it became the duty of the court to allow the special verdict to control the general one. This necessitated setting aside the general verdict.

The defendant contends substantially however that even though the special verdict shall be allowed to control the general still all the court was empowered to do was to grant a new trial. Reliance for this contention is upon Omaha Life Assn. v. Kettenbach, 55 Neb. 330, 75

N. W. 827. There it was said: "To entitle a party to a judgment on the special findings of a jury, where the general verdict is against him, such findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion."

This rule, while it may be said to be sound, has no application here. The court in this case did not render judgment in favor of plaintiff on the special verdict. What the court in actuality did was to accept the finding of the jury in the special finding as determinative of the question of whether or not the contract had been altered and to enter judgment in conformity with the motion for judgment notwithstanding the verdict.

The procedure followed by the trial court conforms with the provisions of section 25-1315.02, R. R. S. 1943. The action of the court is to be sustained, as is made clear by the statutory provision, if on the record it may be said that this is the judgment to which the plaintiff was entitled. Lebs v. Mutual Benefit Health & Accident Assn., 124 Neb. 491, 247 N. W. 19; In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

It appears that the judgment rendered was the only one which could have been properly rendered. As pointed out the proof of plaintiff's cause of action is complete and it stands without refutation, except that the defendant charged and sought to prove that the contract sued upon had been altered. This contention was the only defense. On this defense the jury found against the defendant. There was sufficient evidence upon which to base such a finding by the jury.

The judgment of the district court is affirmed.

AFFIRMED.

STANFORD MOTOR COMPANY, A PARTNERSHIP, APPELLEE, V. EDMUND J. WESTMAN, APPELLANT.
39 N. W. 2d 841

Filed December 1, 1949. No. 32656.

1. **Monopolies.** In determining the validity of a contract in restraint of trade, the test is whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so much as to interfere with the interest of the public.
2. ———. Partial restraints upon the exercise of any business are not considered unreasonable when they are ancillary to any valid contract made in good faith and are apparently necessary to reasonably protect the parties, or either of them.
3. **Contracts.** Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement.
4. ———. When there are several parts of the same transaction each part does not need a separate consideration but the consideration for the whole is consideration for each part.
5. **Damages: Contracts.** If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.
6. **Damages.** As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Johnson & Johnson, Schaper & Schaper, and *Chambers, Holland & Groth,* for appellant.

Evans & Lee, for appellee.

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

WENKE, J.

This is an action at law brought by the Stanford Motor

Company, a partnership, against Edmund J. Westman. The action was brought in the district court for Custer County. The purpose of the action is to recover $500 as stipulated liquidated damages based on the defendant's breach of an automobile repurchase agreement. At the conclusion of defendant's evidence plaintiff moved for a directed verdict. This motion was sustained and judgment entered accordingly. Defendant, his motion for new trial having been overruled, appealed.

The instrument upon which this suit is based was executed by the appellant on October 4, 1947, at a time when he purchased from the appellee the automobile therein described. This instrument provides as follows:

"STANFORD MOTOR COMPANY
Broken Bow, Nebraska
Broken Bow, Nebr., October 4th 1947

FOR ONE DOLLAR and other valuable considerations, I hereby agree that I will not sell, barter, trade or assign Buick 4 Door Sedan Model 71 Serial No. 447 27 392 Motor No. 4908 330 7, to any person within six months from the above date, without first offering to resell it to the STANFORD MOTOR COMPANY, Broken Bow, Nebraska, at a price not exceeding the purchase price less a reasonable amount for usage. This constitutes a repurchase option, for the violation of which purchaser agrees to pay Stanford Motor Company the sum of five hundred dollars ($500.) as liquidated damages.

Witness: /S/ D. Halbersleben /S/ E. J. Westman
Signature of Purchaser"

Appellant contends this agreement is void and unenforceable for the reason that it is an unlawful restraint of trade; is in violation of the laws of Nebraska, particularly sections 59-801, 59-802, and 59-805, R. S. 1943, thereof; is monopolistic in character; and contravenes sound public policy.

Section 59-805, R. S. 1943, provides, in part, as follows: "Every person, * * * or other association engaged in business within this state, * * * who shall sell

any article upon a condition, contract or understanding that it shall not be sold again by the purchaser, or restrain such sale by the purchaser; shall be deemed guilty of a misdemeanor, * * *."

There is no positive restriction in this instrument against reselling. The obligation in the agreement was to first offer the automobile to appellee on the terms as therein set forth if appellant elected to dispose of it within the six-month period therein provided. See Summers v. Adams Motor Co., — Ala. —, 39 So. 2d 300.

In Roberts v. Lemont, 73 Neb. 365, 102 N. W. 770, we said: "In determining the validity of a contract in restraint of trade, the test is whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so much as to interfere with the interest of the public."

In Swingle & Co. v. Reynolds, 140 Neb. 693, 1 N. W. 2d 307, we said: "Partial restraints upon the exercise of any business are not considered unreasonable when they are ancillary to any valid contract made in good faith and are apparently necessary to reasonably protect the parties, or either of them." See Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842.

The record discloses that shortly after the lifting of O.P.A. regulations the appellee adopted a business policy of selling all new cars received by it as agent of the Buick Motor Division of the General Motors Corporation to customers within the trade area of Broken Bow, where it is in business, at list price but required each purchaser to sign an agreement, such as appellant did here, to first offer to resell the car to appellee on the terms as in the repurchase agreement set forth in case such purchaser decided to dispose of the car at any time within six months from the date of purchase. Appellee thought, if the purchasers of its new cars immediately put them on the "gray market" where new used cars were at that time selling far above list price, it

would cause the buying public in the trade area of Broken Bow to feel, and possibly believe, that appellee was actually selling the new cars it received on the "gray market," thus damaging its business reputation in that community. Its purpose, in adopting this policy, was to prevent this from happening and thus protect its good will.

We find nothing in this policy that is contrary to the provisions of any statute that has been called to our attention. Neither do we think it is monopolistic in character, nor do we find it such an unreasonable restraint of trade that it can be said to contravene public policy. We think the restraint, considering the circumstances existing at that time, was reasonably necessary to fairly protect the business of the appellee and that it did not interfere so much with the interests of the public that it can be said to be against sound public policy. In fact, to the extent of the new cars being received by appellee and sold at list price, it protected the public from their being immediately offered for sale to it as new used cars in the "gray market" at a much higher price. We hold the repurchase agreement to be valid and enforceable.

Other states have very recently passed on the same question and have all come to the same conclusion. See, Schuler v. Dearing Chevrolet Co., 76 Ga. App. 570, 46 S. E. 2d 611; Burnett v. Nolen, 336 Ill. App. 376, 84 N. E. 2d 155; Summers v. Adams Motor Co., *supra;* Wade & Dunton v. Gordon, — Me. —, 64 A. 2d 422; and Bay Shore Motors v. Baker, — Cal. —, 202 P. 2d 865.

Appellant refers to the repurchase agreement as lacking mutuality and of its being unilateral in character. As stated in 12 Am. Jur., Contracts, § 13, p. 510: "If by mutuality of obligation is meant, as some courts have suggested, that there must be an undertaking on one side and a consideration on the other, the necessity for its existence cannot be questioned. But if, as other courts have said, mutuality of obligation means that a

contract must be binding on both parties, so that an action may be maintained by each against the other, the statement that mutuality of obligation is essential to every contract is too broad. Whatever the rule may be with respect to the specific enforcement of contracts, there can be no doubt that if a contract is ever unenforceable in other ways because of the lack of mutuality, it is because such lack of mutuality creates a want of consideration. Inasmuch as a promise by one person is merely one of the kinds of consideration that will support a promise by another, mutuality of obligation is not an essential element in every contract. Therefore, to say the least, language which is susceptible of the interpretation that consideration and mutuality of obligation are two distinct elements lacks precision. Consideration is essential; mutuality of obligation is not unless the want of mutuality would leave one party without a valid or available consideration for his promise. The doctrine of mutuality of obligation appears therefore to be merely another mode of stating the rule of consideration that where there is no other consideration for a contract, the mutual promises must be binding on both parties, for the reason that only a binding promise is sufficient consideration for a promise of the other party. But where there is any other consideration for the contract, so that each promise does not depend upon the other for consideration, mutuality of obligation is not essential."

"The doctrine of mutuality is inapplicable to unilateral contracts. If the promisor has received a sufficient consideration, his promise is binding and may be aptly termed an obligation, even though the consideration is not a promise and the promisee is not obligated. * * * Moreover, an option supported by consideration is valid even though the holder is not obligated to exercise it. The essence of an option contract is that it is not mutual, for the optionee pays his money or performs his promise for the right of electing whether or not he will re-

quire performance by the other party, and the optionor relinquishes his right of choice." 12 Am. Jur., Contracts, § 14, p. 512.

We said in Elson & Co. v. Beselin & Son, 116 Neb. 729, 218 N. W. 753: "Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement; * * *."

As stated in Schuler v. Dearing Chevrolet Co., *supra*: "A written agreement between two parties—based upon the consideration of the sale of a specific article of personal property and one dollar, receipt of which is acknowledged by the vendee from the vendor, wherein the vendee agrees that, should he decide to sell said property within six months from the date of the first sale, he will give the vendor the first opportunity to repurchase said property at the original purchase-price before offering the same for sale to others—is not void by reason of a lack of mutuality, and being unilateral, * * *."

The question therefore arises, was there consideration for the agreement here sought to be enforced? In this respect appellant contends the record presents a jury question for the reason that appellant, his wife, and their son all testified that the instrument here sought to be enforced, which will be herein referred to as the repurchase agreement, was never presented to appellant for execution nor was he aware that appellee would require that he sign such an agreement until after he had bought the Buick sedan and given his check, which he says appellee accepted, in payment thereof.

The record discloses that sometime prior to October 3, 1947, appellant had apparently notified appellee that he was desirous of buying a car. On the evening of October 3, 1947, appellee having received the Buick sedan referred to in the repurchase agreement, notified appellant by telephone that it had a car for sale if he was still interested in buying one. Appellant, his wife, and either one or two of their sons came to Broken Bow on the following

day at about 10:30 a. m. They went to appellee's place of business and there contacted Koozer, one of the members of the appellee partnership. Negotiations were then carried on for the purchase of the Buick sedan. Koozer offered the car for sale at the list price of $2,763, which included the accessories thereon of a radio, heater, seat covers, and sun visor, and offered to allow appellant the sum of $177 for his 1937 Chevrolet coupé, which appellee advised appellant it would require him to turn in on the deal. Koozer and appellee's bookkeeper, Halbersleben, testified that during these negotiations appellant was advised that if he bought the car he would be required to sign a repurchase agreement in accordance with the adopted business policy of the appellee in connection with its sale of new cars and was given a copy thereof. Appellant, his wife, and their son, all of whom were present during these negotiations, testified that no mention of this business policy and that appellant would be required to sign such a repurchase agreement was ever mentioned until after appellant had bought the Buick sedan and given a check in payment thereof, although the appellant's evidence indicates he knew, prior to giving his check, of both the policy and that he would be required to sign such an agreement. After lunch, the deal having been made, Koozer left for Omaha but before going turned the closing of the sale over to Halbersleben, appellee's bookkeeper. Halbersleben completed the deal later that same afternoon.

In closing the deal appellant turned over to appellee his 1937 Chevrolet coupé, gave his check in the sum of $2,586, and signed the repurchase agreement. Appellant then received possession of the Buick sedan and later the title thereto, the latter not being assigned to him until October 11, 1947, as appellee did not have the manufacturer's statement of origin at the time of the sale. Both parties executed a state invoice.

We think the evidence establishes, as a matter of law, that the sale and delivery of the Buick sedan constituted

one transaction and that all things done in consummation thereof were a part of the same transaction. While it was made up of several different parts, such as the transfer of title and delivery of the Chevrolet coupé, the transfer of title and delivery of the Buick sedan, the state invoice, the repurchase agreement, and the check, it all constituted part of the same transaction; that is, the sale of the Buick sedan. Being all part of the same transaction each part does not need a separate consideration but the consideration for the whole is consideration for each part which, insofar as the repurchase agreement is concerned, is the sale and delivery by appellee to appellant of the Buick sedan.

As stated in Bay Shore Motors v. Baker, *supra:* "We think that it is a part of the entire agreement of purchase and sale, and that the consideration for the sale is sufficient consideration for the option agreement." See Summers v. Adams Motor Co., *supra,* and Burnett v. Nolen, *supra.*

Although he did not get the title to the Buick sedan until October 11, 1947, appellant, on the evening of the same day he purchased the Buick sedan, sold it to Clyde West and delivered the car to him at that time. He did not give West a certificate of title thereto until October 15, 1947, after he had received his from the appellee. Neither prior to such sale and delivery nor at any time prior to transferring title thereof to West did appellant advise appellee of his intention to dispose of the Buick sedan nor did he give appellee an opportunity to purchase it in accordance with the repurchase agreement which he had signed. Appellant, by such conduct, breached the terms of the repurchase agreement.

Is the provision in this repurchase agreement as to liquidated damages in the nature of a penalty?

We said in Gustin & Co. v. Nebraska Building & Investment Co., 110 Neb. 241, 193 N. W. 269: "* * * where the damages are uncertain, and not readily capable of exact ascertainment by any known rule, and the parties sur-

veyed the whole situation at the time of contract, and agreed upon the amount of damages, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recovery and is liquidated damages and not a penalty."

"In cases where the amount of damages incident to the breach of contract is uncertain, speculative and incapable of being definitely computed, a recovery may be allowed for the amount of the undertaking. 8 R. C. L. 569, sec. 118, 17 C. J. 941, sec. 237. See, also, Am. Ann. Cas. 1912C, 1026." Van Horn v. Ericson Lake Co., 113 Neb. 332, 203 N. W. 553.

"If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages. On the other hand, if the damages may be easily and readily ascertained, and if the amount stipulated is more than sufficient to compensate for the breach, it will be regarded as a penalty." Yant Construction Co. v. Village of Campbell, 123 Neb. 360, 243 N. W. 77.

As stated in Burnett v. Nolen, *supra:* "* * * this is precisely the type of case in which an agreement specifying liquidated damages is desirable, and entitled to enforcement in the courts, provided the amount is reasonable."

"As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court." 25 C. J. S., Damages, § 102, p. 657.

"In such cases the court must find out whether the payment stipulated is in truth liquidated damages or a penalty. The question whether it is the one or the other is a question of law and one quite independent of the

agreement of the parties to call it the one or the other." 15 Am. Jur., Damages, § 246, p. 678.

Here the evidence shows that the market value of this car at the time of its sale to the appellant was far more than $500 above the list price at which it was sold to defendant; that the possible loss of servicing the car, if sold out of the trade area, was substantial but difficult of ascertainment; and that possible loss of future car business and good will, which latter is referred to as the "backbone of business," if new cars handled by appellee appeared for sale in the "gray market" were material but, as to the dollars and cents value thereof, difficult to ascertain and measure. The stipulated amount is not disproportionate to the amount of damages that might reasonably have been anticipated from a breach. We think the appellee has fully established facts showing a situation where it was proper to enter into an agreement for liquidated damages, consequently, evidence as to what appellant did or appellee would have done with the car is irrelevant and immaterial.

In view of the foregoing, the other questions raised become immaterial and will not be discussed. We find the action of the trial court to have been proper and it is therefore affirmed.

AFFIRMED.

REGINALD R. KOEHN, APPELLANT, V. UNION FIRE INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.
39 N. W. 2d 808

Filed December 1, 1949. No. 32668.

Appeal and Error. An order sustaining a demurrer to a petition, without a dismissal or other final disposition of the case, is not a final order reviewable on appeal.

APPEAL from the district court for Fillmore County: STANLEY BARTOS, JUDGE. *Appeal dismissed.*

Waring & Waring, and *Kirkpatrick & Dougherty,* for appellant.

Davis, Stubbs & Healey, John Mekota, and *Thomas Keenan,* for appellees.

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

BOSLAUGH, J.

This case was brought by appellant to recover from the appellee Union Fire Insurance Company on a contract of insurance made by it with the appellant indemnifying him against loss because of bodily injury or property damage caused to any person by reason of the negligent use by appellant of a motor vehicle described in the contract.

The petition states two causes of action: The first, for the amount of a judgment recovered by Dale Bruntz, appellee, against appellant in an action for damages caused the appellee by the negligent operation of the motor vehicle by the appellant; and the second, for expenses incurred by him in defending the damage suit in which the judgment was rendered against him.

The insurance company demurred separately to each cause of action of the petition. The district court sustained the demurrer on the grounds that there was another action pending in that court between the parties involving the same subject matter, and that the petition failed to state facts sufficient to constitute a cause of action in favor of appellant. This is an attempt to appeal from the order of the court sustaining the demurrer.

No judgment was rendered disposing of the case and terminating the litigation in that court. An order sustaining a demurrer to a petition, in the absence of further proceedings, is not a final order reviewable on appeal. §§ 25-1902 and 25-1911, R. S. 1943; Anson v. Kruse, 147 Neb. 989, 25 N. W. 2d 896; Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303.

This appeal must be dismissed.

APPEAL DISMISSED.

LLOYD PETERS ET AL., APPELLEES, V. LOWELL WILKS, EXECUTOR OF THE ESTATE OF ELLSWORTH E. HILL, DECEASED, APPELLEE, IMPLEADED WITH CARL G. NUSS, APPELLANT.

39 N. W. 2d 793

Filed December 1, 1949. No. 32697.

1. **Specific Performance: Frauds, Statute of.** Whether or not an oral contract to leave property to another should be enforced by specific performance after it has been performed by one party depends upon the facts and circumstances of each case.
2. **Equity: Specific Performance.** Courts of equity may grant specific performance of an oral contract to transfer the title of personal property.
3. ———: ———. Equity will grant specific performance of a parol agreement to leave property to another, if it is proved by evidence convincing and satisfactory, if it has been wholly performed by one party, and if its nonperformance would be a fraud on him.
4. **Specific Performance: Frauds, Statute of.** Performance of an oral contract to transfer specific property in consideration of personal care of the owner during the remainder of his life may be decreed by the court when the existence and performance of it is established by clear and satisfactory evidence.
5. **Evidence.** Declarations of a deceased against interest are admissible as evidence of a contract to leave property to another, but such declarations cannot be annulled or explained away by self-serving and hearsay counter declarations.
6. **Contracts: Pleading.** If a defendant relies upon the nonperformance of a contract by plaintiff, he must allege that fact in his answer, and in pleading nonperformance, the facts which constitute the breach must be alleged.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Atkins & Lyman, and *True R. Ferguson*, for appellant.

Mothersead, Wright & Simmons, for appellees.

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

BOSLAUGH, J.

This case was brought by appellees for specific performance of an oral contract alleged to have been made with Ellsworth E. Hill, now deceased, by which he promised to give his property to appellees if they would move to his home on a farm near Minatare, Nebraska, and there care for him until his death. Appellees plead full performance by them of the contract; that deceased violated it by making bonds owned by him payable to appellant; and by bestowing upon him by will all unsold crops of the deceased. Appellant admitted some of the allegations of the petition, and denied generally the others. The decree granted appellees the relief sought by their petition and awarded the bonds and the crops to them. The appeal is from that decree.

Appellant asserts that the decision of the district court is not sustained by the evidence and is contrary to law.

Ellsworth E. Hill was in 1946 about 80 years of age. He and Lloyd Peters had some acquaintance from about 1938. They lived at the Globe Hotel in Scottsbluff from March 21 to April 30, 1946. Peters was a policeman. Jane Peters, his wife, joined him about the first week in April and lived there until May 1, 1946. She became acquainted with Hill. Before he went to the Globe Hotel he had been cared for by a nurse, Dorothy Kuns, until her death. He had no known relative. He owned a life estate in land near Minatare on which was a modern farm home. Appellees saw him each day while they lived at the hotel and they conversed frequently. Hill asked Peters to drive for him. Peters worked on the night shift and drove Hill in the afternoon a number of times—nearly every afternoon—and sometimes Mrs. Peters accompanied them. Peters accompanied Hill to his farm home on some occasions, and they had conver-

sations on these trips. The first of May 1946, appellees and Hill moved from the Globe Hotel in Scottsbluff to his farm home near Minatare, Nebraska, and lived there until Mr. Hill's death on August 10, 1948. On several occasions while they were staying at the Globe Hotel he asked Peters to go out and live on his place and keep house for him; that he would not have to quit the police force, but could use Hill's car for transportation to and from his work. While appellees and Hill resided in his home he frequently referred to Lloyd Peters as his "boy" and Mr. and Mrs. Peters as "the kids," and spoke of his interest in and affection for their little girl. He told acquaintances and friends of his satisfaction with appellees, how they had given him good care, furnished him what he wanted to eat, that they were fine people, kept his house in good condition, and were considerate of him. He also stated that the Peters were to take him to the places where he desired to go, were to take care of the house, do the housework, and take care of him until he died; that he had enough to take care of the Peters and give them a home for a long time; that he thought they should have everything when he died; that he had the kids come out there to take care of him "and they were supposed to have everything that he had after his death if they stayed with him and took care of him until * * * his death"; that "the kids had taken care of him and he was leaving everything to them"; that "he was appreciative of what they had done for him and that at his death whatever he had would be for Peters"; and that " 'If Pete looks after me until I die, I am going to give him everything I have got.' "

These and similar declarations and admissions were frequently made by Hill to his neighbors and acquaintances. There is no contradiction or dispute concerning any of them.

His condition was such that the indispensable thing he required was someone to give him the care he was not capable of giving himself—someone to take him

places, look after his needs, bathe him, prepare the kind of food he could eat and had to have, to clothe him, launder and clean his clothing, his bedding, and his room. He was aged, without teeth, hard of hearing, helpless, and his health and strength had deteriorated to the extent that he had lost control of his bodily functions. His condition and habits made his care onerous, constant, and extremely unpleasant and exacting.

Appellees gave Hill the service, attention, and consideration that he required and should have had. His frequent statements throughout the period of their service shows this. He said "he was well satisfied with what the Peters had done for him and they had taken good care of him * * *." There is neither pleading nor evidence of any neglect, default, or nonperformance on the part of appellees.

An examination and consideration of the evidence is convincing that the oral agreement as claimed by the appellees was made; and that it was performed by them and violated by the deceased to the extent and in the respects complained of by the appellees. The character and effect of the evidence referred to may not furnish a measure for other cases, and the evidence of the making of the contract might be insufficient in a case of different facts and circumstances. Whether an oral contract to leave property to another should be enforced by specific performance after it has been performed by the beneficiary of the contract depends upon the facts and circumstances of each case. Peterson v. Bauer, 83 Neb. 405, 119 N. W. 764; Lennox v. Anderson, 140 Neb. 748, 1 N. W. 2d 912. Courts of equity may grant specific performance of an oral contract to transfer the title of personal property. Hackbarth v. Hackbarth, 146 Neb. 919, 22 N. W. 2d 184; Cox v. Johnston, 139 Neb. 223, 296 N. W. 883. Equity will grant specific performance of a parol agreement to leave property to another if it is shown by evidence convincing and satisfactory, if it has been wholly performed by one party, and its non-

performance would be a fraud on him. Craig v. Seebecker, 135 Neb. 221, 280 N. W. 913; Hackbarth v. Hackbarth, *supra;* Lennox v. Anderson, *supra.* Performance of an oral contract to transfer specific property in consideration of personal care to be given to the owner during the remainder of his life may be decreed by the court when the existence and performance of it is established by clear and satisfactory evidence. Weber v. Crabill, 123 Neb. 88, 242 N. W. 267; Craig v. Seebecker, *supra;* Lennox v. Anderson, *supra;* Davis v. Murphy, 105 Neb. 839, 182 N. W. 365; Damkroeger v. James, 95 Neb. 784, 146 N. W. 936; Harrison v. Harrison, 80 Neb. 103, 113 N. W. 1042.

There is nothing to indicate the services furnished deceased by appellees were gratuitous. There is no claim or evidence that they were paid any amount by the deceased for their services or expenditures. Appellees furnished the food required for the home after they moved there until the date of the death of Mr. Hill. He furnished only the fuel and electricity for heating and cooking. The appellees were not related to the deceased, had only a limited acquaintance with him, had not been befriended by him, and were not under obligation to him in any way. They had no obligation, legal or moral, to care for him or to provide for his welfare. They were, when they moved to the Hill home, a young married couple soon to become parents. The record indicates they had neither home, accumulations, nor income except the limited earning of Peters as a policeman in a western city of the state, and later as a common laborer. During the period vital to this case Mrs. Peters became the mother of two children, cared for them and the deceased, and performed all the household duties without assistance except for those brief periods when she was disabled or prevented by circumstances beyond her control. When appellees were away from the home for very short periods at infrequent intervals, they provided reasonable care for the deceased. These facts support

the claim of an agreement with the deceased, and are evidence as to the nature thereof. The contract asserted is not unreasonable or inequitable. The only property involved in this case consists of United States "E" bonds of the face value of $8,200 and the crops owned by deceased at the time of his death, the value of which is not shown. There is nothing in the case to indicate the deceased would have wanted appellees, or that they would have been willing, to do as they did relying upon an implied agreement to pay them at some time then in the indefinite future such amount of money as a court or jury might estimate as reasonable compensation. Where the acts performed by the claimants tend to show not only that there was an agreement, but also throw some light on the nature of the agreement, the evidence cannot be said to rest wholly in parol. The parol evidence, in such a situation, is auxiliary to the proof afforded by the case itself. Harrison v. Harrison, *supra.*

Appellant claims error because the court excluded evidence offered by him of alleged statements made by the deceased not in the presence of appellees and not adverse to his interest. Offers of proof were made and refused. The proposed evidence was hearsay and self-serving. Declarations of a deceased against interest are admissible as evidence of a contract to leave property to another, but such declarations cannot be annulled or explained away by counter declarations which are self-serving and hearsay. Sampson v. Sissel, *ante* p. 521, 38 N. W. 2d 341; Cahill v. Mockett, 143 Neb. 730, 10 N. W. 2d 679; Davis v. Murphy, *supra.*

The purpose and any importance of the excluded matters were to show failure of appellees to perform their part of the contract. Appellant did not interpose nonperformance as a defense. Appellees pleaded performance on their part in general terms, and appellant relied upon a denial. If defendant relies upon the nonperformance of the contract by the plaintiff, he must allege

that fact in his answer, and in pleading nonperformance, the facts which constitute the breach must be alleged. Where by statute, as in this state, plaintiff is authorized to plead general performance of all conditions precedent, defendant must, if he relies upon the fact that any of the conditions precedent have not been performed, set out specifically the condition and the breach. § 25-836, R. S. 1943; Morearty v. City of McCook, 119 Neb. 202, 228 N. W. 367; Davidson v. First American Ins. Co., 129 Neb. 184, 261 N. W. 144. The rejection of the offers made was not prejudicial to appellant.

The decree of the district court should be affirmed.

AFFIRMED.

WILL FEIGHT, APPELLANT AND CROSS-APPELLEE, V. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.
39 N. W. 2d 823

Filed December 6, 1949. No. 32604.

1. **Appeal and Error: Licenses.** The appeal of a holder of a real estate broker's license from an order of the State Real Estate Commission, provided for by section 81-884, R. S. Supp., 1947, requires the institution of an action in the district court within ten days and a determination thereof upon the issues raised by the pleadings in that court.
2. ———: ———. In such a trial in the district court the court has authority to inquire into the subject matter of the complaints set out in the pleadings, including, if alleged, that the findings of fact made by the commission were contrary to the weight of the evidence.
3. ———: ———. Such an action is equitable in nature and will be tried as any other civil action where the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made.
4. ———: ———. Where a finding adverse to a license holder has been made which reflects upon the character and standing of the licensee, the claim on appeal that the adverse finding and order were wrongfully entered raises a justiciable issue,

even if the license has expired or the disciplinary order satisfied.

5. **Appeal and Error.** An appellee in this court may not cross-appeal from a holding of the district court, claimed to be erroneous, which was made at his express request.

APPEAL from the district court for Dixon County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Free, Berry & Free, Fraser, Connolly, Crofoot & Wenstrand, and *W. H. Wright,* for appellant and cross-appellee.

James H. Anderson, Attorney General, and *Walter E. Nolte,* for appellee and cross-appellant.

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

CARTER, J.

This is an appeal from a judgment of the district court for Dixon County affirming a suspension of appellant's license as a real estate broker in Nebraska.

The complaint was filed by one Richard Mathers before the State Real Estate Commission pursuant to section 81-881, R. S. 1943. After hearing, and on December 26, 1947, the commission entered an order finding that the appellant Feight had violated certain specified provisions of the act and suspended his license from the date of filing the order until January 1, 1949. In an original suit filed in the district court the action of the commission was sustained. Appellant seeks a review of the judgment entered by the district court on December 3, 1948. An appeal was perfected and a supersedeas bond filed.

The evidence shows that appellant was engaged in the real estate brokerage business at Sioux City, Iowa. During the four years preceding the transactions here complained of he carried on considerable business in Nebraska under a nonresident broker's license. On March 8, 1947, appellant contacted Richard Mathers with the view of selling the farm involved to him. He drove Mathers and his wife to the farm where a limited inspection was

made, it being too muddy to get over the whole of the land. It is asserted that appellant made certain misrepresentations at that time concerning the condition of the well, the availability of electricity, and the existence of approximately ten acres of alfalfa on the farm. Without discussing the evidence on these alleged misrepresentations, we hold that the findings of the trial court were correct in determining that such misrepresentations were not established and consequently provided no basis for discipline under the provisions of section 81-881.

After the inspection of the farm Mathers offered to purchase it for the sum of $77.50 an acre. Mathers paid $2,000 to appellant to be retained as a down payment if the offer was acceptable to the owner. The total purchase price was to be $10,400 and a first mortgage loan of not less than $6,500 was to be obtained on the property. A first mortgage loan of $6,700 was obtained and two notes of $850 each were made payable and delivered to Frank H. Linville as owner.

The record discloses that the farm in question had been formerly owned by one Lenora Schopke. Appellant Feight, in seeking a buyer of the farm for Miss Schopke, had sought out D. Van Donselaar, an attorney in Sioux City, as a possible purchaser. Van Donselaar dealt extensively in real estate and Feight had acted as his broker in five or six previous transactions. As a result of Feight's efforts, Van Donselaar contracted to purchase the land at $55 an acre, or a total amount of $7,370. To facilitate a resale of the property the title was taken in the name of Linville, a friend of Van Donselaar.

An agreement was made between Van Donselaar and Feight that Feight should resell the property. Under this agreement Feight was to receive one-half the net profit resulting from the resale and was to waive his commission of $385 on the sale from Schopke to Van Donselaar.

During the time that arrangements were being made for the $6,700 mortgage in order that the transaction

could be consummated, Van Donselaar and Feight became involved in a dispute regarding commissions and other amounts which Feight claimed Van Donselaar owed him. Feight contends Van Donselaar advised him that he would pay him nothing on the Mathers sale and demanded the $2,000 down payment in full. He asserts also that Van Donselaar demanded an abstract of title to the property which Feight had procured at an expense of $74.10. The first mortgage was recorded on April 5, 1947, but the amount it was given to secure was not paid over on the instructions of Feight, who was insisting upon a settlement with Van Donselaar before going ahead with the deal. Mathers was delaying final settlement because of the claimed misrepresentation of the well. The dispute concerning the well was settled on April 17, 1947, by the payment of $400 to Mathers by Feight. The dispute over the commissions owed to Feight by Van Donselaar remained unsettled, and Feight says that Mathers agreed to await their adjustment before completing his purchase of the farm; Mathers in the meantime was to occupy the farm. Mathers denies that any such understanding was had.

A few days after April 17, 1947, Van Donselaar obtained a deed to the farm direct from Lenora Schopke with Linville as the grantee. On April 28, 1947, Van Donselaar obtained an order from Mathers directing the mortgagee to pay the $6,700 to himself or Linville. The company making the loan refused to honor this order at the instance of Feight. Van Donselaar also procured an order from Mathers directing Feight to pay over the $2,000 down payment to himself or Linville. On April 29, 1947, Van Donselaar served notice on Feight that any previous agreement made between the two regarding a commission or a sharing of the profits on the sale of the land to Mathers was canceled. The difficulties between Van Donselaar and Feight remained unadjusted, Mathers remained on the farm, and the situation otherwise remained unchanged until September 23, 1947, when the

complaint in the case was filed with the State Real Estate Commission.

On November 7, 1947, Van Donselaar and Feight settled all their differences. By the settlement Van Donselaar conveyed the title to the farm to Feight and assigned to him the Mathers purchase agreement. Feight attempted to immediately close the sale of the land to Mathers. Mathers procrastinated in the closing of the deal and Feight, in the latter part of November 1947, commenced a suit to foreclose the contract. Mathers, with Van Donselaar appearing as his attorney, filed an answer alleging that Mathers and Van Donselaar had mutually agreed to rescind the contract in June 1947. Mathers counterclaimed for the $2,000 down payment. Feight claims to have had no knowledge of any such rescission until the answer was filed. Mathers remained on the land until February 1948, when he voluntarily relinquished the possession.

The applicable portions of section 81-881 are as follows: "The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any real estate broker or any real estate salesman and shall have the power to revoke or suspend any license, issued under this act, whenever the broker or salesman has been found guilty of any of the following unfair trade practices: * * * (2) failing to account for and remit any moneys coming into his possession belonging to others; * * * (4) acting in a dual capacity of broker and undisclosed principal in any transaction; * * * (14) the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman, whether of the same or of a different character as hereinbefore specified; * * *."

Section 81-882, R. S. 1943, provides for notice and hearing. Section 81-884, R. S. Supp., 1947, provides that the commission shall state in writing its findings and determination and its order in the matter. With reference to appeal, this section states: "Should the applicant for

a license or a license holder desire to appeal from the decision of the commission, he shall, within ten days, file an appeal bond with the commission in the sum of fifty dollars and file an original action in the district court of the county in which the cause of action arose and, pending final determination of such action, the holder of a license shall be permitted to do business as a real estate broker or real estate salesman the same as though a license were in full force and effect." No other procedural requirements are set forth in the act.

It was clearly the intent of the Legislature to provide an appeal to the district court from orders entered by the State Real Estate Commission pursuant to section 81-884. The requirement in the statute that an appeal bond is required, which has the effect of staying the commission's order until the final disposition of the case, appears conclusive of the legislative intent. We are here concerned with the type of hearing to be held in the district court where the appellate proceedings are required to be commenced and carried on as an original action. The proceeding in the district court, under such a statute, is in the nature of an original action, equitable in nature, commenced by an aggrieved party who sets forth his complaint or complaints against the officer, board, or commission making the order which he claims is not in accordance with law. The complaints may be that the charge was insufficient; that he was not given proper notice of the hearing; that opportunity to be heard was not afforded; that the evidence did not warrant the ruling made; or any other objection to the procedure which if sustained would affect the validity of the order. The State Real Estate Commission is then entitled to answer and deny the allegations, or affirmatively set forth its justification of the order complained of. The court is required to determine only the issues thus raised. It appears therefore that it was the intent of the Legislature to provide more than a review to determine whether the order complained of was arbitrary or capricious. The

act confers upon the district court the power to inquire into the subject matter of the complaints set out in the pleadings filed in the district court including, if alleged, that the findings of the commission are contrary to the weight of the evidence. See Withers v. Golding, 100 Utah 179, 111 P. 2d 550.

We think the general rule is that where a review of a finding and order of an administrative officer, board, or commission is afforded by the filing of an original action in the district court, the issues to be determined are those raised by the pleadings and not those raised before the officer, board, or commission. Such a suit will be tried as any other civil action when the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made.

We are of the opinion that the district court was correct in going ahead with the trial of the case on the issues presented in the same way as in any other civil action. Both parties were afforded full opportunity to produce evidence touching upon the issues raised by the allegations of appellant's petition and the answer of the commission. From this the trial court determined that appellant had violated section 81-881 as alleged, and sustained the order of the commission. On appeal to this court we are asked to review the correctness of this finding.

The evidence heretofore cited establishes that appellant withheld $2,000 from the seller which was paid to him by the purchaser of the real estate as a down payment thereon. The evidence will sustain a finding that appellant had waived a commission in the sense that the term is ordinarily used and agreed to accept one-half of the net profit resulting from the sale as his compensation. His attempt to hold the money to enforce his personal demands and claims against Van Donselaar for commissions on this and other sales of real estate, and thereby failing to account for moneys coming into his possession in his capacity as a real estate broker,

was a violation of the trade practice designated as subdivision (2) in section 81-881. While the reasons motivating the adoption of this statutory provision are not material in the present case, it is evident the Legislature believed that the retention of moneys not belonging to him by a real estate broker, and the consequent holding up and delaying of the closing of real estate sales, were so contrary to the public interest as to warrant its prohibition. Without again detailing the evidence in support of the finding that appellant violated the trade practice designated as subdivision (2) in section 81-881, we conclude after an examination of the record before us that it supports a finding that the appellant violated section 81-881. This being true, we do not deem it necessary to discuss the evidence, largely conflicting, bearing upon the other issues raised by the pleadings.

It is contended that the case pending before this court has become moot. We think not. The license granted to appellant was a continuing one so long as he paid the annual license fee prescribed by the statute. § 81-877, R. S. Supp., 1947. While it is true that the specified time of appellant's suspension has terminated during the pendency of the appeal, this does not of itself make the case moot. In Adams v. Union R. R. Co., 21 R. I. 134, 42 A. 515, 44 L. R. A. 273, the court said: "A moot case is one which seeks to determine an abstract question, which does not rest upon existing facts or rights. Where a concrete case of fact or right is shown, we know of no principle or policy of law which will deprive a party of a determination simply because his motive in the assertion of such right is to secure such determination. It is a matter of common practice." We quoted the above with approval in State v. First Catholic Church of Lincoln, 88 Neb. 2, 128 N. W. 657. In Kenworthy & Taylor, Inc. v. State Examiners of Electricians, 320 Mass. 451, 70 N. E. 2d 247, the court said: "We are of the opinion that the principle of the foregoing cases has no application to a person in the predica-

ment of the petitioner. It cannot rightly be said that the petitioner, which is still in business, has no live or existing rights simply because the ten days of the suspension have expired. Obviously the suspension of the license, following the 'conviction' of its president and treasurer, if not reversed, must stand as a permanent record against the petitioner. * * * Administrative boards seem to be regarded as a necessity in modern government, and if their decisions on the suspension of licenses, involving, as they do, the right of the individual to engage in business or profession, can by the shortness of the suspension be removed from the field of judicial review, such boards could create an intolerable tyranny." It might be that a suit to suspend or cancel a license would become moot where the license expired or was otherwise terminated before the completion of the trial. Under such circumstances nothing remains to be determined other than a mere abstraction. In a case, however, where an adverse finding has been had which reflects upon the character and standing of the person charged, the termination of the license does not have the effect of removing the stigma or disgrace resulting from the finding. One claiming his innocence under such circumstances has a justiciable issue which may be of extreme importance to him.

See, Rattray v. Scudder, 67 Cal. App. 2d 123, 153 P. 2d 433; People v. Harnett, 221 App. Div. 487, 224 N. Y. S. 97; Commonwealth v. Fleckner, 167 Mass. 13, 44 N. E. 1053.

While there are cases in this and other states tending to sustain the position of the commission, the better rule is announced in the cases cited. We do not believe the Legislature intended to take away the right to undo the disgrace or professional discredit of a suspension of a license merely because the suspension was served, because it was too short to permit an appeal, or because it terminated before the benefit of an appeal could be had.

The commission has filed a cross-appeal asserting therein that the trial court erred in not assessing a new and further period of suspension due to the fact that the period of the suspension assessed by the State Real Estate Commission had only 27 days to run at the time the judgment of the district court was entered. This question is not before us. In the district court the State Real Estate Commission specifically prayed in its answer "that the court find and determine that the order heretofore entered by the State Real Estate Commission of Nebraska suspending the real estate brokers license of Will Feight be sustained * * *." The commission received all the relief for which it asked. The issue presented by the cross-appeal was never raised in the district court. The error now claimed, if it was error, was committed at the express request of the commission. Under such circumstances the commission is in no position to raise the question for the first time on appeal.

We have examined the remaining assignments of error and find them to be without merit. The judgment of the district court is affirmed.

AFFIRMED.

NANNIE CLAY, APPELLEE, V. THE BUTANE GAS CORPORATION, A CORPORATION, APPELLANT.
39 N. W. 2d 813

Filed December 6, 1949. No. 32637.

1. **Gas: Public Utilities.** A gas company which does not install, own, or control the pipes or appliances in a customer's building is in no way responsible for the condition in which they are maintained, and consequently is not liable for injuries or damage caused by a leak therein of which it has no knowledge.
2. ———: ———. The rule as to the legal duty of a gas company in reference to the escape of gas from service pipes owned and controlled by others on private property, which pipes have been properly installed and tested, does not extend to thereafter making inspection, unless the gas company has knowledge of a

probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom.

3. **Gas: Negligence.** A higher degree of care and vigilance is required in dealing with a manufactured liquefied gas than in the ordinary affairs of life and business. One who handles such a dangerous agency must use a degree of care to prevent damage from the escaping of gas which is commensurate with the danger which it is its duty to avoid, and where damage occurs by the escape of such gas, the question as to whether or not the company engaged in dealing with and handling the same has used that degree of care and caution to prevent its escape may be a question of fact for the jury.
4. **Public Utilities: Negligence.** A company engaged in transportation and delivery of a dangerous fuel commodity must have employees efficient in their line, and it is bound to anticipate injuries or danger resulting from use of such commodity.
5. ———: ———. While liability of a distributor of gas does not attach, in the absence of a reasonable basis for anticipating danger, that fact does not relieve the distributor from such diligent and adequate inspection of its transportation and service facilities where the reasonable basis to anticipate danger actually exists.
6. ———: ———. Where a gas company is cognizant of facts which should indicate to it the possibility of accident, it may be held liable even though the precise manner in which the harm resulted could not have been foreseen.
7. ———: ———. While a distributor of gas is not an insurer of the safety of the consumer's premises or the personal property therein, and the law does not impose upon it the arduous duty of inspection in every case, yet when its agent has good cause to believe that an inspection should be made, it may be negligence not to inspect, and if so, it is liable for damages proximately caused by such negligence.
8. ———: ———. A gas company is chargeable with notice of defects in gas pipes supplying a building, where that degree of care and caution exercised by ordinarily careful and prudent men would have disclosed such defects.

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

Joseph B. Fradenburg and *Ferne A. Fradenburg*, for appellant.

Chambers, Holland & Groth, and *George B. Boland,* for appellee.

Fremont Meyers and *Roy M. Byram,* amici curiae.

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

MESSMORE, J.

This is an action at law brought by the plaintiff to recover damages to a building owned by her caused by an explosion of butane gas alleged to have been due to the defendant's negligence, and for the loss of personal property located in the building. The case was tried to a jury resulting in a verdict in favor of the plaintiff. Upon the overruling of the motion for new trial, defendant appeals.

For convenience the parties will be referred to as designated in the district court.

The negligence charged against the defendant in the plaintiff's petition is as follows: (1) The failure of the defendant's truck driver to ascertain the conditions existing before delivering butane gas into an underground tank adjacent to the plaintiff's building and which serviced the product into the building; and (2) the delivery by the defendant of such butane gas into a storage tank when it knew, or should have known, that the storage tank was not in a safe condition to receive such gas. These allegations of negligence were denied by the defendant's answer. Such alleged negligent acts of the defendant were submitted to the jury.

The record discloses that on April 4 and 5, 1947, the plaintiff owned Lots 5 and 6, Block 52, in North Bend, Nebraska, upon which was located a one-story brick building. The building was 44 feet wide, 110 feet long, running east and west, and situated on a corner facing west. The building was rented by Charles and Wilson Emerson, sons of the plaintiff, and used and operated as a bakery and restaurant.

Any claims that the Emersons had by virtue of the loss of personal property have been assigned to the plaintiff.

There was a partial basement under living quarters which were in the rear of the building. The basement was 12 feet wide, 18 feet long, and 5 feet deep. The stairway to the basement was east of the kitchen, and the steps downward were adjacent to an automatic gas furnace located in the northwest corner of the basement approximately 10 feet from the south wall. The furnace was in operation on April 4 and 5, 1947. It went off and on at intervals of 15 minutes. The igniter in the fire box and the motor produced a spark, or flame, in the operation of the furnace. There was also a compresser in the basement that would go off and on every two hours or so, which would produce a spark or flame from an electric motor.

On the south side of the building the sidewalk extended to the curb, and in the center of the sidewalk was a manhole which covered a metal tank buried underground adjacent to the basement, with a water capacity of 218 gallons. Butane gas, which was purchased from the defendant, was put into this tank to service appliances used in the restaurant. The tank was equipped with a criterion gauge which registered the amount of gas in the tank, and a pressure gauge which registered the pressure. There was also a regulator that fit onto the line between the storage tank and the appliances. The gas came into one side of the regulator at 35 pounds pressure and was reduced to 6 ounces of pressure, which was the amount of gas necessary to operate the appliances used in the restaurant. There was a screw valve on the transmission line which was manually operated to discontinue the flow of gas if desired, generally located between the storage tank and the regulator. There was also an automatic shut-off valve placed in the transmission line so that in the event of failure of equipment resulting in a rush of gas to the valve, the valve would

automatically shut off. There was a galvanized pipe about one-half inch in diameter which led from the tank into the basement, and copper tubing leading upstairs to the kitchen where the outlets serviced a gas range, steam table, and automatic dishwasher.

Butane gas is a manufactured product, a liquefied petroleum gas which is between gasoline and natural gas. It is inflammable, explosive, has a distinct odor, and is very volatile. It boils at approximately 26 degrees above zero. It has 3,300 B. T. U's per cubic foot for heat value. It is heavier than air and sinks below the surface of water. The gas is transported in trucks in liquid form and must be handled with the same type and degree of care as gasoline.

On April 4, 1947, Charles Emerson was working on the evening shift and noticed that there was insufficient pressure in the gas range to cook with. He went outside, checked the gauge on the tank, and found that they were out of butane gas. He called the defendant corporation at Omaha, made inquiry for someone in charge, and contacted Mr. Reitan who was a salesman for the defendant. He informed the salesman that they were out of gas, and was told by him that it would be impossible to deliver gas to them right away. Emerson asked the salesman if he could call Wahoo to see if their truck would come over, and was informed that propane gas, due to its pressure, would not work in their stove. Emerson then told Reitan that bottled gas could be obtained in North Bend, and was informed by Reitan that it was all right to hook up the appliances, that the pressure was all right. Emerson then told Reitan that he would go to the hardware dealer and have him hook up the bottled gas, and Reitan stated that they would be out in the morning and fill the tank with butane gas.

After the conversation with Reitan, Emerson went to the hardware dealer and asked about getting gas to run the range. He was asked by the hardware dealer if he had permission from the gas company to hook on to the

bottled gas which he could furnish. Emerson told him he had just finished talking to the representative of the defendant, and it was all right to hook on a bottle of gas. A man was sent over to deliver the gas and hook it up. To do this, the valve at the main tank was turned off. The connections from the tank which led upstairs to the appliances were broken, and connections were made from the bottle to the main line. The gas was turned on from the bottle, and the joints and the appliances tested at the places where the connections were made. The pipe which came down from the large butane tank was tested by putting and holding a lighted soda straw next to it to see if there was any flame. There was none, and no sign of gas coming out. The connection between the line and the butane tank was just inside the foundation of the building in the basement, about four feet from the basement floor, and two feet beneath the basement ceiling.

Additional tests were made about two hours later in the evening by the hardware dealer who stopped in and inquired as to how the gas was working. He found that it worked nicely. He inquired if his man had tested the joints and was informed that he had, and that Emerson was with him at the time the tests were made. The hardware dealer then suggested that another test should be made to be sure, explaining that bottled gas had more pressure than the gas in underground tanks. He and Emerson went down and tested all the joints downstairs, came back up and tested the joints upstairs. These tests were made with matches, and there was no sign of gas coming in. The outside tank was also tested.

The hardware dealer also testified with reference to the mechanism which led from the butane tank, that the valve is of metal set in rubber which screws down into a rubber socket to make it gas-tight. He stated that the line was not cut off, but it was disconnected by being unscrewed. When the valve was shut off, the pipe was not capped.

The bottle which contained the gas furnished by the hardware dealer was bullet shaped, about four feet in height and one foot in diameter, with a regulator on top of it. It was a 25-gallon tank containing 100 pounds of pressed gas. It was placed in full view on the outside of the building approximately four or five feet from the manhole where the butane gas was put into the tank. This gas was used that evening and the next day.

The witness Reitan testified to receiving a telephone call from the Corner Cafe at North Bend on April 4, 1947, wherein he was informed that they were out of gas or the same was low in pressure, and they wanted to know how soon the defendant could get a truck out there. Reitan told them that he was not in charge of the trucks but would endeavor to get the man in charge of delivery service or one of the truck drivers, and as soon as he contacted somebody who handled deliveries, he would call back. He endeavored to contact the person in charge of deliveries, but was unable to do so. He informed Emerson that it would be 9 or 9:30 that night before a truck could get there. Emerson informed him that that would be too late, as they were out of gas and it was during the evening meal and they needed gas then. He also told him that a man at North Bend would hook up some gas since they could not deliver until the next morning. Emerson asked if the bottled gas would work in their appliances, and Reitan told him that it would. Reitan notified the service manager the next morning that the Corner Cafe at North Bend needed gas, and that they were hooked up with bottled gas temporarily. The service manager instructed one of the truck drivers to go to North Bend and deliver gas to the Corner Cafe, and told him that they were on the bottled gas temporarily, meaning, of course, that they were using gas from a different set-up.

The truck driver so informed, testified that he came to work at 8 o'clock on the morning of April 5, 1947, and the service manager told him that the Corner Cafe

at North Bend was out of gas and that they had a bottle hook-up for temporary service. He loaded the truck with butane gas and proceeded to North Bend, accompanied by another driver who was recently employed, to acquaint him with defendant's service. He arrived at North Bend at 11 a. m. Arriving at the Corner Cafe in North Bend he observed the bottle gas tank on the sidewalk, sitting up against the south side of the building. He lifted the manhole cover in the sidewalk where the connection with the butane tank was located. He got down on his knees to close the valve which was about three feet beneath the surface, and it was closed. He took the hose from his truck and filled the underground tank with 178 gallons of butane gas. The tank was filled to 93 percent of capacity, leaving room for evaporization. After the tank was filled, he checked all of the gauges to see that everything was all right. He also testified that the odor of butane gas is similar to spoiled cabbage and onions, and remains on clothing and other articles for some time. When he made the observations and tests, he found to his satisfaction that the valve had been screwed down as far as he could get it. The criterion and pressure gauges were at zero. It took about 10 to 12 minutes to fill the tank with the liquid gas. When there is an appreciable amount of liquid in the receiving tank, a pressure is built up inside of the tank. He figured the bill, went into the cafe, and there met Wilson Emerson. While Emerson was making out the check in payment of the bill, he asked him if he desired to have the gas changed over to butane, and was informed that they wanted to use the bottled gas because it produced a much higher flame than butane. When Emerson finished making out the check he invited defendant's driver into the kitchen to show him the flame produced by the bottled gas. The driver was explaining to him that the regulator on the butane equipment did not work properly and because of its defective condition the pressure of the butane gas was reduced. At that

time, after he had been in the restaurant about five minutes, the explosion occurred. There was a kind of a puff, a terrific blow, and quite a bit of pressure. He observed the panel between the storeroom and dining room, from the ceiling down to another wall which he took to be a plastic cardboard or heavy wood, as it was blown off into the dining room. He then rushed outside, as did Wilson Emerson. When they reached the outside they checked the valve and the tank and found that the valve was closed. The fire alarm was turned in, and the driver got into his truck and drove it across the street.

The explosion awakened Charles Emerson who lived in the building. He dressed and left the building. He observed flames in the basement through a floor register above the basement.

Wilson Emerson testified that when the explosion occurred the skylight was blown off its foundation. There was a suction fan attached to it which fell to the first floor. A partition on the north side of the kitchen was blown out, and glass fell out of the skylight. All of the studdings in the living quarters were badly burned. He also testified that he had no conversation with the defendant's driver with reference to reconnecting the butane system.

The chief of the fire department and the assistant chief testified that when they arrived at the scene of the fire the building was filled with dense smoke, and the fire was located in the basement. The assistant chief testified that it was difficult to describe the degree of smoke. Due to the size of the basement and the location of the joists, it was difficult to get to the fire, and as a consequence two holes were cut in the floor. The flames were near the ceiling of the basement and it was necessary to pump five or six feet of water into the basement in order to extinguish the fire. After the fire was extinguished, the Schuyler fire department pumped the water out of the basement with a rotary

pump. This operation, from the time the equipment was set up until the job was finished, took about an hour and a half.

The assistant fire chief described the fire as being unusually hot, suddenly intense, and as a "raging inferno." The testimony of other witnesses with reference to the fire is that it was in the basement; the floor joists were badly burned; and the fire burned up into the living quarters.

The fire chief testified that, after the water was pumped down to where the pipe coming from the butane tank into the basement was located, two or three of the firemen were in the basement with the assistant chief who called to the chief, and told him gas was escaping from a pipe and to keep the people back. This witness observed that the floor joists were burned pretty badly, and the fire burned up into the living quarters, and they were in bad condition. He also testified that the skylight was not blown out, because he sent a man up to take it off; that the pipe which came through from the south wall of the basement was six or eight inches long; and the water was about three feet high above this joint when they started to pump. After the fire he went down into the basement and the pipe from the butane tank into the basement was capped.

The assistant fire chief testified that when the fire had ceased, he went into the basement and observed a copper pipe that came in from the south wall possibly a foot or so into the basement. He heard a hissing sound such as made by escaping gas, and observed the pipe on the south wall, in the southwest corner of the open pit. He checked it several times to make sure what was happening. He notified the other firemen who were guarding against fire upstairs, placed his hand over the pipe, and gave an order to obtain a cap so it could be put on the pipe. There was pressure, and gas was shooting out from the pipe.

Plaintiff testified that at the time of the explosion

she had just come out of the kitchen into the dining room to serve an order. It was about 11:30 in the morning. There was an awful noise, she looked up, the side walls fell in, and she ran out of the building.

The explosion occurred in a period of about 15 minutes from the time the driver started to unload the liquid gas into the butane tank. The exact time that it took to pump the water out, down to where the pipe from the butane tank came into the basement, is not shown. It is clear, however, that it would be much less than an hour and a half.

A witness for the defendant testified that the butane gas equipment includes an automatic shut-off valve, the function of which is to automatically shut off the gas in case there is a break in the line; and that on the equipment in question this valve was in perfect working order. He further testified that the pressure sufficient to close the valve is up to ten pounds; that the gas is required to be odorized; that according to the underwriters instructions and specifications in the handling of liquefied petroleum gases, all piping or tubing shall be tested after assembly and proved free from leaks at no less than normal operating pressure; and that when containers are not connected to the system, the outlet valves shall be kept tightly closed or plugged even though containers are considered empty. This witness also testified that an explosion of butane gas causes little, or a very light smoke, not a dark smoke but rather a brownish gray; that ordinarily an explosion of butane gas is caused by extremely slow leaks. When gas escapes at 8½ percent by volume it will not explode, but will explode if ignited with an electric spark, or providing there was a flame in the proper mixture. He further testified for the defendant that if gas was coming out of this pipe, water would seldom extinguish the flame; that even after the flow, the flame would continue to burn on top of the water similar to gasoline as it bubbles up out of water; and that if there was a

leak in the basement, as was brought out by the testimony to the extent of a hissing sound, the basement would be so full of gas that no human being could possibly go into it. He further testified that there was nothing to indicate that the leak was stopped, so it would have to continue for an hour and a half while they were pumping out the basement, and at such time the basement would be so full of gas that no one could breathe, especially if it was made into an explosive mixture in the period of twenty minutes that it took the man to unload the gas.

The plaintiff, on rebuttal, testified that upon the first delivery of butane gas after the fire, which was made in May, she noticed the defendant's driver in the dining room and asked what he was doing. He said he was delivering gas and had been down into the basement to fix it for sure. The driver's version with reference to that delivery of gas was that he went to the basement to connect the plaintiff's set-up to the butane system, upon request. He found the condition of the line to be that there was a piece of copper tubing that was probably squeezing at the end of the line with a fitting to the line. The copper tubing was cut off and squeezed in a vise and nothing could get through it. It was plugged, but not with a regular plug. He further testified that after he turned on the gas the fittings were tested to make sure they were tight. A new regulator was placed on the butane equipment. The tank and all appliances were owned by the plaintiff.

While defendant has failed to conform to rules of this court in the assignments of error in its brief, we conclude it has incorporated such assignments in its propositions of law.

The defendant's contention with reference to the first assignment of error is that the evidence fails to show that the condition of the underground butane tank, the pipe leading into the basement, and the valve attached as part of the equipment, were not the same after the

fire as before the fire, and the evidence admitted as to gas escaping from the pipe leading from the butane tank into the basement was incompetent and prejudicial to the defendant.

In this connection the defendant cites the following: "The broad general rule is that where there is no change in the condition of an appliance or the premises or the scene of an accident, evidence as to the condition of such appliance or place, either before or after the event in issue, is relevant and admissible to show its condition at the time of such event, provided it relates directly to the issue in question and is not too remote in point of time. But the evidence must relate closely enough to the time of the accident to make it apparent that the condition has not been changed or it must appear that the situation is one which is so constant or permanent that lapse of time will not make a material difference. Where the conditions have changed, evidence as to later conditions is not admissible." 20 Am. Jur., Evidence, § 306, p. 284. See, also, Johnson v. Palomba Co., 114 Conn. 108, 157 A. 902, 80 A. L. R. 441; Davenport v. Intermountain Ry. L. & P. Co., 108 Neb. 387, 187 N. W. 905.

The defendant refers to the evidence of the hardware dealer whose man connected the bottled gas with the plaintiff's equipment, disconnected the pipe running from the butane tank into the basement, and made tests for escaping gas, also to the evidence of the defendant's driver that the valve in question had been closed, which evidence tended to show that immediately prior to the fire the butane tank and equipment thereon were in proper condition. The defendant then makes reference to the testimony of the assistant fire chief who testified that the fire at one time was a "raging inferno" and in the immediate vicinity of the pipe and valve in question, arguing that under the circumstances the pipe and the valve would not be in the same condition as before the fire, as many things could happen by virtue of the

fire, such as a break in the pipe or burning of the rubber in the valve and changing the condition. The defendant therefore contends that the evidence objected to and admitted over objection is prejudicially erroneous.

We are not in accord with the defendant's contention. The plaintiff's evidence discloses that the pipe leading from the underground butane tank into the basement had been disconnected at a point six inches to a foot within the basement wall, and it was ascertained by the tests made before the explosion, by the use of lighted matches held close to the pipe, that no gas was escaping therefrom; and for almost a year subsequent to the fire the same valve was used by the plaintiff without difficulty. The fire chief examined the pipe in question after the fire and found it intact. There is ample competent evidence that the pipe leading from the underground tank into the basement and the valve were not damaged, which raises a reasonable presumption that they were in the same condition as existed before the fire. There is no evidence to show that the pipe or valve were altered in any manner between the time the butane gas was unloaded by the defendant's employee until the fire started some 15 minutes later. The principal evidence to which the defendant objects in such respect as constituting prejudicial error is that of the assistant fire chief, an eye witness, as to what he observed immediately after the fire.

The evidence was admissible, and its weight was for the jury. The defendant's contention is without merit.

The defendant contends that there is no evidence of negligence on its part for the reason that the tank, pipes, and equipment were owned and controlled by the plaintiff, therefore the defendant was under no obligation to make any inspection, but the duty was upon the plaintiff to ascertain that the system was in proper condition to receive the delivery of butane gas.

Generally speaking, a gas company which does not install, own, or control the pipes or appliances in a cus-

tomer's building is in no way responsible for the condition in which they are maintained, and consequently is not liable for injuries caused by a leak therein of which it has no knowledge. This rule is followed extensively in this country. See, Clough v. North Central Gas Co., 150 Neb. 418, 34 N. W. 2d 862; Annotation in 138 A. L. R. 883.

The defendant cites the following: "The rule as to the legal duty of the gas company in reference to the escape of gas from service pipes owned and controlled by others on private property, which pipes have been properly installed and tested, does not extend to thereafter making inspection, unless the gas company has knowledge of a probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom." Wilson, Jr. v. East Ohio Gas Co., 68 Ohio App. 490, 42 N. E. 2d 180, and cases cited therein.

The law imposes a duty on a gas company as follows: "Natural gas is a dangerous agency. Its distribution is accompanied by many possible dangerous consequences, and it is therefore well established that a higher degree of care and vigilance is required in dealing with such agency than is required in the ordinary affairs of life. A degree of care commensurate to the danger involved is required of a distributor of natural gas to avoid injury and damage and, in case of failure to exercise such care, and injury results, it is liable." Koch v. Southern Cities Distributing Co., 18 La. App. 664, 138 So. 178. See, also, Moran Junior College v. Standard Oil Co., 184 Wash. 543, 52 P. 2d 342; Fonda v. Northwestern Public Service Co., 134 Neb. 430, 278 N. W. 836.

The rule so announced applies to a gas such as butane gas or other manufactured liquefied gases of the same character or kind.

It is also the rule that a company engaged in the transportation and delivery of a dangerous fuel commodity such as natural gas must have employees efficient in

their line, and it is bound to anticipate injuries resulting from the use of such commodity. See, Fonda v. Northwestern Public Service Co., *supra*; Annotation in 138 A. L. R. 882.

It being common knowledge that gas is a powerful and dangerous force that requires care on the part of those furnishing it, a gas company which knows of the location of the tank, pipes, and cutoffs in a customer's building is under the obligation and duty, in filling the tank, to exercise that degree of care, to protect the building and its occupants from injury, commensurate with the dangers incident to the use of such gas. See Lane v. Community Natural Gas Co., 133 Tex. 128, 123 S. W. 2d 639.

While liability of a distributor of gas does not attach, in the absence of a reasonable basis for anticipating danger, that fact does not relieve the distributor from such diligent and adequate inspection of its transportation and service facilities where the reasonable basis to anticipate danger actually exists. See Sternbock v. Consolidated Gas Utilities Corp., 151 Kan. 81, 98 P. 2d 162.

Where a gas company is cognizant of facts which should indicate to it the possibility of accident it may be held liable even though the precise manner in which the harm resulted could not have been foreseen. See Sternbock v. Consolidated Gas Utilities Corp., *supra;* Annotation in 138 A. L. R. 880.

While the defendant was not an insurer of the safety of the plaintiff's premises or the personal property therein, and the law does not impose upon it the arduous duty of inspection in every case, yet when its agent has good cause to believe that an inspection should be made, it may be negligence not to inspect, and if so, it is liable for damages proximately caused by such negligence. See Lynchburg Gas Co. v. Sale, 160 Va. 783, 169 S. E. 577.

In the instant case the evidence discloses that the defendant was advised that the Corner Cafe at North Bend was out of butane gas and agreed and acquiesced

that the operators of the cafe would obtain bottled gas to continue the operation of the business; agreed that the bottled gas would work in the appliances used in the business; and knew that there would have to be a change-over from the butane system. The defendant further knew that its agent in charge of delivery had been told about the matter of the Corner Cafe being temporarily connected to use bottled gas, and the delivery manager so informed the driver who was to deliver the gas that morning. Further, the driver, upon arriving at the location of the Corner Cafe in North Bend, saw the bottle of gas leaning up against the side of the building and knew, as did the other agents of the defendant, that condition required a hookup separate from the supply tank which held the butane gas. The driver for the defendant knew that there had been some disconnection.

In Julian v. Sinclair Oil & Gas Co., 168 Okl. 192, 32 P. 2d 31, where the gas company contended since it was not the owner of the pipes at the point where the gas escaped it was not charged with the responsibility of inspecting such pipes and was not liable for injuries occasioned by faulty material which it did not own, the court said: "As we view it, this fact alone would not absolve the company from liability. The gas which caused the damage was defendant's gas, and was turned into the pipes by defendant with knowledge on its part that it was a highly dangerous substance and subject to escape. Through the duly appointed agents and employees, defendant was charged with knowledge that its gas was being transported through the pipes in question." The question as to whether the gas company had exercised such a degree of care and caution as was commensurate with the known nature of natural gas was held an issue of fact which under proper instructions should be submitted to a jury. The same, by analogy, would apply to butane gas in the instant case.

Under the facts adduced in the instant trial and the authorities cited, the defendant's employees, before fill-

ing the butane tank with an inflammable, explosive, and volatile gas, should have familiarized themselves with the conditions then existing with reference to the equipment and appliances to receive the same, when they knew that the butane gas tank had been disconnected. They made no inspection to ascertain whether the pipe from the butane tank leading into the basement had been disconnected, or whether gas was escaping therefrom.

"The responsibility of the gas company arises from knowledge of a dangerous condition and not by reason of the condition." Stephany v. Equitable Gas Co., 347 Pa. 110, 31 A. 2d 523.

We conclude that the evidence was sufficient to show negligence on the part of the defendant, and such negligence was a question for the jury under proper instructions.

Where a person occupies such a position in relation to another that a want of ordinary care will obviously cause injury to such other person a duty arises to use such care and thus to avoid causing injury. A gas company owes the duty to all lawful users of a building not to supply gas to the pipes in such building unless it has used care commensurate with the known dangers to see that such gas is properly regulated and controlled. See Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475, 97 N. E. 580.

The defendant contends that there is no proof that there was a fire caused by the explosion of butane gas.

In this connection it may be appropriately stated that under the evidence as heretofore detailed, the jury could have found that gas was escaping from the butane underground tank through the pipe which led into the basement; that the explosion could under the factual situation have been attributed to the escaping gas becoming ignited by one of the electrically operated motors in the basement; and that as a result of the explosion and following it, the fire occurred on the premises.

The evidence was sufficient to warrant the jury to have reasonably concluded that this gas was an inherently

dangerous substance requiring the defendant to use a high degree of care in all its conduct with reference to the supply system, and that the defendant was negligent either in the acts of its servant in filling the butane tank, under the circumstances, on the day of the explosion, or failing to discover the leak in the pipes. See Breed v. Philgas Co., 118 Conn. 128, 171 A. 14.

And, as stated in Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712: "The cause of an accident, like any other factor, may be proved by circumstantial evidence." In the afore-cited case a sufficient cause of the accident was shown, the circumstances indicated that inadequate inspection was made, and the gas company was held liable. On the same point, see also Sternbock v. Consolidated Gas Utilities Corp., *supra*.

A consideration of the evidence yields inference that the gas escaping from the butane tank and gas escaping through the distributing system was responsible for the conflagration, and that defendant, through its agents, was negligent in permitting the gas to escape. No testimony indicated the cause of the fire save only by reason of inflammable gas that unquestionably escaped from the tank and distributing system. On the contrary, the evidence is quite affirmative that the fire was caused by escaping gas. We believe that the record discloses evidence sufficient from which the jury could find that the gas company had notice of the dangerous condition existent, and if it did have such notice, it became a question for the jury whether or not it made proper inspection and repairs with reference to it.

For the reasons given in this opinion, the judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

THE CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, V. HENRY C. GLISSMANN, APPELLANT, NINETIETH STREET REALTY COMPANY, A CORPORATION, AND WEST HILLS IMPROVEMENT CLUB, A CORPORATION, INTERVENERS AND APPELLEES.

39 N. W. 2d 828

Filed December 6, 1949. No. 32640.

1. **Injunction: Municipal Corporations.** Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances per se, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property.
2. **Constitutional Law: Municipal Corporations.** A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance.
3. ———: ———. The purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto as such property is always held subject to the city's lawful exercise of the police power.
4. **Municipal Corporations.** A new ordinance operates retroactively to require a denial of an application or to nullify a permit already issued, provided that the holder of the latter has not already engaged in construction or incurred obligations directly in relation thereto, when such application or permit seeks or grants a use no longer permitted under the new ordinance.
5. ———. If, after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change.
6. **Constitutional Law: Municipal Corporations.** The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must however not be unreasonable, discriminatory, and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance.

7. ———: ———. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.
8. ———: ———. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
9. ———: ———. In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.
10. ———: ———. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.

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

Winters & Winters, for appellant.

Edward F. Fogarty, Edward Sklenicka, James M. Paxson, Herbert M. Fitle, and *Spier & Ellick,* for appellees.

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

WENKE, J.

This action was brought by the City of Omaha, a municipal corporation under home rule charter, to permanently enjoin Henry C. Glissmann from proceeding with the construction, maintenance, or operation of a tourist camp, trailer camp, or trailer park on lands leased by him from Gwyer H. Yates. The basis for the relief asked is that such use is contrary to and prohibited by the zoning ordinances of the city of Omaha which are applicable to the area which defendant had leased and on which he proposes to construct, maintain, and operate such tourist camp, trailer camp, or trailer park. A decree was entered by the trial court in favor of the city

and two interveners. These interveners will be more fully referred to later in the opinion. From this decree, which enjoined him from using or permitting the use of the premises he had leased from Gwyer H. Yates for the construction, maintenance, or operation of a tourist camp, trailer camp, trailer park, or any similar enterprise and directing him to remove therefrom all structures, fixtures, or equipment thereon usable only for such purposes, his motion for new trial having been overruled, the defendant appealed.

After this action had been filed by the city there were two petitions of intervention filed. The first was by the West Hills Improvement Club and the second by the Ninetieth Street Realty Company. Both of these interveners are Nebraska corporations and by the petitions of intervention sought the same relief as had been asked for by the city in its petition. The West Hills Improvement Club is a nonprofit corporation organized to promote and encourage the beneficial growth of the city of Omaha and of all territory adjacent thereto, especially that area west of the city limits. The members of this corporation all reside on or own real estate in the immediate vicinity of Ninetieth Street and Dodge Road. Ninetieth Street Realty Company is a corporation owning substantial real estate located generally southwest of the corner of Ninetieth Street and Dodge Road. This real estate is zoned as "1st Residence District" and intervener is engaged in improving, developing, and selling this real estate for residential purposes. Appellant contends that these parties had no right to intervene in this suit and that the trial court erred in holding that they were proper parties. While this question is immaterial, as the matter is properly before us on the city's petition, however, we think the ruling of the trial court was correct.

In Bangs v. Dworak, 75 Neb. 714, 106 N. W. 780, 5 L. R. A. N. S. 493, we said: "Injunction will issue to prevent the erection of buildings in violation of a munic-

ipal ordinance, though they are not nuisances per se, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property." See Holzbauer v. Ritter, 184 Wis. 35, 198 N. W. 852, and Boehner v. Williams, 213 Iowa 578, 239 N. W. 545. The allegations of the petitions of intervention and the evidence offered in support thereof bring the interveners within the foregoing principle.

The record discloses that appellant, on October 14, 1939, leased a tract of land for use as a golf course and developed thereon the Indian Hills Golf Course. The land he leased was and is owned by Gwyer H. Yates and is described as "part of the Northeast Quarter of Section 22, Township 15, North, Range 12, East of the 6th P. M. in Douglas County, Nebraska, lying south of the south line of State Highway No. 30-S," with certain described tracts excepted therefrom. These exceptions are unimportant except for two tracts which were included in a later lease and which will hereinafter be more fully referred to. This lease, by its terms, expired on December 31, 1963, but had in it a provision whereby the lessor, at any time after the sixth year, could cancel it and recapture possession of the premises provided he had a valid sale of the entire premises or intended to subdivide the premises or a substantial part thereof. To cancel the lease the lessor was required to give the lessee a three month's notice prior to the first of any January and to pay him the sum as in the lease set forth, the amount depending upon the year in which cancellation, if made, took place. These amounts decreased substantially each year.

The whole of the lands covered by this lease were devoted to the golf course and appellant expended a very substantial sum in developing its use for that purpose. Realizing the danger of this cancellation provision which permitted cancellation and recapture on payment of a much smaller amount than the appellant had invested in the development of the golf course, the appellant, as

early as November 25, 1946, sought such a modification of this lease as would eliminate this provision. This ultimately resulted in a new lease being executed on November 8, 1947. The new lease superseded the old lease as of January 1, 1948. This new lease eliminated the cancellation provision, increased the fixed rentals, and included the two tracts already referred to. The one is tax lot No. 2, known as "the wooded hilltop," and contains about 4.81 acres. It lies in the golf course and some distance south of Dodge Road. The other is a tract of about 9.1 acres lying just south of Dodge Road and along the north side of the golf course, being just west of Eighty-seventh Street and running west to within 240 feet of Ninetieth Street.

Dodge Road, as it will herein be referred to, is State Highway No. 30-S which is Dodge Street to about Eighty-fourth Street, then northwest to intersect with Cass Street at about Eighty-seventh Street, and then west on what would be Cass Street if it were extended.

The appellant testified that prior to executing the new lease on November 8, 1947, he had the intention of using these two tracts for a trailer camp or park; that in July and August 1947 he, with his wife and granddaughter, traveled some 6,500 miles and he expended some $600 in visiting trailer camps and parks to get information and data in regard thereto; and that in October 1947 he purchased eight small buildings at a sale held in connection with disbursing surplus war assets at the Mead Ordnance Plant to use in connection therewith. He paid $308 for these buildings. However, the evidence fully establishes the fact that he negotiated the new lease for the purpose of getting rid of the cancellation provision. The new lease is for a period of 20 years, terminating on December 31, 1967, and, with reference to such land as was not used in the golf course, provided: "* * * may be used by the Lessee as farm land or pasture, or for any other purpose which may be permissible under the provisions of the present

rural zoning ordinance of the City of Omaha applicable to said tract, * * *." At the time this lease was executed the area covered by the lease was zoned as "2nd Suburban District." This zoning authorized its use for the following purposes: "Trailer camps, trailer parks and tourist camps, subject to permit and regulation prescribed by ordinances of The City of Omaha."

Appellant testified that after he executed the new lease on November 8, 1947, but before he made application to the city on November 12, 1947, for a permit to establish, maintain, and operate a trailer and cabin camp on the tract of land lying adjacent to Dodge Road, he took two men and a tractor from the golf course and used them for about a week in cutting and grubbing out some trees and grading a road in the 4.81 acre tract known as "the wooded hilltop" in contemplation of its use as a trailer camp site; and that he also used two men for a day and a half on the tract adjacent to Dodge Road for the purpose of digging a cesspool, but that they did not complete the work.

On November 12, 1947, appellant filed his written application with the council of the city of Omaha asking permission, "* * * for the right to establish, maintain, and operate a 'Trailer and Cabin Camp,' with the trailer accomodations, the main object, with perhaps a few cabins to be added. This camp is to be erected on what is part of the Indian Hills Golf Course, which faces U. S. 30. A. or Dodge St road, from 84th St. to 90th street." A rough sketch of the proposed camp was submitted with the application showing the entrance thereto at about Eighty-seventh Street from the south side of Dodge Road. On November 18, 1947, the appellant's request for a permit was granted by the city council but made subject to the approval of the city's building department. This was done in order to make sure that the regulations for trailer camps would be complied with. This authorized permit was never actually issued because when appellant presented his

bond and plans, the latter having been prepared by the Rohrbough Engineering Company, to the building inspector of the city's building department he refused to accept them as the matter was then before the city council on a petition to reconsider the matter of its authorization.

On November 25, 1947, residents of this area filed a petition with the city asking the city council to reconsider its action of November 18, 1947, authorizing the permit. The council referred this petition to the city legal department but directed the clerk to notify appellant to cease all operations under the permit which it had authorized. This the clerk did by telephone on November 26, 1947, and also by letter dated December 6, 1947. On December 3, 1947, a petition was filed with the city planning commission asking its consideration of this matter at its meeting on December 5, 1947. On December 8, 1947, the city planning commission submitted its report in regard thereto to the city council. This report included a proposed amendment to the zoning ordinances making certain areas, including the territory herein involved, into a "1st Residence District." This would eliminate its use for the purpose of trailer parks, etc. Hearing on both the petition to reconsider and the proposed amendment was held on December 9, 1947, which hearing appellant attended. The petition to reconsider was not acted upon but the proposed amendment to the zoning ordinances was favorably received and set for final hearing on December 30, 1947. Notice of this hearing was published in the World Herald. On December 30, 1947, the proposed ordinance, amending the zoning ordinance and making this a "1st Residence District," was passed by the city council and, by its terms, became effective 15 days thereafter.

Sometime between the first and fifteenth of January, 1948, appellant had some grading done on these premises but almost all of the work done in getting it ready for use as a trailer camp or park was done in March, April,

and May, 1948, and appellant started to use it as such in May 1948.

Appellant's primary contention is that under these facts and circumstances he had established a nonconforming use of these premises as a trailer camp or park prior to the amendment by the city of its zoning ordinances relating thereto and that such right, being vested, the city could not deprive him thereof.

A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance. See Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W. 2d 600.

However, the purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto as such property is always held subject to the city's lawful exercise of the police power. See, West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S. E. 881; 16 C. J. S., Constitutional Law, § 175, p. 541; and 11 Am. Jur., Constitutional Law, § 264, p. 1000.

Assuming, for the purpose of this discussion, that appellant was authorized by the city council's action of November 18, 1947, to use the tract adjacent to Dodge Road for trailer park or camp purposes, although no permit was ever actually issued to him, did he take any action thereunder prior to December 30, 1947, which vested him with rights of which he could not be deprived by the city's ordinance passed on that date changing the classification of this area to "1st Residence District"?

In this respect a new ordinance operates retroactively to require a denial of an application or to nullify a permit already issued, provided that the holder of the latter has not already engaged in construction or incurred obligations directly in relation thereto, when such application or permit seeks or grants a use no longer per-

mitted under the new ordinance. See Rice v. Van Vranken, 225 App. Div. 179, 232 N. Y. S. 506, and Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d 776, 194 P. 2d 148.

However, after such purchase or lease, when a permit has been obtained to use the lands for a use then permissible under the zoning ordinances, a situation may arise when the city is estopped to deny the party the right to proceed thereunder. Some courts hold that, although a permit has been obtained, work commenced thereunder, and contracts entered into with reference thereto, the owner thereof is not vested with any rights by reason thereof which cannot be affected by an amendment of general application in a valid exercise of the city's police power unless there has been substantial construction on the property. Other courts hold that when a permit has been obtained permitting the use of property in accordance with the then zoning regulations and the holder thereof has proceeded to act thereunder then a vested right is created which is not cut off by a subsequent amendment thereto. See, Fitzgerald v. Merard Holding Co., Inc., 110 Conn. 130, 147 A. 513, certiorari denied, 281 U. S. 732, 50 S. Ct. 247, 74 L. Ed. 1148; Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N. W. 2d 84, 138 A. L. R. 495; Pratt v. City and County of Denver, 72 Colo. 51, 209 P. 508; Crow v. Board of Adjustment of Iowa City, 227 Iowa 324, 288 N. W. 145; City of Lansing v. Dawley, 247 Mich. 394, 225 N. W. 500; Pendleton v. City of Columbia, 209 S. C. 394, 40 S. E. 2d 499; Rice v. Van Vranken, *supra;* Baker v. Somerville, 138 Neb. 466, 293 N. W. 326; Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N. W. 707.

We have come to the conclusion that if, after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or

revoked then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change. See Trans-Oceanic Oil Corp. v. City of Santa Barbara, *supra*.

We find appellant's contention in this respect is not well taken for under the facts and circumstances of this case, as hereinbefore fully set out, the appellant had not established any vested right to use these premises for the purpose here contended when the change was made. Consequently, we find that the ordinance passed on December 30, 1948, which eliminated the use of the premises for that purpose, lawfully extinguished his permit and any rights he may have had thereunder.

Appellant also contends that the ordinance passed on December 30, 1947, is arbitrary, unreasonable, and bears no relation to the proper exercise of the city's police powers and deprives him of his property without just compensation and in violation of the provisions relating thereto of both the state and federal Constitutions.

The police power of a city is subject to the limitation that its exercise must be reasonable and for the public good. "The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals and the general welfare. Any such act of the city must however not be unreasonable, discriminatory and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance." Cassel Realty Co. v. City of Omaha, *supra*.

However, an ordinance passed in the exercise of such police power properly delegated to a city is presumably valid and the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence. See, Union Pacific R. R. Co. v. State, 88 Neb. 247, 129 N. W. 290; Faucher v. Grosse Ile Township Building Inspector, 321 Mich. 193, 32 N. W. 2d 440; Ervin Acceptance Co. v. City of Ann Arbor, 322 Mich.

404, 34 N. W. 2d 11; Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 175 P. 2d 542.

As stated in Lombardo v. City of Dallas (Tex. Civ. App.), 47 S. W. 2d 495: "The authorities are unanimous in holding that courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenge their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to the public safety, health, morals, or the general welfare."

We said in State ex rel. Krittenbrink v. Withnell, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. N. S. 898:

"To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.

"In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

"In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised."

As stated in Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634:

"What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown it is not the province of the court to interfere. * * *

"In passing upon the validity of zoning ordinances, an appellate court should give great weight to the deter-

mination of local authorities and local courts especially familiar with local conditions."

Therein we cited with approval the following from Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835:

"The police power is inherent in the effective conduct and maintenance of government and is to be upheld, even though the regulation affects adversely property rights of some individual. City of Aurora v. Burns, 319 Ill. 84.

" 'If considerations of public health, safety, comfort or general welfare could have justified zoning ordinance, the court must assume that they did justify it, and cannot take issue with the city council.' State v. City of New Orleans, 154 La. 271."

In Pettis v. Alpha Alpha Chapter of Phi Beta Pi, *supra,* the court went on to say: "The weight of judicial authority clearly appears to support the proposition that, before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the council, or it must be without substantial relation to public health, safety, morals, or general welfare."

The following, taken from West Bros. Brick Co. v. City of Alexandria, *supra,* has application here, to wit: " 'Petitioner presents a strong appeal from the standpoint of financial loss occasioned by this restriction. But, as said by the North Carolina court in City of Elizabeth City v. Aydlett, 201 N. C. 602, 161 S. E. 78, 81: "Financial loss is not the test; the question is whether the scheme is sound, and the classification fair." ' (Leary v. Adams, 226 Ala. 472, 147 So. 391)."

"Every intendment is in favor of the validity of the exercise of police power, and, even though a court might differ from the determination of the legislative body, if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, the zoning measure will be deemed to be

within the purview of the police power. (Acker v. Baldwin, 18 Cal. 2d 341, 344 [115 P. 2d 455]; Miller v. Board of Public Works, 195 Cal. 477, 490 [234 P. 381, 38 A. L. R. 1479]; Zahn v. Board of Public Works, 195 Cal. 497 [234 P. 388]; see Otis v. City of Los Angeles, 52 Cal. App. 2d 605, 614 [126 P. 2d 954].)" Wilkins v. City of San Bernardino, *supra.*

"What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. Morgan v. City of Chicago, 370 Ill. 347; Speroni v. Board of Appeals, 368 id. 568; Michigan-Lake Building Corp. v. Hamilton, *supra;* Minkus v. Pond, 326 Ill. 467." Zadworny v. City of Chicago, 380 Ill. 470, 44 N. E. 2d 426.

The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts presented in each particular case. The evidence here shows, with reference to the tracts herein involved, that the commercial development along Dodge Road is a considerable distance to the south and east; that the immediate area to the east, southeast, and south is the golf course operated by the appellant; that to the southwest, west, northwest, and northeast are residential areas and to the north are some gardens. There appears to be no commercial development in this immediate area. In fact, the entire neighborhood is zoned as residential. Under these facts we do not think the city council acted arbitrarily or unreasonably in the passing of this ordinance. We find that in so doing it properly exercised the police powers granted to it, and that the ordinance is valid and should be enforced. In view thereof, we find the decree of the trial court to be correct and the same is therefore affirmed.

AFFIRMED.

CARTER, J., dissenting.

I am not in accord with the decision of the majority. A zoning law or ordinance is a direct infringement or limitation upon vested property rights. As such they must be reasonable in their application and not constitute arbitrary and capricious legislation.

The property involved in the present case lies outside of the city of Omaha. It is a part of a tract used primarily as a golf course and it is reasonable to anticipate that it will be so used for at least another 18 years since it is under lease for that purpose for that period of time. It lies adjacent to a state highway carrying a heavy volume of traffic, commercial and otherwise. The evidence does not show that there are any residences on this or adjoining tracts within 700 feet of appellant's property.

Under such circumstances I find no justification or reason for zoning the tract as first residence property. The zoning of such property as first residence property is arbitrary and capricious, and has the effect of a condemnation of the property without compensating the owner therefor. It was never contemplated that such an arbitrary interference with the right to use property should be permitted under the guise of zoning for the public good of a municipality. In my opinion the ordinance unreasonably interferes with the property rights of the appellant and is void insofar as it applies to the property in question. This court should so hold.

YEAGER and BOSLAUGH, JJ., concur in this dissent.

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sion, and, unless this is done, the judgment will not ordinarily be reversed for such defects. *Plumb v. Burnham* 129

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9. Where the record contains no authentic bill of exceptions, or the bill of exceptions has been quashed, no question will be considered by the Supreme Court the determination of which necessarily involves an examination of the evidence adduced in the trial court, and in such a situation, if the pleadings are sufficient to support the judgment, it will be affirmed. *Benson v. General Implement Corporation* 234

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31. Where the trial court admonishes the jury concerning the propriety of an oral argument, after objection by an adverse party, no error can be predicated thereon where the record discloses that the party claiming error acquiesced in the admonition given. *Thoren v. Myers* 453

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37. Where the evidence on material questions of fact is in irreconcilable conflict, the Supreme 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 therefore must have accepted one version of the facts rather than the opposite. *Fischer v. Adams* 512

38. In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court. *Trevett v. Trevett* 517

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43. Where the charge to the jury, considered as a whole, correctly states the law, a judgment on the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete. *Planck v. State* 599

44. While a motion for a new trial is unnecessary in a workmen's compensation case, if such a motion is filed in the district court under the general provisions of the Code of Civil Procedure, the time for perfecting an appeal from the district court to the Supreme Court does not commence to run until the overruling or sustaining of such motion. *Meester v. Schultz* 614

45. Where a motion for a new trial is granted and the losing party does not appeal therefrom but voluntarily participates in a second trial, and does not preserve the record of the first trial in the second trial but appeals from the judgment in the second trial only, there can be no review of the proceedings in the first trial or of the order granting it. *Meester v. Schultz* 614

46. In a proceeding under the workmen's compensation law, where the evidence is in irreconcilable conflict, the Supreme Court, upon a trial de novo, may consider the fact that the district court gave credence

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49. Where the charge to a jury in a particular respect contains a correct general statement of the law, error cannot be predicated on a failure to give a more specific instruction in the absence of a request therefor. *Thurow v. Schaeffer* 651

50. The Supreme Court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions. *Thurow v. Schaeffer* 651

51. A ruling of the court on a motion for an instructed verdict could not, prior to 1947, be reviewed by the Supreme Court unless it had been assigned as error in a motion for a new trial by the party aggrieved thereby. *Krepcik v. Interstate Transit Lines* 663

52. If a motion for an instructed verdict was granted, in the absence of a motion for a new trial, the review in the Supreme Court was, prior to 1947, limited to a determination that the pleadings did or did not support the judgment. *Krepcik v. Interstate Transit Lines* 663

53. A legislative act of 1947 provided a new procedure for obtaining a new trial and for a judgment notwithstanding the verdict. *Krepcik v. Interstate Transit Lines* 663

54. The purpose of the 1947 legislative act for obtaining a new trial and for a judgment notwithstanding the verdict was to prevent needless cost and effort, and to simplify and expedite the final disposition of litigation. *Krepcik v. Interstate Transit Lines* 663

55. The manner of appeal is statutory, and one who complies with the requirements of the applicable statute is entitled to a review of his case within the

scope provided by law. *Krepcik v. Interstate Transit Lines* 663
56. A motion for a new trial is not necessary to a review in the Supreme Court on appeal of any order made by authority of the legislative act of 1947 providing for judgment notwithstanding the verdict. *Krepcik v. Interstate Transit Lines* 663
57. When a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness. *Sorter v. Citizens Fund Mutual Fire Ins. Co.* 686
58. A defeated litigant in a will contest is not entitled to a trial de novo on appeal from the judgment of the district court. The existence of an issue of fact in such a contest is determined in the Supreme Court by the sufficiency of the evidence to sustain a verdict of the jury. *In re Estate of Hunter* 704
In re Estate of Wahl 812
59. Except where jurisdiction is involved, the Supreme Court will consider on appeal only questions which have been presented to and passed upon by the trial court. *Dodge v. Galusha* 753
60. Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, has been, or was afterwards, allowed to be given by the witness. *Kunkel v. Cohagen* 774
61. An assignment of error directed to the rejection of offered testimony may be disregarded on appeal, if the places in the record where the offer of proof and the challenged ruling may be found are not pointed out in appellant's brief. *Kunkel v. Cohagen* 774
62. The Supreme Court will not disturb the findings of a jury unless on an examination of the record it may be said that such findings are not supported by any evidence or are clearly wrong. *Kunkel v. Cohagen* 774
63. Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse. *Elliott v. Swift & Co.* 787
64. On appeal to the Supreme Court in a statutory proceeding by the State Fire Marshal to condemn a building, the review is by trial de novo as in equity. *In re Application of Iverson* 802
65. In testing the sufficiency of evidence to support

a verdict it will be considered in the light most favorable to the successful party, any controverted fact will be resolved in his favor, and he will be given the advantage of any inferences that can reasonably be deduced therefrom. *In re Estate of Wahl* 812

66. Where a law action is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. *Heusser v. McAtee* 828

67. The Legislature may properly specify the nature of the orders subject to review in setting up a special appellate proceeding. *In re Application of Airline Ground Service, Inc.* 837

68. The Legislature has provided that any order of the Nebraska State Railway Commission upon which there has been a hearing before the commission is reviewable for the purpose of securing its reversal, vacation, or modification. *In re Application of Airline Ground Service, Inc.* 837

69. Any order of the Nebraska State Railway Commission is reviewable which meets the conditions set forth in the statute and which involves a justiciable issue that is decisive of some subject matter of which the commission has jurisdiction and the power to enforce against any party to the proceeding. *In re Application of Airline Ground Service, Inc.* 837

70. Where the railway commission assumes jurisdiction of the subject matter and issues a cease and desist order after a hearing, such order is reviewable even though the order was labeled a temporary or interim order. *In re Application of Airline Ground Service, Inc.* 837

71. In determining whether an order of the railway commission is reviewable it is the content and not the form which is the controlling factor. *In re Application of Airline Ground Service, Inc.* 837

72. An order sustaining a demurrer to a petition, without a dismissal or other final disposition of the case, is not a final order reviewable on appeal. *Koehn v. Union Fire Ins. Co.* 859

73. The appeal of a holder of a real estate broker's license from an order of the State Real Estate Commission requires the institution of an action in the district court within ten days and a determination thereof upon the issues raised by the pleadings in that court. *Feight v. State Real Estate Commission* 867

74. In a trial in the district court with respect to revocation of a real estate broker's license, the court has authority to inquire into the subject matter of the complaints set out in the pleadings, including, if alleged, that the findings of fact made by the State Real Estate Commission were contrary to the weight of the evidence. *Feight v. State Real Estate Commission* 867

75. Trial in district court of an appeal from an order of revocation of a real estate broker's license is equitable in nature and will be tried as any other civil action where the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made. *Feight v. State Real Estate Commission* 867

76. Where a finding adverse to a license holder has been made which reflects upon the character and standing of the licensee, the claim on appeal that the adverse finding and order were wrongfully entered raises a justiciable issue, even if the license has expired or the disciplinary order satisfied. *Feight v. State Real Estate Commission* 867

77. An appellee in the Supreme Court may not cross-appeal from a holding of the district court, claimed to be erroneous, which was made at his express request. *Feight v. State Real Estate Commission* 867

Assignments.

A promise to individually care for another is personal and not subject to assignment or to performance by another. While the death of the promisee does not constitute a willful violation of the promise it does, nevertheless, result in a failure to perform the promise and a failure of the consideration so far as the promisee is concerned for which an equity court will grant relief. *Whitney v. Combe* 401

Attorney and Client.

When two or more persons employ the same attorney in relation to the same business, their communications are not privileged between themselves, even though their interests may be diverse, where the disclosures are made in the presence of all parties concerned, or are intended for the information of all parties. *Jenkins v. Jenkins* 113

Automobiles.

1. When a person 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. *Gorman v. Dalgas* 1
2. Before a verdict can be properly directed the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury. *Gorman v. Dalgas* 1
3. Where a person 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 of negligence is usually one for the jury. *Gorman v. Dalgas* 1
4. Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way. *Gorman v. Dalgas* 1
5. As a general rule, it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by the lights of his automobile, but there are well-established exceptions thereto, dependent upon the nature or condition of the object in relation to conditions on or adjacent to the highway, adversely affecting immediate visibility of the object. *Plumb v. Burnham* 129
6. The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such that reasonable minds may draw different conclusions therefrom,

the questions of negligence and contributory negligence are for the jury. *Plumb v. Burnham* 129

7. The mere stalling of a motor vehicle temporarily upon the highway, caused by an exhaustion of the gas supply, would not ipso facto constitute negligence as a matter of law, but a failure to use ordinary care in removing the stalled vehicle from the highway within a reasonable time when it was possible to do so, would be negligence. *Plumb v. Burnham* 129

8. It is negligence for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such a manner that it cannot be stopped or its course changed in time to avoid a collision with an obstruction discernible within the range of vision ahead. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431
Thurow v. Schaeffer 651

9. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossings at intersections. The driver of a motor vehicle owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances, and a larger degree of care towards a child of tender years while making such a crossing of a street. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431

10. When a motor vehicle operated on a public highway collides with a person causing injury, liability arises when the peril of the injured person is discovered by the operator of the vehicle or by the exercise of ordinary care and caution could have been discovered in time to have avoided injury, if at the time of the collision no negligence of the injured person was active or a contributing factor to the accident. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431

11. The owner of an automobile which is kept for family purposes is liable for injuries inflicted upon a stranger resulting from the negligence of one member of the family who was using it for his individual pleasure or purpose with the owner's consent. *Thoren v. Myers* 453

12. The purpose of requiring a motorist to stop within the range of his vision is to remove from the jury the question of negligence and cause it to be determinable as a matter of law only in cases where the facts are not in dispute or where they are so con-

clusive in character that reasonable minds may not differ in relation thereto. *Thurow v. Schaeffer* 651

13. The general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision ahead, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care and prudence required of a reasonably careful and prudent person under the circumstances of the particular situation. *Thurow v. Schaeffer* 651

14. Where a pedestrian crossing a street between intersections in violation of a city ordinance looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he can avoid injury to himself, it usually presents a case for a jury. *Trumbley v. Moore* 780

15. Unless some reasonable excuse is shown which is consistent with the facts established, one who is obligated to keep a lookout for vehicles or persons favored over him is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery. *Trumbley v. Moore* 780

16. 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 a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored 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. *Elliott v. Swift & Co.* 787

Banks and Banking.

1. The Par Check Act is a fair and reasonable exercise of police power with relation to banking, a business pre-eminently public in nature, and thus does not impair the obligation of contracts, unreasonably de-

prive state banks of their right to contract, or deprive them of due process or equal protection of the laws. *Placek v. Edstrom* 225

2. The Par Check Act does not prohibit state banks from collecting legitimate exchange charges from their own customers or depositors for making their funds available, by one recognized mode or another, at distant places for their own purposes. *Placek v. Edstrom* 225

3. The Par Check Act does not compel drawee state banks to donate the use of their services or property without compensation, but simply requires that if they clear checks, it must be done at par, without deduction of any exchange charges whatever from remittances to forwarding banks. *Placek v. Edstrom* 225

4. "Special collection items," within the purview of the Par Check Act, are those which are sent to a bank for collection only, and which in fact actually require the employment of unusual and individual treatment or services in the act or process of collection and remittance thereof, as distinguished from those which require only the treatment or services ordinarily involved or employed in the general course of clearance transactions between a forwarding bank and the drawee bank. *Placek v. Edstrom* 225

Bastards.

1. A child born in wedlock is presumed to be the legitimate offspring of the husband and wife, and this is so even though the birth of the child happens so soon after the marriage as to render it certain that it was the result of coition prior thereto. *Hudson v. Hudson* 210

2. The presumption of legitimacy may be rebutted by competent proof that the husband had no access to the wife, that he was absent at such time as in the course of nature the child was begotten, that he was impotent, or other circumstances showing that he could not have been the father of the child. *Hudson v. Hudson* 210

3. A wife is not permitted to testify to facts which would bastardize her child, and her declarations cannot be used in evidence to prove the same fact. *Hudson v. Hudson* 210

4. When a husband admits he has had intimate relations with his wife before their marriage and within the probable period of gestation of a child which

was conceived before but born after the marriage and he is informed of the pregnancy prior thereto, he cannot deny its paternity but must submit to the marriage and the presumed paternity of the child. *Hudson v. Hudson* 210

Boundaries.

1. Original corners, as established by the government surveyors, if they can be found, or the places where they were originally established if they can be definitely determined, are conclusive on all persons owning or holding with reference thereto, without regard to whether they were located correctly or not, and must remain the true corners by which to determine boundaries. *Foltz v. Brakhage* 216
2. When the owner of two contiguous tracts of land conveys one of them to a grantee and subsequently conveys the other to a different grantee, in a contest between the grantees concerning the boundary line between the two tracts, the second grantee cannot, for the purpose of establishing title by adverse possession against prior grantee, tack his possession to that of the common grantor. *Foltz v. Brakhage* 216
3. A hedge constituting a boundary between adjoining lands is the common property of the owners of the lands, but neither has a right to cut, injure, or destroy the hedge by the exercise of his desire or judgment. *Jurgens v. Wiese* 549

Bridges.

1. Repairs of county bridges contemplated by the Emergency Bridge Act are such as may be made at once and without considerable cost. *State ex rel. Heil v. Jakubowski* 471
2. In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of such discretion. *State ex rel. Heil v. Jakubowski* 471
3. It is a general principle that the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. *State ex rel. Heil v. Jakubowski* 471

Brokers.

1. Whether a broker is the procuring cause of a sale is generally a question of fact for the jury, the decision in each case being dependent upon the particular facts and circumstances thereof. *Albers v. Ziegler* 408
2. Where one contracts as owner with a broker or agent for the sale of real estate he may not defend an action for commission for sale thereof on the ground that he had no interest in the real estate. *Sohler v. Christensen* 843

Buildings.

1. Where repairs or alterations can be made lawfully upon a building so as to eliminate the special dangers, arising from its location and condition, to surrounding property and to persons, such repairs or alterations should be ordered rather than ordering the destruction of the building. *In re Application of Iverson* 802
2. The State Fire Marshal has the right under statute to rest his order upon a requirement that the building be destroyed. However, when he does so, and the order is resisted, he has the burden of proving that destruction is a necessity to meet the requirements of the statute. *In re Application of Iverson* 802

Cancellation of Instruments.

Where relief is given by setting aside or canceling a deed the consideration for which was an agreement by the grantee to individually care for the grantor, because full performance has been prevented by the death of the grantee, the court may impose such conditions as the equities of the case justify. *Whitney v. Combe* 401

Carriers.

1. While the published tariff of an interstate common carrier over a stipulated or designated route is in force and effect, the classifications and rates named therein are binding by statute upon both the carrier and shipper. Any statements, agreements, or conduct of the carrier or its agents concerning such classifications and rates or the shipper's ignorance of them will not estop or prevent such carrier from

collecting, or relieve the shipper from liability for, the proper published rate of which he is presumed to have knowledge. *Union Transfer Co. v. Renstrom* 326

2. The rights and duties of the carrier and shipper prescribed by the Interstate Commerce Act and the Motor Carrier Act are for the good of the public, to protect it against secret rebates and discriminations, rather than for the enrichment of either the carrier or shipper at the expense of others, and any direct or indirect evasion of such rights and duties by either is expressly prohibited by the acts. *Union Transfer Co. v. Renstrom* 326

3. When no question affecting the power or administrative discretion or judgment of the Interstate Commerce Commission is involved, but the controversy merely involves the question of whether or not the carrier has exacted the rate prescribed in its tariff, courts have jurisdiction of the subject matter. *Union Transfer Co. v. Renstrom* 326

4. The State Railway Commission is authorized by the Constitution to regulate rates and service and to have general control of common carriers within the state, as the Legislature may provide by law, and in the absence of specific legislation its powers and duties are unqualified. *State ex rel. State Railway Commission v. Ramsey* 333

5. The powers and duties of the State Railway Commission are derived from and an independent part of the Constitution, and are administrative, legislative, and judicial. *State ex rel. State Railway Commission v. Ramsey* 333

6. Common carriers by air are indistinguishable from other common carriers with respect to the policy of the law. *State ex rel. State Railway Commission v. Ramsey* 333

7. Any person or organization engaged in transportation by air for hire is a common carrier. *State ex rel. State Railway Commission v. Ramsey* 333

8. The authority of the State Railway Commission to regulate and control common carriers as the Legislature may provide by law means in the manner in which the Legislature provides by specific legislation. *State ex rel. State Railway Commission v. Ramsey* 333

Charities.

1. A bequest to a charitable corporation by name, with-

out further restriction or limitation as to use, is in fact not a bequest to the corporation as such, but to the objects and purposes for which such corporation was organized. *In re Estate of Harrington* 81

2. A gift to a charitable corporation is equivalent to a bequest to a charitable trust, and is ordinarily governed by the same rules of law, for the reason that want of the trust relation in the former is overcome by the fact that the objects and purposes of the charitable corporation coincide with the charitable purposes of the gift. *In re Estate of Harrington* 81
3. The intent of the donor in a bequest to a charitable corporation must be gathered from the four-corners of the will, but the objects and purposes for which such a donee was incorporated may be considered in determining the construction and legal effect of such bequest. *In re Estate of Harrington* 81
4. A bequest to a charitable corporation "if in existence; but if not in existence at the death of the survivor of said testators" then to another, passes to the latter if the former has at the death of the surviving testator ceased to carry out the objects and purposes for which it was incorporated, although still legally existent as a corporation. *In re Estate of Harrington* 81

Chattel Mortgages.

1. The mortgagee's burden of proving that the mortgage was properly recorded, or the burden of proving, by one who asserts it, that the recordation was invalid, may be sustained by any competent evidence sufficient to establish the necessary facts. *Green Finance Co. v. Becker* 479
2. Upon the principle of comity, a chattel mortgage, properly executed and recorded according to the law of the state where the mortgage is executed and the property is located, will, if valid in such state, be held valid as against existing creditors and subsequent purchasers in another state to which the property may be removed without the mortgagee's consent. *Green Finance Co. v. Becker* 479
3. A buyer of personalty subject to a mortgage of which he has constructive notice takes whatever title he may acquire in hostility to mortgagee, and does not become purchaser in good faith for value as against such mortgage. *Green Finance Co. v. Becker* 479

Constitutional Law.

1. In view of the self-executing provisions of Article I, section 13, Constitution of Nebraska, courts of this state must be open at all times to afford a remedy by due course of law for any injury done a party in his person, without denial or delay, and without reference to and wholly unaffected by the subsequent death of the wrongdoer or the party wronged. *Rehn v. Bingaman* 196
2. Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises. *Rehn v. Bingaman* 196
3. The Par Check Act is a fair and reasonable exercise of police power with relation to banking, a business pre-eminently public in nature, and thus does not impair the obligation of contracts, unreasonably deprive state banks of their right to contract, or deprive them of due process or equal protection of the laws. *Placek v. Edstrom* 225
4. Private rights must yield to the public welfare, and one whose rights are appropriately declared and defined by a valid legislative enactment under the police power of the state cannot, by purported contractual authority or otherwise, avoid observance thereof or make such legislation ineffectual. *Placek v. Edstrom* 225
5. The State Railway Commission is authorized by the Constitution to regulate rates and service, to have general control of common carriers within the state, as the Legislature may provide by law, and, in the absence of specific legislation, its powers and duties are unqualified. *State ex rel. State Railway Commission v. Ramsey* 333
6. The powers and duties of the State Railway Commission are derived from and independent part of the Constitution, and are administrative, legislative, and judicial. *State ex rel. State Railway Commission v. Ramsey* 333
7. A Constitution is intended to respond and be applied to any condition and circumstances as they arise in the course of the progress of the state. *State ex rel. State Railway Commission v. Ramsey* 333

8. The powers granted by a Constitution do not change, but they do apply in different periods to all things to which they are in their nature applicable. *State ex rel. State Railway Commission v. Ramsey* 333
9. Legislative and official interpretation long acquiesced in is entitled to weight in seeking the meaning of a doubtful constitutional provision. *State ex rel. State Railway Commission v. Ramsey* 333
10. The meaning of a constitutional provision is to be determined as of the time of its adoption, and the intent and understanding of its framers and the people who adopted it is the principal inquiry in construing it. *State ex rel. State Railway Commission v. Ramsey* 333
11. It is permissible in determining the meaning of language of a Constitution to consider the facts of history, the evil intended to be overcome, the objects sought to be accomplished, and the scope of the remedy its terms include. *State ex rel. State Railway Commission v. Ramsey* 333
12. The word "specific" as used in the phrase in the constitutional amendment providing for the State Railway Commission means the opposite of "general" and is synonymous with "particular." *State ex rel. State Railway Commission v. Ramsey* 333
13. Act seeking to transfer jurisdiction over common carriers by air from State Railway Commission to Department of Aeronautics is general and not specific legislation, is in conflict with the provisions of Article IV, section 20, of the Constitution of Nebraska, and is invalid. *State ex rel. State Railway Commission v. Ramsey* 333
14. A regulatory or restrictive ordinance subject to the objection that it is discriminatory as to classes of property and subject to the objection that it is not a reasonable exercise of the police power in the interest of the public welfare is violative of the Constitution of the State of Nebraska. *Panebianco v. City of Omaha* 463
15. The rights guaranteed to an accused in a criminal prosecution by Article I, section 11, of the Constitution of Nebraska are all personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure. *Hawk v. State* 717
16. Courts do not deny due process just because they act expeditiously, and if no witnesses are suggested or

information furnished that would possibly lead to some material evidence or witnesses, the mere failure to delay in order to investigate would not be a denial of due process. *Hawk v. State* 717

17. In passing upon claims of denial of due process of law contrary to the Fourteenth Amendment in state criminal trials, doubt should be resolved in favor of the integrity, competence, and proper performance of their official duties by the judge and the prosecuting attorney lawfully chosen to discharge serious public responsibilities under their oaths of office. *Hawk v. State* 717

18. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *Hawk v. State* 717

19. A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance. *City of Omaha v. Glissmann* 895

20. The purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto as such property is always held subject to the city's lawful exercise of the police power. *City of Omaha v. Glissmann* 895

21. The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must however not be unreasonable, discriminatory, and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance. *City of Omaha v. Glissmann* 895

22. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory. *City of Omaha v. Glissmann* 895

23. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to

the subject of municipal legislation. *City of Omaha v. Glissmann* 895

24. In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. *City of Omaha v. Glissmann* 895

25. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. *City of Omaha v. Glissmann* 895

Contracts.

1. Where the purpose of the agreement is plainly stated, it will be given great weight in determining the intention of the parties when the agreement was made. *O'Connor v. Burns, Potter & Co.* 9

2. The words "as quickly as possible" in a contract for the construction of an irrigation well mean with reasonable diligence or without unreasonable delay. *Western Land Roller Co. v. Schumacher* 166

3. The failure to commence work by the date specified in a contract constitutes a breach thereof for which liability ordinarily exists for all damages proximately resulting therefrom. *Western Land Roller Co. v. Schumacher* 166

4. Where parties reduce their agreement to writing, such writing, in the absence of fraud, mistake, or ambiguity in the writing, constitutes the best and only competent evidence of the contract. *Hoerger v. City State Bank* 321

5. A distinction exists between an ordinary commercial contract and a contract to personally care for another during his lifetime. Contracts of the latter class are in a different classification and not subject to the ordinary rules applied by courts in other cases. *Whitney v. Combe* 401

6. A promise to individually care for another is personal and not subject to assignment or to performance by another. While the death of the promisee does not constitute a willful violation of the promise it does, nevertheless, result in a failure to per-

form the promise and a failure of the consideration so far as the promisee is concerned for which an equity court will grant relief. *Whitney v. Combe* 401

7. One who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation, unless the terms or nature of the contract indicate that he does not assume this risk. *Sparks v. Cater Electrical Construction Co., Inc.* 675

8. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. *O-N-L Mills, Inc. v. Union Pacific R. R. Co.* 692

9. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. *O-N-L Mills, Inc. v. Union Pacific R. R. Co.* 692

10. If a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it. But if the construction must depend upon proof of other and extrinsic facts, then these questions of fact should be submitted to the jury, under proper instructions from the court. *O-N-L Mills, Inc. v. Union Pacific R. R. Co.* 692

11. Unless waived or excused, a tender of performance under a contract for the sale of real estate must be upon conditions for which there is a foundation in the contractual relation between the parties. *Dodge v. Galusha* 753

12. Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement. *Stanford Motor Co. v. Westman* 850

13. When there are several parts of the same transaction each part does not need a separate consideration but the consideration for the whole is consideration for each part. *Stanford Motor Co. v. Westman* 850

14. If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will

usually be regarded as a provision for liquidated damages. *Stanford Motor Co. v. Westman* 850

15. If a defendant relies upon the nonperformance of a contract by plaintiff, he must allege that fact in his answer, and in pleading nonperformance, the facts which constitute the breach must be alleged. *Peters v. Wilks* 861

Coram Nobis.

1. The common-law writ of error coram nobis exists in this state. *Hawk v. State* 717
2. The purpose of a writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented. *Hawk v. State* 717
3. Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ of error coram nobis must be denied. *Hawk v. State* 717
4. Proceedings to obtain a writ of error coram nobis are essentially civil in character. *Hawk v. State* 717
5. The petitioner for a writ of error coram nobis carries the burden of proof in a collateral attack on a judgment which he seeks to have declared a nullity. *Hawk v. State* 717
6. Upon an application for a writ of error coram nobis, the court will not weigh conflicting testimony adduced in the original trial nor pass upon the credibility of witnesses where the jury has determined the same. *Hawk v. State* 717
7. The common-law writ of error coram nobis is not a substitute for the statutory remedy of a writ of error under the Nebraska criminal procedure. *Hawk v. State* 717
8. The writ of error coram nobis will not lie to vacate a judgment of conviction and secure a retrial of the accused because of his inability, within statutory limits of time, to prepare a record on appeal to the Supreme Court showing the errors of which complaint was made. *Hawk v. State* 717

Corporations.

1. A corporation is a complete entity, separate and distinguishable from its stockholders and officers, and

if it sees fit to have one of the latter serve it in the capacity of an ordinary employee there is nothing to prevent it from so doing. *Solheim v. Hastings Housing Co.* 264

2. An executive officer of a corporation is not, as such, its employee in the ordinary use of the word and, in the absence of express statutory provisions so providing, does not come within the provisions of the Workmen's Compensation Act covering only employers and employees. *Solheim v. Hastings Housing Co.* 264

3. A person holding the position of an executive managing officer and, at the same time, holding a job as an employee and performing the work thereof should be allowed to draw only compensation based on wages received by him in the latter capacity. *Solheim v. Hastings Housing Co.* 264

Counties.

County commissioners, being officers of the county and acting under its authority, stand in the shoes of the county and are not liable for negligence in the performance of their duties. *Harmer v. Petersen* 412

Courts.

1. In view of the self-executing provisions of Article I, section 13, Constitution of Nebraska, courts of this state must be open at all times to afford a remedy by due course of law for any injury done a party in his person, without denial or delay, and without reference to and wholly unaffected by the subsequent death of the wrongdoer or the party wronged. *Rehn v. Bingaman* 196

2. Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises. *Rehn v. Bingaman* 196

3. It is the spirit and policy of the law to give every party an opportunity to prosecute or defend his case in court, and courts will never deny such right except for the fault, lack of diligence, or gross laches of such party or his authorized attorney. *Benson v. General Implement Corporation* 234

4. An entry made in a probate fee book of a county court cannot be considered for the purpose of ascertaining what were the proceedings, or when taken in that court, or to contradict an order of that court as it appears in a properly authenticated transcript in the Supreme Court. *In re Estate of Bednar* 242
5. The act of the clerk of a county court in furnishing information to a member of the bar as to the date of action previously taken by the court is not the performance of an official duty, and in doing so as a courtesy to counsel the clerk acts as his agent, and any error therein cannot be an excuse for failure of counsel to take timely action in any matter required by law. *In re Estate of Bednar* 242
6. It is a fundamental rule applicable to appellate proceedings that the record of a court from whence the case comes when properly authenticated imports verity and cannot be contradicted, varied, or changed by any extrinsic evidence. *In re Estate of Bednar* 242
7. If the record of a lower court is incorrect or incomplete, the remedy is appropriate proceedings to secure a correction thereof in that court. *In re Estate of Bednar* 242
8. On appeal to the district court from the county court where the county court had no jurisdiction of the subject matter, such appeal confers no jurisdiction upon the district court. *In re Trust Estate of Myers* 255
9. The county court is without jurisdiction to interpret instruments creating trusts or to determine the rights of rival claimants of trusts and matters of like import. *In re Trust Estate of Myers* 255
10. The county court has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves. *In re Trust Estate of Myers* 255
11. The jurisdiction of the county court in the construction of a will is limited to a construction for the benefit of the executor in carrying out the terms of the will but no such construction is binding on the heirs, legatees, or other persons interested in the distribution of the corpus of the estate. *In re Trust Estate of Myers* 255
12. The Administrative Testamentary Trust Act confers only concurrent jurisdiction of the county court with the district court in supervision over administration of testamentary trusts. *In re Trust Estate of Myers* 255
13. When no question affecting the power or adminis-

tration discretion or judgment of the Interstate Commerce Commission is involved, but the controversy merely involves the question of whether or not the carrier has exacted the rate prescribed in its tariff, courts have jurisdiction of the subject matter. *Union Transfer Co. v. Renstrom* 326

14. Comity is neither a matter of absolute obligation or mere courtesy or good will, but is the doctrine under which contracts made, rights acquired, and obligation incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition of such right or title. *Green Finance Co. v. Becker* 479

15. A litigant has no vested right in any mode of procedure. *Krepcik v. Interstate Transit Lines* 663

16. Ordinarily the meaning of words in common use is a question for the court. *O-N-L Mills, Inc. v. Union Pacific R. R. Co.* 692

Criminal Law.

1. An instruction in a criminal case that "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with other testimony which you find to be true," is erroneous and ordinarily prejudicial. *Schluter v. State* 284
Boeche v. State 368
Kitts v. State 679

2. Statute requiring finding of substantial miscarriage of justice to reverse judgment in criminal case is not effective to sustain a conviction where a substantial right of a defendant has been invaded or abridged. *Schluter v. State* 284

3. The venue in a criminal case may be established by circumstantial evidence. *Clark v. State* 348

4. One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof aliunde of the essential facts constituting the crime. *Clark v. State* 348

5. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, with slight corroborative circumstances, be sufficient to warrant a conviction. *Clark v. State* 348

6. The corpus delicti may be proved either by direct or circumstantial evidence. *Clark v. State* 348
7. Circumstances capable of an innocent construction may be interpreted in the light of the defendant's confession, and the fact under investigation be thus given a criminal aspect. *Clark v. State* 348
8. The intent with which an act is committed is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of the attendant circumstances. *Clark v. State* 348
9. Where the jury is told that if it found that a written statement was freely and voluntarily given and signed without fear, compulsion, or inducements, the jury should consider it the same as any other evidence, it is not necessary that the court include in the instruction the requirement that the jury so find beyond a reasonable doubt where the court has covered the matter generally in other instructions. *Clark v. State* 348
10. The sentence in the first instance lies with the trial judge even when leniency has been recommended, and will not be disturbed unless there is an abuse of sound judicial discretion in such respect. *Pauli v. State* 385
11. The proof of value and ownership of personal property destroyed was sufficiently established by testimony of administrator of church that he was acquainted with and knew the general extent of articles destroyed and the value thereof. *Pauli v. State* 385
12. Evidence was sufficient to sustain a conviction of the malicious destruction of personal property over and above the value of thirty-five dollars. *Pauli v. State* 385
13. In a criminal action, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that it can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Planck v. State* 599
14. Where the evidence in a criminal case is conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury. *Planck v. State* 599
15. It is the duty of a trial judge during a criminal

trial to refrain from asking witnesses questions in such a manner as to indicate the court's opinion regarding the guilt of the accused. However, when the trial judge propounds a question and elicits an answer from a witness which does not, in the light of the record, show bias or prejudice on his part or indicate his opinion regarding the guilt or innocence of the accused, such inquiry does not constitute prejudicial error. *Planck v. State* 599

16. To sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt. *Reyes v. State* 636

17. The corpus delicti may, as any fact, be established by circumstantial evidence. *Reyes v. State* 636

18. The corpus delicti is the body or substance of the crime, the fact that a crime has been committed without regard to the identity of the person committing it. *Reyes v. State* 636

19. To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby, and inconsistent with any reasonable hypothesis of innocence. *Reyes v. State* 636

20. Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the accused. *Reyes v. State* 636

21. Where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion. *Reyes v. State* 636

22. Circumstantial evidence should be weighed and acted upon cautiously, and a conviction should not be based upon suspicion, speculation, the weakness of the status of the accused, the embarrassing position in which he finds himself, or the mere fact that some unfavorable circumstances are not satisfactorily explained. *Reyes v. State* 636

23. In determining the sufficiency of circumstantial evidence to support a conviction, each case must be determined on its own peculiar circumstances. *Reyes v. State* 636

24. In laying a foundation for the admission of a con-

fession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. *Kitts v. State* 679

25. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of a confession in evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary character is still a question of fact to be determined by the jury. *Kitts v. State* 679

26. Where the trial court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to refuse to submit to the jury for its determination, under appropriate instructions, the factual question of whether defendant's alleged confession was voluntary, in which event it should be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded. *Kitts v. State* 679

27. The common-law writ of error coram nobis exists in this state. *Hawk v. State* 717

28. The purpose of a writ of error coram nobis is to enable the court to recall some adjudication, made while some fact existed which, if before the court, would have prevented rendition of the judgment, and which, through no fault of the party, was not presented. *Hawk v. State* 717

29. Where the facts alleged are known to the applicant before or during the progress of the trial, or could have been known by the exercise of reasonable diligence, the writ of error coram nobis must be denied. *Hawk v. State* 717

30. Proceedings to obtain a writ of error coram nobis are essentially civil in character. *Hawk v. State* 717

31. The petitioner for a writ of error coram nobis carries the burden of proof in a collateral attack on a judgment which he seeks to have declared a nullity. *Hawk v. State* 717

32. Upon an application for a writ of error coram nobis, the court will not weigh conflicting testimony adduced in the original trial nor pass upon the

credibility of witnesses where the jury has determined the same. *Hawk v. State* 717
33. The common-law writ of error coram nobis is not a substitute for the statutory remedy of a writ of error under the Nebraska criminal procedure. *Hawk v. State* 717
34. No standard length of time must elapse before defendant in a capital case should go to trial, and each case, and facts surrounding it, provides its own yardstick. *Hawk v. State* 717
35. The writ of error coram nobis will not lie to vacate a judgment of conviction and secure a retrial of the accused because of his inability, within statutory limits of time, to prepare a record on appeal to the Supreme Court showing the errors of which complaint was made. *Hawk v. State* 717
36. The failure to give a preliminary examination to a person charged with a crime is not a jurisdictional defect and is waived if not complained of before a plea of not guilty to the charge is made in the district court. *Swanson v. Jones* 767

Damages.

1. Contributions which are speculative or conjectural may not be properly included in fixing the amount of damage for wrongful death. *Dorsey v. Yost* 66
2. The amount of damages accruing to a next of kin because of the wrongful death of a minor child is difficult to estimate. Such damages are peculiarly within the province of the jury to determine and, unless clearly wrong, a reviewing court will not interfere with the verdict. *Dorsey v. Yost* 66
3. In actions for breach of contract, there must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment. *Western Land Roller Co. v. Schumacher* 166
4. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered. *Thoren v. Myers* 453
5. The reasonable value of the use of machinery for commercial purposes is the reasonable net rental value upon the market at the place in question of the machine involved or machinery of like capacity and

performance, the lessee bearing all such expenses as he would have to bear in the operation of his own machine. *Kunkel v. Cohagen* 774

6. Where the evidence shows that a similar machine could not be rented in the market, or that a rental value cannot be established, then the owner of the machine may rely on proof of loss of profits to establish the reasonable value of the loss of use. *Kunkel v. Cohagen* 774
7. If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages. *Stanford Motor Co. v. Westman* 850
8. As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court. *Stanford Motor Co. v. Westman* 850

Death.

1. In an action by the personal representative of a deceased child, for the benefit of a parent, to recover damages for negligently causing the death of the child, the measure of damages is the present worth in money of the contributions having monetary value of which the parent is shown by the evidence with reasonable certainty to have been deprived. *Dorsey v. Yost* 66
2. The amount of damages accruing to a next of kin because of the wrongful death of a minor child is difficult to estimate. Such damages are peculiarly within the province of the jury to determine and, unless clearly wrong, a reviewing court will not interfere with the verdict. *Dorsey v. Yost* 66

Declaratory Judgments.

1. Proceedings for a declaratory judgment extend to the validity of a statute where there is a justiciable, determinable controversy between parties in respect to rights thereunder. *State ex rel. State Railway Commission v. Ramsey* 333
2. The Uniform Declaratory Judgments Act puts the duty upon the plaintiffs in the first instance of

joining as parties all persons who have or claim any interest which would be affected by the declaration. *Redick v. Peony Park* 442

3. The Uniform Declaratory Judgments Act is applicable only where there is a present actual controversy and all interested persons are made parties, and only where justiciable issues are presented. *Redick v. Peony Park* 442

4. An action to secure a declaration of rights is designed to terminate a controversy so far as it relates to the parties and facts giving rise thereto, and courts should, under most circumstances, dismiss such an action without prejudice, whenever all parties, whose claims gave rise to the controversy and whose rights upon such claims would be adjudicated by the declaration sought, had they been a party to the action, have not been impleaded. *Redick v. Peony Park* 442

5. There must be an actual and bona fide controversy as to which the judgment will be res adjudicata. Such a case requires that all the interested parties shall be before the court. *Redick v. Peony Park* 442

6. The Uniform Declaratory Judgments Act does not contemplate the adjudication of interests of a party over which the court has no jurisdiction. *Redick v. Peony Park* 442

7. No matter what may be the wishes of the parties, the courts will not ordinarily entertain and render decrees in declaratory judgment actions which, for want of necessary parties, cannot adjudicate the questions presented. *Redick v. Peony Park* 442

Deeds.

1. Whether or not a deed has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. *Black v. Romig* 61

2. Where a grantor instructs an escrow agent to safely keep deeds until his death and then to deliver them to the named grantees, and there is no evidence of any reservation of a right of possession by word or act before the death of the grantor, there is a delivery of the deeds sufficient to pass title. *Black v. Romig* 61

3. Evidence in support of an allegation that an absolute deed was intended as a mortgage must be clear, convincing, and satisfactory. *Holman v. Peter Kiewit Sons' Inc.* 71

4. Where relief is given by setting aside or canceling a

deed the consideration for which was an agreement by the grantee to individually care for the grantor, because full performance has been prevented by the death of the grantee, the court may impose such conditions as the equities of the case justify. *Whitney v. Combe* 401

5. By statute it is required that consideration shall be set forth in a deed of conveyance of real estate but when title is attacked on the ground of want of consideration no burden devolves upon the grantee to assume the burden of proving consideration. *Sampson v. Sissel* 521

6. When an attack is made on a deed on the ground of lack of consideration the general rule is that the statement of consideration is prima facie evidence which may be rebutted. *Sampson v. Sissel* 521

7. As a general rule a delivered deed passes title even if there is no consideration. *Sampson v. Sissel* 521

8. A deed without consideration does not protect a title obtained by fraud or undue influence or a transfer in fraud of creditors. *Sampson v. Sissel* 521

9. The possession of a deed or other instrument of conveyance by a grantee raises a presumption that the instrument was properly delivered and the burden of proof is upon him who disputes it to overcome the presumption. *Sampson v. Sissel* 521

10. In an action to set aside an instrument on the ground of undue influence the burden is on the plaintiff to establish that the grantor was subject to such influence; that the opportunity to exercise it existed; that there was a disposition to exercise it; and that the result appears to be the effect of such influence. *Sampson v. Sissel* 521

11. Undue influence exercised by anyone, whether he or another gains by its exercise, renders the instrument thus procured worthless. *Sampson v. Sissel* 521

12. Before it may be said that an instrument was procured by undue influence the evidence must be sufficient to show that the grantor was capable of having his free agency destroyed and that he was capable of being constrained to depart from his own judgment and will and to follow the will of another. *Sampson v. Sissel* 521

13. In an action to set aside an instrument on the ground of undue influence, testimony of third persons as to conversations had with a deceased grantor long after

the execution of the instrument of grant relating to the grantor's proposed disposition of his estate is inadmissible as hearsay. *Sampson v. Sissel* 521

14. If a deed is in fact intended as a mortgage and only given as security for a debt such an agreement is enforcible and may be established by parol evidence but it must be established by evidence that is clear, satisfactory, and convincing. *Winkelmann v. Luebbe* 543

15. A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage. *Winkelmann v. Luebbe* 543

Descent and Distribution.

Joint bank deposit statute was not only legislatively intended to be for protection of banks, but also fixes the property rights of the payees named in joint and survivorship deposits, as provided therein, and upon the death of one payee, the survivor takes the whole legal title unless a contrary intent affirmatively appears from the terms of the deposit. *Rose v. Kahler* 532

Divorce.

1. Ordinarily there is no right of intervention by third parties in an action for divorce. *Harris v. Harris* 191

2. When it is sought to revise or alter a divorce decree insofar as it concerns the care, custody, and maintenance of children, the proceeding is ancillary in the original action and is not controlled by the statute relating to intervention. *Harris v. Harris* 191

3. In a divorce action where intervention becomes necessary to secure justice or to protect rights, intervention becomes proper. *Harris v. Harris* 191

4. Upon granting a decree of divorce 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. *Harris v. Harris* 191

5. After a decree of divorce has been granted, if the circumstances of the parties shall change or if it shall be to the best interests of their children, the court may on its own motion revise or alter the decree

so far as it concerns the care, custody, and maintenance of the children. *Harris v. Harris* 191

6. A third party may properly by petition intervene after divorce decree to invoke the control which the statute gives to courts over the care, custody, and maintenance of children of divorced persons. *Harris v. Harris* 191

7. The trial court is vested with sound discretion in determining whether a divorce from bed and board or an absolute divorce should be granted, but ordinarily an absolute divorce is to be preferred. *Hudson v. Hudson* 210

8. Where an action for divorce on the ground of extreme cruelty has been abandoned and reconciliation effected on the promise that there would be no repetition, repetition of cruelties revives the right of the complaining party to reassert the cruelties alleged in the first action as grounds for divorce. *Trevett v. Trevett* 517

9. One party to the marriage may condone the cruelty of the other, but one claiming condonation must establish it by clear and satisfactory proof. *Trevett v. Trevett* 517

10. In a divorce action in the matter of division of property it is the duty of the court to take into consideration the estate of the parties, if any, at the time of the marriage and their respective contributions since; the duration of the marriage; the wife's loss of interest in the husband's property by virtue of the divorce; the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the conduct of the parties leading up to the divorce; to which party the divorce was granted; the age and condition of health of the parties; and all other facts and circumstances, and make an award which appears to be fair and equitable. *Marquardt v. Marquardt* 583

11. The amount awarded in a divorce case for support of an infant child of the parties should be based upon existing facts, definite in amount and time of payment, and should not depend upon uncertain or speculative contingencies. *Christoffersen v. Christoffersen* 763

12. In determining provision to be made in a divorce case for support of an infant child of the parties, their status, situation, and all the attendant circumstances should be considered, and an amount fixed

in accordance with the best judgment of the court. *Christoffersen v. Christoffersen* 763

Drains.

1. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty. *Lee v. Chicago, B. & Q. R. R. Co.* 797
2. Upper riparian owner constructing and maintaining artificial structure affecting flow of waters for temporary purpose advantageous to it is not obligated by lapse of time to maintain structure and conditions produced thereby though incidentally benefiting lower owners. *Lee v. Chicago, B. & Q. R. R. Co.* 797

Ejectment.

Ejectment is an action at law triable to a jury, unless the right is waived, notwithstanding any equitable matters presented in the case. *Foltz v. Brakhage* 216

Eminent Domain.

1. The words "in the same manner as appeals are prosecuted in the civil actions" in eminent domain statute apply alike to appeals from the county court to the district court and from the district court to the Supreme Court. *In re Petition of School District of Omaha* 304
2. Eminent domain statute requires the appellant to file an appeal bond within 10 days from the filing of the appraisers' award. *In re Petition of School District of Omaha* 304
3. Eminent domain statute requires the appellant to deliver a transcript of the proceedings to the clerk of the district court within 30 days from the filing of the appraisers' award. *In re Petition of School District of Omaha* 304
4. The filing of the appeal bond and the delivery of the transcript within the times limited are essential to confer jurisdiction of the cause upon the district court. *In re Petition of School District of Omaha* 304

Equity.

1. Where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the cause,

adjudicate all matters in issue, and thus avoid unnecessary litigation. *Security Investment Co. v. Golz* 172

2. In an equity action where decree is rendered in favor of a defendant at the close of the evidence of a plaintiff, every fact in evidence and every reasonable inference deducible therefrom must on appeal be resolved in favor of the plaintiff. *Sampson v. Sissel* 521

3. On appeal to the Supreme Court in a statutory proceeding by the State Fire Marshal to condemn a building, the review is by trial de novo as in equity. *In re Application of Iverson* 802

4. Where the State Fire Marshal by order directs the destruction, repair, or alteration of any building and issues are made as provided by statute, the hearing, determination, and judgment based thereon had in the district court constitute a trial in equity. *In re Application of Iverson* 802

5. Courts of equity may grant specific performance of an oral contract to transfer the title of personal property. *Peters v. Wilks* 861

6. Equity will grant specific performance of a parol agreement to leave property to another, if it is proved by evidence convincing and satisfactory, if it has been wholly performed by one party, and if its nonperformance would be a fraud on him. *Peters v. Wilks* 861

Estates.

1. As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate. *Security Investment Co. v. Golz* 172

2. The life tenant must pay taxes that accrued within the time of the life estate though before he possessed it. *Security Investment Co. v. Golz* 172

3. A mortgagee of a life estate takes it cum onere and must devote the rents to the payment of taxes due from said estate before acquiring the mortgage as well as those imposed subsequent thereto. *Security Investment Co. v. Golz* 172

4. Where the mortgagee of a life estate, prior to acquiring the mortgage thereon, purchased tax sale certificates upon the land held by the life tenant, it being the life tenant's duty to pay the taxes, it likewise becomes the duty of the mortgagee to pay all taxes thereon, which amounts to the redemption of the same. *Security Investment Co. v. Golz* 172

Evidence.

1. The evidence of an ordinance not pleaded and of its violation is admissible under a general averment of negligence where the question is material. *Carter v. Zdan* 185
2. The polygraph has not yet gained such standing and scientific recognition as to justify the admission of expert testimony deduced from tests made with it. *Boeche v. State* 368
3. Admissions of a party against interest made in or out of court with reference to and pertinent to the issues being tried are admissible in evidence against such party. *Thoren v. Myers* 453
4. Audits or statements of account prepared for use at the trial are not ordinarily admissible, but the trial court may, in the exercise of its judicial discretion, admit them when they are merely abstracts, tabulations, or summaries of other evidence capable of calculation, which have been properly admitted. *Rose v. Kahler* 532
5. The general rule is that, while the court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. *Loup County v. Rumbaugh* 563
6. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. *Loup County v. Rumbaugh* 563
7. In laying a foundation for the admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. *Kitts v. State* 679
8. The question of whether or not in the first instance the State has laid a proper and sufficient foundation for the admission of a confession in evidence is one of law for the court. If the court determines as a matter of law that no sufficient foundation has been laid then the confession should be rejected, but where the confession is received in evidence, its voluntary

character is still a question of fact to be determined by the jury. *Kitts v. State* 679

9. Where the trial court properly admits evidence of a confession challenged as involuntary by defendant's evidence, it is prejudicial error to refuse to submit to the jury for its determination, under appropriate instructions, the factual question of whether defendant's alleged confession was voluntary, in which event it should be considered as any other evidence, or whether it was involuntary, in which event it should be wholly rejected and disregarded. *Kitts v. State* 679

10. A presumption is not evidence, but may take the place thereof until evidence is produced to rebut it. When evidence sufficient in quality appears to rebut the presumption, it disappears, and thereafter the determination of the issue depends upon the evidence, with the requirement that the party having the affirmative of the issue involved in order to succeed shall sustain his position by a preponderance of the evidence. *In re Estate of Hunter* 704

11. It is not error to refuse to admit into evidence a deposition in its entirety when the witness giving the testimony incorporated therein is present in court and is extensively cross-examined on the material, competent, and relevant questions and answers contained in the deposition and admits that he testified as the deposition discloses he did, and where other subject matter contained in the deposition is in the record. *Elliott v. Swift & Co.* 787

12. Declarations of a deceased against interest are admissible as evidence of a contract to leave property to another, but such declarations cannot be annulled or explained away by self-serving and hearsay counter declarations. *Peters v. Wilks* 861

Executions.

1. An execution issued by the clerk of a district court upon a transcripted judgment of a justice of the peace or county judge of the same county and delivered to the sheriff and by him returned unsatisfied will prevent the judgment from becoming dormant. *Hilton v. First Trust Co.* 99

2. In an equity suit in aid of execution, in the absence of any showing to the contrary, the plaintiff's burden of showing the exhaustion of his legal remedies is

satisfied by proof of an execution returned unsatisfied. *Hilton v. First Trust Co.* 99

Executors and Administrators.

1. The word "claim" includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment, out of the general fund of the estate. *Rehn v. Bingaman* 196
2. A contingent claim against an estate is one where the liability depends upon some future event or contingency which may or may not ever occur, and which therefore makes it wholly uncertain whether or not there ever will be a liability. Such contingency does not relate simply to the amount which may be recovered but to the uncertainty of whether or not the future event will ever occur to thereby effect a right of action or liability. *Rehn v. Bingaman* 196
3. Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim, since of necessity such a claim must be based upon the theory that the event, the tort giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence. *Rehn v. Bingaman* 196
4. The representative of an estate has capacity to maintain an appeal to the district court, without entering into a bond, from an order of the county court granting the widow of the deceased an allowance for her support and maintenance. *In re Estate of Bednar* 242
5. The right of appeal from an order of a county court made in the exercise of its probate jurisdiction is statutory, and the requirements of the statute must be timely and substantially performed to vest jurisdiction in the appellate court. *In re Estate of Bednar* 242
6. An appeal to the district court from an order of a county court in an estate matter should be dismissed if appellant by inattention took no action to take an appeal within 30 days after the making of the order. *In re Estate of Bednar* 242
7. The provision that an appeal shall be taken within 30 days after the decision complained of requires that some action be taken within that period clearly and unequivocally indicating that appellant will prosecute an appeal from the order in question to the district court. *In re Estate of Bednar* 242

8. The true representative is bound by those acts of an executor de son tort which are lawful and such as the true representative would be bound in any event to perform in the due course of administration. *Rose v. Kahler* 532
9. Although an executor de son tort cannot by his own wrongful act acquire any benefit, yet he is protected in all his acts not for his own benefit which a rightful representative might do. *Rose v. Kahler* 532
10. An executor de son tort is liable to the lawful representative or a creditor, either in an action at law for conversion, or in equity for an accounting, for all the assets of the estate he received, except such as were used in payment of such demands as he affirmatively shows were just claims against the estate, and such payments for the use and benefit of the distributees as would have been made in due course of administration. *Rose v. Kahler* 532

Forcible Entry and Detainer.

In an action of forcible detainer, plea of not guilty puts in issue all facts necessary to entitle plaintiff to a judgment for restitution of the premises. *Myers v. Willmeroth* 712

Fraud.

Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that he was induced by the fraud or misrepresentation. *Sorter v. Citizens Fund Mutual Fire Ins. Co.* 686

Frauds, Statute of.

1. The burden is on the party claiming the estate of a person deceased under an alleged oral contract, to prove such contract, the terms of which must be clear, satisfactory, and unequivocal, and that the acts of such party constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract. *Jenkins v. Jenkins* 113
2. A high degree of proof is required in order to establish a trust by parol evidence. The proof must be clear, convincing, and satisfactory. *Parrott v. Hofmann* 249

3. Oral agreements for the sale of lands are void on their face as within the statute of frauds because not in writing, even though proved by clear and satisfactory evidence, unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation. *Winkelmann v. Luebbe* 543
4. The statute of frauds does not apply to a constructive trust growing out of an undertaking by one person as agent to purchase property for another, where in violation of his agreement he has taken the title in his own name or otherwise for himself, and refuses to convey after tender of the agreed part of the purchase price. *Maddox v. Maddox* 626
5. The basis for the rule that a constructive trust is not within the statute of frauds is that in such a case the principal is not seeking to enforce an oral contract, but to declare and enforce a constructive trust resulting from the violation of confidential and fiduciary duties by the agent. *Maddox v. Maddox* 626
6. An agreement by one person to purchase personal property for another is not ordinarily a contract of sale but a contract of agency, and in such a case the statute of frauds has no application. *Maddox v. Maddox* 626
7. Whether or not an oral contract to leave property to another should be enforced by specific performance after it has been performed by one party depends upon the facts and circumstances of each case. *Peters v. Wilks* 861
8. Performance of an oral contract to transfer specific property in consideration of personal care of the owner during the remainder of his life may be decreed by the court when the existence and performance of it is established by clear and satisfactory evidence. *Peters v. Wilks* 861

Gas.

1. A gas company which does not install, own, or control the pipes or appliances in a customer's building is in no way responsible for the condition in which they are maintained, and consequently is not liable for injuries or damage caused by a leak therein of which it has no knowledge. *Clay v. Butane Gas Corporation* 876

2. The rule as to the legal duty of a gas company in reference to the escape of gas from service pipes owned and controlled by others on private property, which pipes have been properly installed and tested, does not extend to thereafter making inspection, unless the gas company has knowledge of a probable defective condition in such pipes, or his knowledge of circumstances rendering it probable that gas is escaping therefrom. *Clay v. Butane Gas Corporation* 876
3. A higher degree of care and vigilance is required in dealing with a manufactured liquefied gas than in the ordinary affairs of life and business. One who handles such a dangerous agency must use a degree of care to prevent damage from the escaping of gas which is commensurate with the danger which it is its duty to avoid, and where damage occurs by the escape of such gas, the question as to whether or not the company engaged in dealing with and handling the same has used that degree of care and caution to prevent its escape may be a question of fact for the jury. *Clay v. Butane Gas Corporation* 876

Guardian and Ward.

1. Where the grounds for removal of a guardian are enumerated by statute, removal cannot ordinarily be had on other grounds. *In re Guardianship of Carstens* 425
2. By virtue of statute the county court has power to remove a guardian upon notice if he is insane or otherwise incapable of discharging his trust, or is evidently unsuitable therefor. *In re Guardianship of Carstens* 425
3. The word "unsuitable" in the statute has a broad general meaning and applies to every case where the guardian is for any reason shown to be incapable of or not in a situation to properly and suitably protect his ward's rights and interests. *In re Guardianship of Carstens* 425
4. Corruption or malfeasance is not necessary to authorize the removal of a guardian, but competent evidence of a failure or inability to properly protect the ward's rights or interests is sufficient proof of unsuitability. *In re Guardianship of Carstens* 425
5. A guardian may not be removed arbitrarily or at the mere caprice of the court or the complaining party. Since a guardian is an officer of the court and as such charged with duties fiduciary in charac-

ter under its supervision, the trial court is allowed a broad judicial discretion in the matter of removal or refusal to remove a guardian, and the Supreme Court will not interfere with the exercise of such discretion unless it clearly appears that it has been abused. *In re Guardianship of Carstens* 425

Habeas Corpus.

1. If the facts well pleaded in a petition for a writ of habeas corpus are insufficient to entitle the petitioner to the relief sought, it is the duty of the court to refuse to issue a writ. *Swanson v. Jones* 767
2. The sufficiency of a petition to support a writ of habeas corpus may be determined by the court before a writ is issued, and if it is not sufficient to warrant a discharge of the person alleged to be illegally restrained of his liberty, a writ may be denied. *Swanson v. Jones* 767
3. The remedy of habeas corpus is not demandable of course, but legal cause must be shown to entitle a petitioner to the benefit of it. *Swanson v. Jones* 767
4. Habeas corpus is a collateral, not a direct, proceeding, when regarded as a method of attack of a judgment imposing a sentence for a crime, and facts, as distinguished from legal conclusions, are required to be alleged to negative the legal force and effect of the judicial record. *Swanson v. Jones* 767
5. To obtain a release from a sentence and commitment for a crime by habeas corpus, the sentence must be void. *Swanson v. Jones* 767
6. Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court. *Swanson v. Jones* 767
7. The remedy of habeas corpus is not available in the absence of a statute authorizing it for the purpose of inquiring into the legality of a particular form, manner, or place of confinement executively or administratively imposed upon a prisoner lawfully in custody in an authorized place under a valid sentence and commitment. *Swanson v. Jones* 767

Highways.

1. 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. *Gorman v. Dalgas* 1

2. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accord with such assumption. *Plumb v. Burnham* 129
3. Petitioners who have signed a petition for vacation of a public highway have the right to withdraw their names from the petition before the same is presented to the county board. *Koch v. County of Dakota* 506
4. The statutory provision that a petition for the establishment or vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional. *Koch v. County of Dakota* 506
5. The facts essential to the jurisdiction of a county board to establish or vacate a road must affirmatively appear on the record of the proceedings. *Koch v. County of Dakota* 506

Homicide.

1. The fact that a person is fatally injured by a cause not established, and the defendant was the one last known to have been with such person before the injuries were sustained, does not permit an inference that the injuries were feloniously inflicted. In such a situation, the presumption is that the injuries were not of criminal origin. *Reyes v. State* 636
2. The crime of homicide is not established until it is proved that a human being is dead, and that the death occurred as the result of the criminal agency of another. The State must prove that the death was the result of a criminal act, and until it does so, the presumption is the cause of death was not criminal. *Reyes v. State* 636

Husband and Wife.

Generally, where a party acting as agent or trustee, is barred from purchasing property because of a confidential or fiduciary relationship, the husband or wife of such party is equally barred and no advantage can be gained by purchasing the property and taking the

title thereto in the name of such husband or wife. *Maddox v. Maddox* 626

Indictments and Informations.

An information which apprises the defendant, with reasonable certainty, of the accusation against him so that he may prepare a defense and plead the judgment as a bar to subsequent prosecution for the same offense, meets fundamental purposes of information, as well as constitutional requirements. *Pauli v. State* 385

Infants.

1. The age when an infant during his minority may be capable of understanding and avoiding dangers encountered while traveling upon a public street in a city cannot be fixed by arbitrary rule, and generally is a question of fact for the jury. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431
2. Whether or not an infant between 11 and 12 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431
3. The act of an infant between 11 and 12 years of age riding on a bicycle, in making a left-hand turn, without a warning signal, at about the middle of a block, in an attempt to reach an opening of an alley on the opposite side of the street from that he was using before the turn, and not at a regular crossing of the street, was not of itself negligence. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431

Injunction.

1. Equity will afford relief by injunction against a continuing injury to land caused by an unlawful diversion of the waters of a natural watercourse. *Andersen v. Town of Maple* 103
2. For injury arising from unlawful diversion of flowing water, injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act. *Jack v. Teegarden* 309
3. Injunction is the proper remedy to prevent unlawful diversion of waters. Equity looks to the nature of the injury inflicted, together with the fact of its

constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Skolil v. Kokes* 392

4. Injunction is a proper remedy to prevent injury or destruction of a hedge by a stranger to the inheritance. *Jurgens v. Wiese* 549

5. Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances per se, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property. *City of Omaha v. Glissmann* 895

Insurance.

1. By statute no representation or warranty made in the negotiation for a contract of insurance by the insured is material or can void the policy unless the representation or warranty deceived the company to its injury. *Sorter v. Citizens Fund Mutual Fire Ins. Co.* 686

2. If an applicant in negotiations for a contract of insurance makes false representations to the company upon a subject within the knowledge of the applicant relating to a matter material to the risk and the company relies and acts thereon, they will void the policy if the company takes timely advantage thereof. *Sorter v. Citizens Fund Mutual Fire Ins. Co.* 686

Interest.

1. If the right to damages is a matter of reasonable litigation and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount. *Smith v. Platte Valley Public Power and Irrigation District* 49
McKain v. Platte Valley Public Power and Irrigation District 497

2. Where from the verdict and pleadings it appears that if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and include such interest in the judgment. *Heusser v. McAtee* 828

Judges.

1. The qualifications of a de facto county judge to act may not be collaterally attacked. His acts, unless directly attacked, are valid and binding upon the parties. *Tucker v. Heirs of Myers* 359
2. A county judge is prohibited by the Constitution from practicing law in any court in any matter arising in or growing out of any proceeding in his own court. *Tucker v. Heirs of Myers* 359

Judgments.

1. Statute vests the district court with power to vacate or modify its own judgments after the term at which such judgments were made, and where fraud is practiced by the successful party in obtaining the judgment. *Miller v. Schlereth* 33
2. Proceedings to vacate a judgment after the term at which the judgment was entered must be commenced within two years of the date of rendition of such judgment. *Miller v. Schlereth* 33
3. To vacate or set aside a judgment the party seeking to do so must file a petition in the district court verified by affidavit, setting forth the judgment sought to be set aside, and alleging the grounds upon which the same should be vacated or set aside, and summons shall be issued thereon and served as in the commencement of an action. *Miller v. Schlereth* 33
4. When the district court is authorized to try a workmen's compensation case de novo as in equity, statutory provisions for vacation or modification of judgment at subsequent term are applicable. *Miller v. Schlereth* 33
5. When a judgment is vacated and set aside, it is nullified, so that the resulting situation is precisely the same as if the judgment had never existed. *Miller v. Schlereth* 33
6. The effect of setting aside or vacating a judgment, generally speaking, is to leave the matter in controversy open for future determination, and that determination must afford the parties in interest the right of a fair trial. *Miller v. Schereth* 33
7. In proceedings to vacate or modify judgment at subsequent term, the court may first try and decide upon the grounds to vacate a judgment, before trying or deciding upon the validity of the cause of action. However, this does not authorize or em-

power the court to determine the merits of the controversy. *Miller v. Schlereth* 33

8. When a judgment has been rendered by the county court and a transcript thereof filed in the district court of the same county, the district court may then properly transcript such judgment to any other district court. *Hilton v. First Trust Co.* 99

9. A finding is not conclusive on the parties in a subsequent suit unless a judgment is entered thereon, or it is incorporated into or covered by a judgment. *Gouger v. County of Sarpy* 207

10. Ordinarily, where a judgment has been entered by default and a prompt application made at the same term to set it aside with tender of an answer disclosing a meritorious defense, the court should, on reasonable terms, sustain the motion and permit the cause to be heard upon the merits. *Benson v. General Implement Corporation* 234

11. Where a default has been regularly entered, it is largely within the discretion of the trial court to say whether or not the defendant shall be permitted to come in afterwards and make his defense, and unless an abuse of discretion is made to appear, the Supreme Court will not interfere. *Benson v. General Implement Corporation* 234

12. The exercise of the power to set aside a default and judgment, being a matter of judicial discretion by the trial court, is governed by the facts of each particular case as disclosed in the showing therefor. *Benson v. General Implement Corporation* 234

13. A judgment rendered without jurisdiction of the subject matter may not be used as the basis for the application of the doctrine of res adjudicata. *Koch v. County of Dakota* 506

14. It is a general rule with respect to domestic judgments that they cannot be collaterally impeached by the parties for collusion or fraud not going to the jurisdiction, and that consent judgments are as conclusive on collateral attack as judgments rendered after a trial. *Loup County v. Rumbaugh* 563

15. If the judgment was collusive or by the consent of an officer to a matter with respect to which he had no authority to bind the public, and it was not a decision by the court after a hearing on the merits, it does not afford a basis for a plea of res adjudicata as against the public interest involved. *Loup County v. Rumbaugh* 563

16. If a suit is devised for the purpose of having a certain judgment entered, it will not be binding upon the public or those who are not parties to the scheme adopted for that purpose. *Loup County v. Rumbaugh* 563

Juries.

1. The effect of a stipulation of the parties for a transfer of an action at law to the equity docket of the court is a waiver of a trial thereof by jury. *Foltz v. Brakhage* 216
2. Matters inhering in the verdict of a jury cannot afterward be attacked by the affidavits or testimony of the jurors. Evidence of jurors on such matters should be excluded by the trial court. *Scherz v. Platte Valley Public Power and Irrigation District* 415
3. A juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts within his personal knowledge and not given in evidence. If such facts relate to a matter in dispute and influence the jury in arriving at a verdict, it constitutes prejudicial error. *Scherz v. Platte Valley Public Power and Irrigation District* 415
4. Improper statement of facts by juror may properly be established by the affidavits or testimony of jurors for the reason that such misconduct on the part of a juror does not inhere in the verdict. *Scherz v. Platte Valley Public Power and Irrigation District* 415
5. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict, decide the weight to be given the testimony of the various witnesses. *Heusser v. McAtee* 828

Landlord and Tenant.

1. An option contained in a lease is not one of the terms of the original tenancy which will be incorporated into the tenancy created by a tenant holding over after the expiration of the lease unless, by apt language therein, it is so provided. *Wright v. Barclay* 94
2. When the relation of landlord and tenant has been created, the possession of the tenant is consistent with the title of the landlord. *Koch v. County of Dakota* 506
3. The mere nondemand and nonpayment of rent are

not sufficient to bar the landlord's title. *Koch v. County of Dakota* 506

4. The tenant is precluded from relying on his possession to bar his landlord, as are also all persons who come in under or derive possession from the tenant in any manner. *Koch v. County of Dakota* 506

5. Where the relationship of landlord and tenant exists, possession is presumed to be in accordance with the title. This presumption holds until some unequivocal act of exclusion shall have occurred. *Koch v. County of Dakota* 506

Larceny.

Where an instruction requires the jury to find beyond a reasonable doubt that a defendant did unlawfully and feloniously steal, take, and carry away certain property of another, and that such taking was with the intent to permanently deprive the owner of said property, it requires the jury to find that the property was taken with a felonious intent. *Clark v. State* 348

Licenses.

1. The appeal of a holder of a real estate broker's license from an order of the State Real Estate Commission requires the institution of an action in the district court within ten days and a determination thereof upon the issues raised by the pleadings in that court. *Feight v. State Real Estate Commission* 867

2. In a trial in the district court with respect to revocation of a real estate broker's license, the court has authority to inquire into the subject matter of the complaints set out in the pleadings, including, if alleged, that the findings of fact made by the State Real Estate Commission were contrary to the weight of the evidence. *Feight v. State Real Estate Commission* 867

3. Trial in district court of an appeal from an order of revocation of a real estate broker's license is equitable in nature and will be tried as any other civil action where the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made. *Feight v. State Real Estate Commission* 867

4. Where a finding adverse to a license holder has been made which reflects upon the character and standing of the licensee, the claim on appeal that

the adverse finding and order were wrongfully entered raises a justiciable issue, even if the license has expired or the disciplinary order satisfied. *Feight v. State Real Estate Commission* 867

Limitations of Actions.

The statute of limitations does not run in favor of an occupant of real estate unless his occupancy and possession are adverse to the true owner and he has manifested an intent and purpose to claim title for himself against the true owner. *Foltz v. Brakhage* 216

Mandamus.

1. Findings of fact in a mandamus proceeding, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong. *State ex rel. Heil v. Jakubowski* 471
2. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. *State ex rel. Heil v. Jakubowski* 471
3. Mandamus, while classed as a law action, is an extraordinary remedy, which is not awarded as a matter of right, but rests in the sound discretion of the court governed by equitable principles, and will not issue when to do so would compel the doing of a substantial wrong. *State ex rel. Heil v. Jakubowski* 471
4. While the writ of mandamus may be issued to require an inferior tribunal or board to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control its judicial discretion. *State ex rel. Heil v. Jakubowski* 471
5. Mandamus may issue against a public officer to compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear. *State ex rel. Heil v. Jakubowski* 471

Marriage.

1. Marriage is a civil contract which, if procured by fraud, may, under certain conditions, be set aside. *Hudson v. Hudson* 210
2. A marriage contract will not be declared void for mental incapacity unless there existed at the time of the marriage such a want of understanding as to render the party incapable of assenting thereto. *Fischer v. Adams* 512

3. Mere weakness or imbecility of mind, eccentricity, or partial dementia, are not sufficient to void a contract of marriage unless there be such a mental defect as to prevent the party from comprehending the nature of the contract and from giving to it his free and intelligent consent. *Fischer v. Adams* 512

Master and Servant.

1. Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in other objectives, not incident to his employment, the relation of employee and employer does not exist until he returns to a place where, by the terms of his employment, he is required to perform services. *Solheim v. Hastings Housing Co.* 264
2. The mission of the master must be the major factor in the journey or movement, and not merely incidental thereto, that is to say, if incidental to the main purpose of going to or from the place of employment it would not bring such person under the protection of the Workmen's Compensation Act. *Solheim v. Hastings Housing Co.* 264
3. A master is not liable for damages for conversion of property by or criminal acts of the servant not within the scope of his employment, and not expressly or impliedly authorized by the master, unless such acts are subsequently ratified by him. *Huesser v. McAtee* 828

Monopolies.

1. In determining the validity of a contract in restraint of trade, the test is whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so much as to interfere with the interest of the public. *Stanford Motor Co. v. Westman* 850
2. Partial restraints upon the exercise of any business are not considered unreasonable when they are ancillary to any valid contract made in good faith and are apparently necessary to reasonably protect the parties. *Stanford Motor Co. v. Westman* 850

Mortgages.

1. Evidence in support of an allegation that an absolute deed was intended as a mortgage must be

clear, convincing, and satisfactory. *Holman v. Peter Kiewit Sons' Inc.* 71

2. A mortgagee of a life estate takes it cum onere and must devote the rents to the payment of taxes due from said estate before acquiring the mortgage as well as those imposed subsequent thereto. *Security Investment Co. v. Golz* 172

3. Where the mortgagee of a life estate prior to acquiring the mortgage thereon purchased tax sale certificates upon the land held by the life tenant, it being the life tenant's duty to pay the taxes it likewise becomes the duty of the mortgagee to pay all taxes thereon, which amounts to the redemption of the same. *Security Investment Co. v. Golz* 172

4. One who is under an obligation to pay the taxes on land, such as a mortgagee in possession thereof, cannot strengthen his title thereto by buying in the tax title when the property is sold as a consequence of his omission to make such payment. In such a case the sale will merely operate as a payment of the taxes and the title will be the same as it was before the sale, except that the lien for taxes is discharged. *Security Investment Co. v. Golz* 172

5. A mortgagee who takes possession of a life tenant's estate and pays the taxes thereon from the rents and profits, and prior to taking such mortgage purchased tax sale certificates on the land, holds the same in abeyance until the mortgage obligation has been paid in full, and then presses his action to foreclose the same, is not in equity and good conscience entitled to a decree of foreclosure as against the remainderman or the life tenant's grantee. *Security Investment Co. v. Golz* 172

6. If a deed is in fact intended as a mortgage and only given as security for a debt, such an agreement is enforcible and may be established by parol evidence, but it must be established by evidence that is clear, satisfactory, and convincing. *Winkelmann v. Luebbe* 543

7. A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage. *Winkelmann v. Luebbe* 543

Motor Carriers.

1. The Nebraska State Railway Commission has authority to approve and authorize, upon such terms and conditions as it finds to be just and reasonable, the consolidation, merger, purchase, lease, contract to operate, or acquisition of control by the purchase of stock, of the properties of motor carriers for the purpose of ownership, management, or operation thereof. However, the Nebraska State Railway Commission has such authority only when the situations set forth in the statute are present and when the conditions therein specified are found to exist. These conditions are that the transaction proposed will be consistent with the public interest and does not unduly restrict competition. *In re Application of Neylon* 587
2. In conformity with constitutional provision, the Legislature has the right to prescribe how the Nebraska State Railway Commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate. *In re Application of Neylon* 587
3. When a certificate of public convenience and necessity has already been issued and an application is made to transfer the operating rights thereunder to another, such application requires a hearing thereon after notice has been had upon all interested parties. *In re Application of Neylon* 587

Municipal Corporations.

1. A municipality has no authority to enact or enforce any rule or regulation contrary to statutory provisions regulating the use of highways prescribed by the Legislature. *Gorman v. Dalgas* 1
2. Under the police power a city may promulgate police regulations affecting and amounting to restrictions upon the use of property within certain areas of a city without such restrictions affecting all other areas if such regulations are reasonably in the interest of the public welfare. *Panebianco v. City of Omaha* 463
3. In the absence of anything appearing to the contrary a presumption obtains that such restrictions are reasonably in the interest of the public welfare. *Panebianco v. City of Omaha* 463
4. In order to maintain an action which is brought

to remove agricultural lands from within the corporate limits of a municipality, on the basis that justice and equity require that it be disconnected therefrom, it is only necessary for the plaintiffs to allege and prove that they are the owners and in possession of the several tracts of land, and such other facts as would show that it is inequitable to retain the territory within the corporate limits of the city. *Kuebler v. City of Kearney* 698

5. When an action is brought to remove agricultural lands from within the corporate limits of a municipality, on the basis that justice and equity require that it be disconnected therefrom, it is sufficient to show that the lands sought to be removed have no unity or community of interest with such municipality and receive few, if any, benefits by reason thereof. *Kuebler v. City of Kearney* 698

6. When an action is brought to remove agricultural lands from within the corporate limits of a municipality, on the basis that justice and equity require that it be disconnected therefrom and appeal is taken from a final decree rendered therein, the same is reviewable de novo in the Supreme Court. *Kuebler v. City of Kearney* 698

7. Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances per se, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property. *City of Omaha v. Glissmann* 895

8. A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance. *City of Omaha v. Glissmann* 895

9. The purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto, as such property is always held subject to the city's lawful exercise of the police power. *City of Omaha v. Glissmann* 895

10. A new ordinance operates retroactively to require a denial of an application or to nullify a permit already issued, provided that the holder of the latter has not already engaged in construction or incurred

obligations directly in relation thereto, when such application or permit seeks or grants a use no longer permitted under the new ordinance. *City of Omaha v. Glissmann* 895

11. If, after a purchase or leasing thereof, a permit is obtained to use lands for a use then permissible under the zoning ordinances and either substantial construction is made thereon or substantial liabilities are incurred relating directly thereto, or both, before the permit is canceled or revoked, then the right to such use has become established and vests as a permissive nonconforming use which cannot be affected by a subsequent change. *City of Omaha v. Glissmann* 895

12. The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals, and the general welfare. Any such act of the city must however not be unreasonable, discriminatory, and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance. *City of Omaha v. Glissmann* 895

13. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory. *City of Omaha v. Glissman* 895

14. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation. *City of Omaha v. Glissmann* 895

15. In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. *City of Omaha v. Glissmann* 895

16. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. *City of Omaha v. Glissmann* 895

Negligence.

1. If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except insofar as the same may appear in the evidence adduced for the plaintiff. *Plumb v. Burnham* 129
   Elliott v. Swift & Co. 787
2. As a general rule, it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by the lights of his automobile, but there are well-established exceptions thereto, dependent upon the nature or condition of the object in relation to conditions on or adjacent to the highway, adversely affecting immediate visibility of the object. *Plumb v. Burnham* 129
3. The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, and where the evidence is such that reasonable minds may draw different conclusions therefrom, the questions of negligence and contributory negligence are for the jury. *Plumb v. Burnham* 129
4. The mere stalling of a motor vehicle temporarily upon the highway, caused by an exhaustion of the gas supply, would not ipso facto constitute negligence as a matter of law, but a failure to use ordinary care in removing the stalled vehicle from the highway within a reasonable time when it was possible to do so, would be negligence. *Plumb v. Burnham* 129
5. In order to recover under the doctrine of last clear chance there must be sufficient evidence to sustain findings that: (1) The party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care; (2) the party against whom it is asserted knew or ought to have known of the other's peril; (3) the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others; (4) the failure to avoid the accident was due to a want of ordinary

care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident; and (5) the negligence of the party imperiled is neither active nor a contributing factor to the accident. *Carter v. Zdan* 185

6. The evidence of an ordinance not pleaded and of its violation is admissible under a general averment of negligence where the question is material. *Carter v. Zdan* 185

7. A party's right of action for negligence against a third person with whom he has no contractual relation as employer and employee, is not a right given by statute, but a common-law right previously existent and preserved thereby. *Rehn v. Bingaman* 196

8. Under the comparative negligence statute the words "slight" and "gross" as therein used are comparative terms. The intent of the statute is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence. *Roby v. Auker* 421

9. Whether or not an infant between 11 and 12 years of age has sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact and not of law. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431

10. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossings at intersections. The driver of a motor vehicle owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances, and a larger degree of care towards a child of tender years while making such a crossing of a street. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431

11. The act of an infant between 11 and 12 years of age riding on a bicycle in making a left-hand turn, without a warning signal, at about the middle of a block, in an attempt to reach an opening of an alley on the opposite side of the street from that he was using before the turn, and not at a regular crossing of the street, was not of itself negligence. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431

12. It is negligence for a motorist to drive a motor vehicle on a public highway, at any time, at a speed

or in such a manner that it cannot be stopped or its course changed in time to avoid a collision with an obstruction discernible within his range of vision ahead. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431
Thurow v. Schaeffer 651
13. The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431
14. When a motor vehicle operated on a public highway collides with a person causing injury, liability arises when the peril of the injured person is discovered by the operator of the vehicle or by the exercise of ordinary care and caution could have been discovered in time to have avoided injury, if at the time of the collision no negligence of the injured person was active or a contributing factor to the accident. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431
15. The owner of an automobile which is kept for family purposes is liable for injuries inflicted upon a stranger resulting from the negligence of one member of the family who was using it for his individual pleasure or purpose with the owner's consent. *Thoren v. Myers* 453
16. The defendant, in a personal injury action, may show under a general denial that the injury was caused by the negligence of a third person for whose negligence he is not responsible. *Thoren v. Myers* 453
17. In negligence cases the trial court should sustain a motion for directed verdict, or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Umberger v. Sankey* 488
18. When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone would not have caused the result. *Umberger v. Sankey* 488
19. In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting

damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue. *Umberger v. Sankey* 488

20. The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given state of facts and set of circumstances. *Thurow v. Schaeffer* 651

21. Negligence is to be tested by submission of the facts, if they are not admitted or if not more than one inference or conclusion may be drawn from the evidence, to a jury to determine whether or not the person charged with negligence failed to exercise the care and prudence required of a reasonably careful and prudent person under the given circumstances. *Thurow v. Schaeffer* 651

22. Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury. *Thurow v. Schaeffer* 651

23. Under the rule requiring a motorist to stop within the range of his vision, the question of negligence is determinable as a matter of law only in cases where the facts are not in dispute or where they are so conclusive in character that reasonable minds may not differ in relation thereto. *Thurow v. Schaeffer* 651

24. The general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision ahead, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care and prudence required of a reasonably careful and prudent person under the circumstances of the particular situation. *Thurow v. Schaeffer* 651

25. 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. *Trumbley v. Moore* 780

26. Where a pedestrian crossing a street between intersections in violation of a city ordinance looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he can avoid injury to himself, it usually presents a case for a jury. *Trumbley v. Moore* 780

27. Unless some reasonable excuse is shown which is consistent with the facts established, one who is obligated to keep a lookout for vehicles or persons favored over him is required to see that which is in plain sight. Where he fails to do so, his negligence is sufficient to defeat a recovery. *Trumbley v. Moore* 780

28. A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a situation involves questions of comparative negligence and not those of the last clear chance doctrine. *Trumbley v. Moore* 780

29. A person with impaired vision is required to use greater care for his own safety than one not so afflicted in order to attain the standard of care which the law requires. *Trumbley v. Moore* 780

30. In negligence cases, the burden of proof is upon plaintiff to show by a preponderance of the evidence that an accident was proximately caused by some negligent act charged, directly attributable to defendant. To support a verdict, negligence must be so established, either by direct proof or by physical facts or circumstances, of sufficient weight from which a reasonable inference of the same may arise. *Elliott v. Swift & Co.* 787

31. 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 a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negli-

gence in proceeding to cross the intersection is a jury question. *Elliott v. Swift & Co.* 787

32. A higher degree of care and vigilance is required in dealing with a manufactured liquefied gas than in the ordinary affairs of life and business. One who handles such a dangerous agency must use a degree of care to prevent damage from the escaping of gas which is commensurate with the danger which it is its duty to avoid, and where damage occurs by the escape of such gas, the question as to whether or not the company engaged in dealing with and handling the same has used that degree of care and caution to prevent its escape may be a question of fact for the jury. *Clay v. Butane Gas Corporation* 876

33. A company engaged in transportation and delivery of a dangerous fuel commodity must have employees efficient in their line, and it is bound to anticipate injuries or danger resulting from use of such commodity. *Clay v. Butane Gas Corporation* 876

34. While liability of a distributor of gas does not attach, in the absence of a reasonable basis for anticipating danger, that fact does not relieve the distributor from such diligent and adequate inspection of its transportation and service facilities where a reasonable basis to anticipate danger actually exists. *Clay v. Butane Gas Corporation* 876

35. Where a gas company is cognizant of facts which should indicate to it the possibility of accident, it may be held liable even though the precise manner in which the harm resulted could not have been foreseen. *Clay v. Butane Gas Corporation* 876

36. While a distributor of gas is not an insurer of the safety of the consumer's premises or the personal property therein, and the law does not impose upon it the arduous duty of inspection in every case, yet when its agent has good cause to believe that an inspection should be made, it may be negligence not to inspect, and if so, it is liable for damages proximately caused by such negligence. *Clay v. Butane Gas Corporation* 876

37. A gas company is chargeable with notice of defects in gas pipes supplying a building, where that degree of care and caution exercised by ordinarily careful and prudent men would have disclosed such defects. *Clay v. Butane Gas Corporation* 876

New Trial.

1. A trial court may not grant a new trial for arbitrary, vague, or fanciful reasons. *Scherz v. Platte Valley Public Power and Irrigation District* 415
2. When the evidence adduced in support of a motion for a new trial is sufficient to sustain the finding of the court thereon, it cannot be said that the trial court abused its discretion in granting a new trial. *Scherz v. Platte Valley Public Power and Irrigation District* 415
3. In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show (1) that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, (2) that it was not merely cumulative, but competent, relevant, and material with relation to a material issue, and (3) that it was of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted. *In re Guardianship of Carstens* 425
4. While a motion for a new trial is unnecessary in a workmen's compensation case, if such a motion is filed in the district court under the general provisions of the Code of Civil Procedure, the time for perfecting an appeal from the district court to the Supreme Court does not commence to run until the overruling or sustaining of such motion. *Meester v. Schultz*.... 614
5. Where a new trial of all the issues is granted, the first trial is wholly set aside and the case stands as if there had been no trial. *Meester v. Schultz* 614
6. Where a motion for a new trial is granted and the losing party does not appeal therefrom but voluntarily participates in a second trial, and does not preserve the record of the first trial in the second trial but appeals from the judgment in the second trial only, there can be no review of the proceedings in the first trial or of the order granting it. *Meester v. Schultz* 614
7. The Supreme Court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been offered in evidence and appropriately included in and presented by a bill of exceptions. *Thurow v. Schaeffer* 651

8. If the verdict was not sustained by the evidence or was contrary to law, or if the court was convinced it erred in submitting the case to the jury, the remedy, prior to 1947, was a new trial, and not a judgment of dismissal of the case. *Krepcik v. Interstate Transit Lines* 663
9. A ruling of the court on a motion for an instructed verdict could not, prior to 1947, be reviewed by the Supreme Court unless it had been assigned as error in a motion for a new trial by the party aggrieved thereby. *Krepcik v. Interstate Transit Lines* 663
10. If a motion for an instructed verdict was granted, in the absence of a motion for a new trial, the review in the Supreme Court was, prior to 1947, limited to a determination that the pleadings did or did not support the judgment. *Krepcik v. Interstate Transit Lines* 663
11. The primary purpose of a motion for a new trial is to enable the court to correct errors occurring at the trial of a cause. *Krepcik v. Interstate Transit Lines* 663
12. A motion for a new trial is not necessary to a review in the Supreme Court on appeal of any order made by authority of the act of 1947. *Krepcik v. Interstate Transit Lines* 663

Officers.

1. The purpose of statute prohibiting county attorney from accepting retainer in civil matters growing out of a criminal prosecution is to protect the public by making certain that the duties of county attorneys are not influenced by private interest. *Thompson v. Thompson* 110
2. A public officer is not liable to an action if he acts unwisely in a matter wherein it is his duty to exercise judgment and discretion, even though a private person may be damaged thereby. This rule is particularly applicable to officers in control of highways, for the reason that their operations touch the property of so many persons that, if not exempt, they might be constantly harassed. *Harmer v. Petersen* 412
3. County commissioners, being officers of the county and acting under its authority, stand in the shoes of the county and are not liable for negligence in the performance of their duties. *Harmer v. Petersen* 412
4. Mandamus may issue against a public officer to

compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear. *State ex rel. Heil v. Jakubowski* 471

5. The term of an official statutory bond is not ordinarily measured by annual premium charges but by the fixed term of the public office for which the bond was given, or the term as specifically provided in the bond itself. *School District of Omaha v. Adams* 741
6. In the absence of express statutory authority no public official or governing body has authority to cancel, substitute, change, or modify an existing official statutory bond, or to release and discharge the surety thereon prior to termination of the trust of the office of the term for which it was given. *School District of Omaha v. Adams* 741
7. A statute simply granting an official or governing body prospective authority to exercise a limited discretion and thereby fix the amount of the penalty and approve an official statutory bond does not by implication authorize such official or body to modify or cancel a bond theretofore validly executed, or to reduce the penalty and pro rata release and discharge the surety prior to its termination. *School District of Omaha v. Adams* 741
8. The incorporation of a statutory provision prospectively authorizing an official or governing body to enlarge the penalty of an existing bond or to require an additional bond cumulative in character, which statute omits any reference to authority to make a reduction of the penalty after it had been theretofore fixed as required by statute, does not give any implied authority to do so. *School District of Omaha v. Adams* 741

Parent and Child.

1. The legal obligation of a child to support his parents under the pauper statute is limited to the conditions therein prescribed and cannot be enforced in an action against a third person. *Dorsey v. Yost* 66
2. A child born in wedlock is presumed to be the legitimate offspring of the husband and wife, and this is so even though the birth of the child happens so soon after the marriage as to render it certain that it was the result of coition prior thereto. *Hudson v. Hudson* 210
3. The presumption of legitimacy may be rebutted by

competent proof that the husband had no access to the wife, that he was absent at such time as in the course of nature the child was begotten, that he was impotent, or other circumstances showing that he could not have been the father of the child. *Hudson v. Hudson* 210

4. A wife is not permitted to testify to facts which would bastardize her child and her declarations cannot be used in evidence to prove the same fact. *Hudson v. Hudson* 210

5. When a husband admits he has had intimate relations with his wife before their marriage and within the probable period of gestation of a child which was conceived before but born after the marriage and he is informed of the pregnancy prior thereto, he cannot deny its paternity but must submit to the marriage and the presumed paternity of the child. *Hudson v. Hudson* 210

6. The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties imposed by the relation or that they have forfeited that right. *Boucher v. Dittmer* 580

Parties.

1. Ordinarily there is no right of intervention by third parties in an action for divorce. *Harris v. Harris* 191

2. In a divorce action where intervention becomes necessary to secure justice or to protect rights intervention becomes proper. *Harris v. Harris* 191

3. A third party may properly by petition intervene after divorce decree to invoke the control which the statute gives to courts over the care, custody, and maintenance of children of divorced persons. *Harris v. Harris* 191

Pensions.

Where a claim to a fireman's pension is grounded on the total disability of the claimant resulting from an accident, a release of the claim of disability for a valid consideration arising under the Workmen's Compensation Act or any other law, and all other claims and causes of action, is a bar to a claim for a fireman's pension. *Schmidt v. City of Lincoln* 317

Pleading.

1. A party who stands on a general demurrer to a pleading thereby admits the material facts averred, and must take all the consequences which result from such admission. *Panebianco v. City of Omaha* 463
2. The presumption of reasonableness of a restriction in the interest of the public welfare does not obtain in the face of a factual declaration to the contrary and an admission of the declaration by demurrer. *Panebianco v. City of Omaha* 463
3. In the absence of an issue of negligence by plaintiff or by a third person imputable to plaintiff, allegations in an answer denying that defendant was negligent and alleging that the accident and resulting damages were solely and proximately caused by the negligence of such third person is not an affirmative plea in avoidance of plaintiff's cause of action and imposes no burden of proof upon defendant with relation thereto, but rather is one entirely consistent with and provable under the general issue. *Umberger v. Sankey* 488
4. There is no variance between an allegation of a petition in an action for damages resulting from seepage of land, that the use of power and irrigation works caused water to seep therefrom and damage the land, and an allegation in the reply that the damage to the land was caused by it becoming saturated with water pushed in and under the topsoil by leakage of water from the works. *McKain v. Platte Valley Public Power and Irrigation District* 497
5. Where defendant pleads an affirmative defense not consistent with and provable under the general issue, or pleads facts in confession and avoidance of plaintiff's cause of action, the burden of proof is upon him to establish the same by a preponderance of the evidence. *Heusser v. McAtee* 828
6. Where defendant by answer pleads a set-off or counterclaim, or seeks affirmative relief by cross-petition traversed by plaintiff, the burden is upon him to prove the allegations set forth therein by a preponderance of the evidence. *Heusser v. McAtee* 828
7. If a defendant relies upon the nonperformance of a contract by plaintiff, he must allege that fact in his answer, and in pleading nonperformance, the facts which constitute the breach must be alleged. *Peters v. Wilks* 861

Principal and Agent.

1. Agency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and guidance by the settlor or cestui only to a limited extent and when expressly provided for. *O'Connor v. Burns, Potter & Co.* 9
2. The use of the words "for safekeeping" and "investment" in an agreement is not controlling in determining whether the party charged is a trustee or an agent. They will be considered together with all the other facts and circumstances in determining that question. *O'Connor v. Burns, Potter & Co.* 9
3. Where a party to an agreement is designated as "manager" of funds and securities, he will be considered an agent unless other evidence and circumstances are sufficient to show that a different relationship was intended. *O'Connor v. Burns, Potter & Co.* 9
4. The fact that an agreement is subject to cancellation on thirty-days notice by either party does not establish that the party charged was either a trustee or an agent. It is a circumstance which may be considered with all the other evidence in determining that fact. *O'Connor v. Burns, Potter & Co.* 9
5. The power to "invest or re-invest the funds from time to time and buy, sell or exchange any of my securities at such times and prices as your best judgment may dictate" is consistent with both an agency and trust relation. It also may be considered with all the other evidence in the case in determining that question. *O'Connor v. Burns, Potter & Co.* 9
6. Where the agreement states that the purpose of the arrangement is to relieve the settlor of handling his investment affairs, it ordinarily evidences a principal and agent relation, although it is not conclusive. *O'Connor v. Burns, Potter & Co.* 9
7. Agreement for handling of securities, when viewed with all the evidence and circumstances shown by the evidence, is held to be a managerial agreement and not a trust. *O'Connor v. Burns, Potter & Co.* 9
8. The high degree of care required of a trustee cannot properly be imposed upon a managerial agent except by contract. *O'Conor v. Burns, Potter & Co.* 9
9. An agent is required to act in good faith and exercise reasonable skill, care, diligence, and judgment

in acting for his principal. *O'Connor v. Burns, Potter & Co.* 9

10. Where an agent holds himself out as specially skilled in the undertaking assumed, he is required to exercise that degree of care and skill which would ordinarily be exercised at the time by one performing similar functions under like circumstances. *O'Connor v. Burns, Potter & Co.* 9
11. In the absence of specific instructions to the contrary, an agent is not required to change the nature of the securities in which his principal has invested, if he acted in good faith upon the information available to him. *O'Connor v. Burns, Potter & Co.* 9
12. In the absence of instructions to so do, a managerial agent is not required to diversify the securities of his principal when he follows the general pattern of investment pursued previously by such principal and acted in good faith upon available information. *O'Connor v. Burns, Potter & Co.* 9
13. An agent is not liable in the absence of bad faith for losses sustained by investing in open-end investment trust stocks, foreign bonds, utility, industrial and rail stocks, or local bonds, where they were the subject of investment by the principal and no instructions to discontinue the purchase of such securities were given. *O'Connor v. Burns, Potter & Co.* 9
14. An economic depression does not excuse negligence or bad faith. It is a condition, however, which may be considered in determining whether or not a breach of duty and its consequent liability has been established. *O'Connor v. Burns, Potter & Co.* 9
15. An agreement by one person to purchase personal property for another is not ordinarily a contract of sale but a contract of agency, and in such a case the statute of frauds has no application. *Maddox v. Maddox* 626

Public Service Commissions.

1. The grant or denial of a certificate of public convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers. *In re Application of Neylon* 587
2. The Nebraska State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with statute. *In re Application of Neylon* 587

3. The Nebraska State Railway Commission has authority to approve and authorize, upon such terms and conditions as it finds to be just and reasonable, the consolidation, merger, purchase, lease, contract to operate, or acquisition of control by the purchase of stock, of the properties of motor carriers for the purpose of ownership, management, or operation thereof. However, the Nebraska State Railway Commission has such authority only when the situations set forth in the statute are present and when the conditions therein specified are found to exist. These conditions are that the transaction proposed will be consistent with the public interest and does not unduly restrict competition. *In re Application of Neylon* 587
4. In conformity with constitutional provision, the Legislature has the right to prescribe how the Nebraska State Railway Commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate. *In re Application of Neylon* 587
5. When a certificate of public convenience and necessity has already been issued and an application is made to transfer the operating rights thereunder to another, such application requires a hearing thereon after notice has been had upon all interested parties. *In re Application of Neylon* 587
6. The Legislature has provided that any order of the Nebraska State Railway Commission upon which there has been a hearing before the commission is reviewable for the purpose of securing its reversal, vacation, or modification. *In re Application of Airline Ground Service, Inc.* 837
7. Any order of the Nebraska State Railway Commission is reviewable which meets the conditions set forth in the statute and which involves a justiciable issue that is decisive of some subject matter of which the commission has jurisdiction and the power to enforce against any party to the proceeding. *In re Application of Airline Ground Service, Inc.* 837
8. Where the railway commission assumes jurisdiction of the subject matter and issues a cease and desist order after a hearing, such order is reviewable even though the order was labeled a temporary or interim order. *In re Application of Airline Ground Service, Inc.* 837

9. In determining whether an order of the railway commission is reviewable it is the content and not the form which is the controlling factor. *In re Application of Airline Ground Service, Inc.* 837

Public Utilities.

1. The authority of the State Railway Commission to regulate and control common carriers as the Legislature may provide by law means in the manner in which the Legislature provides by specific legislation. *State ex rel. State Railway Commission v. Ramsey* 333
2. A gas company which does not install, own, or control the pipes or appliances in a customer's building is in no way responsible for the condition in which they are maintained, and consequently is not liable for injuries or damage caused by a leak therein of which it has no knowledge. *Clay v. Butane Gas Corporation* 876
3. The rule as to the legal duty of a gas company in reference to the escape of gas from service pipes owned and controlled by others on private property, which pipes have been properly installed and tested, does not extend to thereafter making inspection, unless the gas company has knowledge of a probable defective condition in such pipes, or has knowledge of circumstances rendering it probable that gas is escaping therefrom. *Clay v. Butane Gas Corporation* 876
4. A company engaged in transportation and delivery of a dangerous fuel commodity must have employees efficient in their line, and it is bound to anticipate injuries or danger resulting from use of such commodity. *Clay v. Butane Gas Corporation* 876
5. While liability of a distributor of gas does not attach, in the absence of a reasonable basis for anticipating danger, that fact does not relieve the distributor from such diligent and adequate inspection of its transportation and service facilities where a reasonable basis to anticipate danger actually exists. *Clay v. Butane Gas Corporation* 876
6. Where a gas company is cognizant of facts which should indicate to it the possibility of accident, it may be held liable even though the precise manner in which the harm resulted could not have been foreseen. *Clay v. Butane Gas Corporation* 876
7. While a distributor of gas is not an insurer of the

safety of the consumer's premises or the personal property therein, and the law does not impose upon it the arduous duty of inspection in every case, yet when its agent has good cause to believe that an inspection should be made, it may be negligence not to inspect, and if so, it is liable for damages proximately caused by such negligence. *Clay v. Butane Gas Corporation* 876

8. A gas company is chargeable with notice of defects in gas pipes supplying a building, where that degree of care and caution exercised by ordinarily careful and prudent men would have disclosed such defects. *Clay v. Butane Gas Corporation* 876

Receivers.

1. Every order appointing a receiver should contain special directions in respect to his powers and duties. *Frese v. Michalec* 57
2. District courts are authorized by statute, after judgment or decree, to appoint a receiver to carry the judgment or decree into execution. *Frese v. Michalec* 57

Release.

General words in a release are sufficient to bar a claim which had accrued at the date of the execution of the release, or a claim known to exist by the party signing it. *Schmidt v. City of Lincoln* 317

Replevin.

When a defendant in replevin denies plaintiff's title and right of possession of the property, and pleads a right of possession thereof in himself, and prays the return of the property, proof of the demand before the bringing of action is unnecessary. *Green Finance Co. v. Becker* 479

Sales.

A transaction for the sale or purchase of securities between a customer and a dealer in stocks and bonds is ordinarily that of buyer and seller. *O'Connor v. Burns, Potter & Co.* 9

Schools and School Districts.

1. The statutory requirement that a school district treasurer shall give a bond is not a duty of the office but rather a required precedent element of qualifica-

tion for the office, as distinguished from eligibility therefor. Upon failure to have such an official bond executed, approved, and filed as required by law, such office becomes ipso facto vacant. *School District of Omaha v. Adams* 741

2. A board of education is a creature of statute, and as such possesses no other powers than those expressly granted by the Legislature. *School District of Omaha v. Adams* 741

Specific Performance.

1. Where time is of the essence of a contract for the sale of real estate, a court of equity will refuse to enforce specific performance in favor of a party who is in default, unless strict performance has been waived or excused. *Dodge v. Galusha* 753
2. Whether or not an oral contract to leave property to another should be enforced by specific performance after it has been performed by one party depends upon the facts and circumstances of each case. *Peters v. Wilks* 861
3. Courts of equity may grant specific performance of an oral contract to transfer the title of personal property. *Peters v. Wilks* 861
4. Equity will grant specific performance of a parol agreement to leave property to another, if it is proved by evidence convincing and satisfactory, if it has been wholly performed by one party, and if its nonperformance would be a fraud on him. *Peters v. Wilks* 861
5. Performance of an oral contract to transfer specific property in consideration of personal care of the owner during the remainder of his life may be decreed by the court when the existence and performance of it is established by clear and satisfactory evidence. *Peters v. Wilks* 861

Statutes.

1. The word "may" when used in a section of the statute means "must" whenever third persons or the public have an interest in having the act done, or have a claim de jure that the power shall be exercised. *Miller v. Schlereth* 33
2. Specific statutory provisions relating to a particular subject control over general provisions and other parts of the law which otherwise were broad enough to cover the subject and generally where there is a

conflict between the two the special will prevail. *Redick v. Peony Park* 442

3. The rule ejusdem generis, that, where particular words are followed by general, the general words are restricted in meaning to objects of the like kind with those specified, is only an aid to interpretation, and yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed. *In re Estate of Grainger* 555
4. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *School District of Omaha v. Adams* 741
5. Statute providing for reduction of amount of bond of treasurer of school district in metropolitan city is operative prospectively only. *School District of Omaha v. Adams* 741
6.[c] The maxim, expressio unius est exclusio alterius, means that where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the Legislature has plainly indicated a contrary purpose or intention. *School District of Omaha v. Adams* 741

Streets.

1. When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet. *Gorman v. Dalgas* 1
2. 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. *Gorman v. Dalgas* 1

Taxation.

1. One who is under an obligation to pay the taxes on land, such as a mortgagee in possession thereof, cannot strengthen his title thereto by buying in the tax title when the property is sold as a consequence of his omission to make such payment. In such a case the sale will merely operate as a payment of the taxes and the title will be the same as it was before the sale, except that the lien for taxes is discharged. *Security Investment Co. v. Golz* 172

2. A mortgagee who takes possession of a life tenant's estate and pays the taxes thereon from the rents and profits, and prior to taking such mortgage purchased tax sale certificates on the land, holds the same in abeyance until the mortgage obligation has been paid in full, and then presses his action to foreclose the same, is not in equity and good conscience entitled to a decree of foreclosure as against the remainderman or the life tenant's grantee. *Security Investment Co. v. Golz* 172

3. A redemption by the owner of real estate foreclosed in accordance with statute requires that the person entitled to redeem shall pay the amount of the decree, interest, and costs, and, if sold to a person not a party to the suit, the person redeeming must pay in addition thereto interest at 12 percent per annum on the amount of the purchase price from the date of the sale to the date of redemption. *Gouger v. County of Sarpy* 207

4. There is no statutory authority in this state authorizing a county board of equalization to assess and levy taxes against landowners and school land leasehold owners within an irrigation district to pay judgments obtained against such public corporations. *Loup County v. Rumbaugh* 563

5. When a county brings an action to foreclose a tax sale certificate against a school land leaseholder within an irrigation district and the taxes constituting the basis of the action were assessed and levied by the county board of equalization without statutory authority to pay judgments obtained against the district, the county cannot successfully maintain the foreclosure suit against the leaseholder. *Loup County v. Rumbaugh* 563

Torts.

Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim, since of necessity such a claim must be based upon the theory that the event, the tort giving rise to liability, has already occurred, and that a cause of action is already accrued and is in existence. *Rehn v. Bingaman* 196

Trial.

1. A conflict in the testimony of qualified experts presents a question for the jury. *Smith v. Platte Valley Public Power and Irrigation District* 49
2. In testing the sufficiency of evidence to support the verdict it will be considered in the light most favorable to the successful party, any controverted fact will be resolved in his favor, and he will be given the advantage of any inferences that can reasonably be deduced therefrom. *Smith v. Platte Valley Public Power and Irrigation District* 49
   In re Estate of Hunter 704
   In re Estate of Wahl 812
3. Where a county attorney participates in the trial of a civil action and no objection is made by opposing counsel, who has full knowledge of the facts upon which disqualification is based, its assertion for the first time in a petition to vacate the decree comes too late. Any right the opposing party may have had under the statute is waived. *Thompson v. Thompson* 110
4. 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. *Plumb v. Burnham* 129
5. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. *Plumb v. Burnham* 129
   Thoren v. Myers 453
6. A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence, and, by analogy, the same rule applies to a motion for judgment notwithstanding the verdict. *Plumb v. Burnham* 129
   Umberger v. Sankey 488
7. In any equity suit, triable de novo in the Supreme

Court, where the oral evidence of witnesses is conflicting and cannot be reconciled, the Supreme Court will consider the fact that the trial judge observed the witnesses and had a better opportunity to determine their credibility. *Western Land Roller Co. v. Schumacher* 166

8. An instruction in a criminal case that "Yet you have no right to reject the testimony of any of the witnesses without good reason, and should not do so, unless you find it irreconcilable with other testimony which you find to be true," is erroneous and ordinarily prejudicial. *Schluter v. State* 284
Boeche v. State 368
Kitts v. State 679

9. When a motion is made by a defendant at the close of plaintiff's evidence for a directed verdict or for dismissal for want of sufficient evidence to make a prima facie case, every fact alleged which the evidence tends to prove, for the purposes of the motion, will be considered as proved. *Hoerger v. City State Bank* 321

10. The findings of a court in a law action have the effect of a verdict of a jury and will not be interfered with unless they are clearly wrong. *Union Transfer Co. v. Renstrom* 326
Albers v. Ziegler 408

11. Where the jury is told that if it found that a written statement was freely and voluntarily given and signed without fear, compulsion, or inducements, the jury should consider it the same as any other evidence, it is not necessary that the court include in the instruction the requirement that the jury so find beyond a reasonable doubt where the court has covered the matter generally in other instructions. *Clark v. State* 348

12. Where an instruction requires the jury to find beyond a reasonable doubt that a defendant did unlawfully and feloniously steal, take, and carry away certain property of another, and that such taking was with the intent to permanently deprive the owner of said property, it requires the jury to find that the property was taken with a felonious intent. *Clark v. State* 348

13. In the absence of a request therefor the trial court is not required to give a cautionary instruction relative to the weighing of circumstantial evidence. *Clark v. State* 348

14. It is not the province of the Supreme Court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Clark v. State* 348

15. Where there is substantial evidence sustaining the jury's verdict, it will not be set aside. *Clark v. State* 348

16. Instructions are to be considered together, to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Pauli v. State* 385
In re Estate of Wahl 812

17. The weight of evidence or credibility of witnesses is not a concern of Supreme Court in the review of such a case except to determine that the findings and judgment are supported by evidence and are not contrary to law. *Albers v. Ziegler* 408

18. Matters inhering in the verdict of a jury cannot afterward be attacked by the affidavits or testimony of the jurors. Evidence of jurors on such matters should be excluded by the trial court. *Scherz v. Platte Valley Public Power and Irrigation District* 415

19. A juror will not be permitted to state to his fellow jurors, while they are considering their verdict, facts within his personal knowledge and not given in evidence. If such facts relate to a matter in dispute and influence the jury in arriving at a verdict, it constitutes prejudicial error. *Scherz v. Platte Valley Public Power and Irrigation District* 415

20. Improper statement of facts by jurors may properly be established by the affidavits or testimony of jurors for the reason that such misconduct on the part of a juror does not inhere in the verdict. *Scherz v. Platte Valley Public Power and Irrigation District* 415

21. In determining whether or not a verdict should have been directed by the trial court, the evidence must be considered in the light most favorable to the party against whom the motion was made; 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. *Scherz v. Platte Valley Public Power and Irrigation District* 415
Thoren v. Myers 453

22. When evidence is in conflict and such that reasonable minds can draw different conclusions therefrom it presents a jury question. *Smith v. Platte Valley Public Power and Irrigation District* 49
Scherz v. Platte Valley Public Power and Irrigation District 415
Roby v. Auker 421
23. When a judgment is excessive and the items composing the excess can be ascertained, a remittitur may properly be required as a condition to its affirmance. *Roby v. Auker* 421
24. A motion to dismiss admits the truth of all material and relevant evidence. The party against whom the motion was made is entitled to have it considered in the light most favorable to him and to have the benefit of all inferences reasonably deducible therefrom in testing the correctness of the action of a court in granting the motion. *Armer v. Omaha & Council Bluffs St. Ry. Co.* 431
25. A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. *Green Finance Co. v. Becker* 479
26. In negligence cases the trial court should sustain a motion for directed verdict, or for judgment notwithstanding the verdict, only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Umberger v. Sankey* 488
27. In a law action, it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for their determination. *Umberger v. Sankey* 488
28. It is error to give the jury instructions which contain inconsistent and conflicting paragraphs relating to the burden of proof. *Umberger v. Sankey* 488
29. The giving of an instruction which places the burden of proof on the wrong party to establish some of the facts put in issue by the pleadings is reversible error. *Umberger v. Sankey* 488
30. In deciding the correctness of the action of the trial court in submitting a case to the jury, the evidence will be viewed in the light most favorable to the successful party, controverted facts will be resolved in his favor, and he will be given the advantage of

any inferences reasonably deducible from the evidence. *McKain v. Platte Valley Public Power and Irrigation District* 497

31. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. *McKain v. Platte Valley Public Power and Irrigation District* 497

32. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error. *McKain v. Platte Valley Public Power and Irrigation District* 497

33. Agreements of counsel in regard to the trial of a cause are not absolute, although in writing, and are not to be treated as contracts to be enforced under all circumstances, and they may be set aside by the court in the exercise of a sound judicial discretion for the promotion of justice. *Rose v. Kahler* 532

34. Where the charge to the jury, considered as a whole, correctly states the law, a judgment on the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete. *Planck v. State* 599

35. An objection that the court has failed to instruct with relation to a statutory provision which fails to identify the provision contemplated by the objection will not be considered. *Thurow v. Schaeffer* 651

36. The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error. *Thurow v. Schaeffer* 651

37. Where the charge to a jury in a particular respect contains a correct general statement of the law error cannot be predicated on a failure to give a more specific instruction in the absence of a request therefor. *Thurow v. Schaeffer* 651

38. Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury. *Thurow v. Schaeffer* 651

39. Where the evidence is in dispute and where reasonable men might draw different conclusions from the

evidence, negligence is a question for the jury. *Thurow v. Schaeffer* 651

40. Before the act of 1947, a judgment notwithstanding the verdict could only be rendered when the pleadings of the party in whose favor the verdict was given showed a right to judgment in favor of the other party. *Krepcik v. Interstate Transit Lines* 663

41. The act of 1947 provided a new procedure for review of rulings on motions for new trial and judgment notwithstanding the verdict. *Krepcik v. Interstate Transit Lines* 663

42. The purpose of the 1947 act providing for judgment notwithstanding the verdict was to prevent needless cost and effort, and to simplify and expedite the final disposition of litigation. *Krepcik v. Interstate Transit Lines* 663

43. The issue raised by a motion for judgment, or in the alternative for a new trial, as authorized by the act of 1947, is one of law; it requires a mere examination of the record made on the trial and a determination of the legal questions raised by the motion. *Krepcik v. Interstate Transit Lines* 663

44. The findings of the court in a law action in which a jury is waived are accorded the same weight as a verdict of a jury. *Sorter v. Citizens Fund Mutual Fire Ins. Co.* 686

45. If an instruction is given, which it is claimed did not fully state the rule of law upon the subject involved therein, but did not misstate any rule to be applied, the attention of the court should be called to the claimed omission by an instruction containing the alleged omission, otherwise there can be no ground for complaint. *In re Estate of Hunter* 704

46. The refusal to give a requested instruction is not error if the subject thereof is substantially and correctly included in the charge of the court to the jury. *Myers v. Willmeroth* 712

47. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear. *Myers v. Willmeroth* 712

48. When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, the judgment will not be reversed for indefiniteness or ambiguity in one of the instructions. *Myers v. Willmeroth* 712

49. In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions. The true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject. *Myers v. Willmeroth* 712
50. The court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. *Myers v. Willmeroth* 712
51. A verdict and judgment which is not sustained in point of fact and is not supported by legal principles may not be allowed to stand. *Satterfield v. Mallory* 739
52. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial court to instruct the jury to return a verdict for defendant. *Elliott v. Swift & Co.* 787
53. It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict, decide the weight to be given the testimony of the various witnesses. *Heusser v. McAtee* 828
54. Where a law action is presented to the jury under proper instructions, a verdict based upon conflicting evidence will not be set aside unless clearly wrong. *Heusser v. McAtee* 828
55. Where there is a direct conflict in the evidence relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevent evidence and admissible for consideration of the jury. *Heusser v. McAtee* 828
56. Where from the verdict and pleadings it appears that if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and include such interest in the judgment. *Heusser v. McAtee* 828
57. An instruction will not be held to be prejudically erroneous because of a harmless imperfection which cannot be said to have confused or misled the jury to the prejudice of the party complaining. *Sohler v. Christensen* 843

58. Where a request for a directed verdict has been made at the close of all the evidence and overruled, the trial court is empowered to set aside the verdict and enter judgment in accordance with the motion. *Sohler v. Christensen* 843

59. In a case where there are special findings of fact, which findings are inconsistent with the general verdict, the former controls the latter and the court may render judgment accordingly. *Sohler v. Christensen* 843

60. To entitle a party to a judgment on special findings of a jury, where the general verdict is against him, the findings must establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion. *Sohler v. Christensen* 843

61. The propriety of a trial court in vacating a verdict and rendering judgment in conformity with a motion for a directed verdict made at the close of the evidence depends upon whether or not the party moving was at the time entitled to judgment in accordance with the motion. *Sohler v. Christensen* 843

Trusts.

1. Ordinarily a trust is not created where the transaction is as consistent with another relationship as with that of a trust. *O'Connor v. Burns, Potter & Co.* 9

2. A trust, when not qualified by the word "charitable," "resulting," or "constructive," is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it. *O'Connor v. Burns, Potter & Co.* 9

3. The manifestation of intention of the settlor is the external expression of his intention as distinguished from his undisclosed intention. *O'Connor v. Burns, Potter & Co.* 9

4. In construing an agreement to determine if it created a trust, regard will be had to its provisions as expressed and the interpretation given it by the parties as manifested by their acts and conduct in performing it. *O'Connor v. Burns, Potter & Co.* 9

5. Agency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and

guidance by the settlor or cestui only to a limited extent and when expressly provided for. *O'Connor v. Burns, Potter & Co.* 9

6. The use of the terms "trust," "trustee," or "trust fund" is not essential to the creation of an express trust where facts exist which establish that a trust actually existed. Likewise, the use of these terms does not create a trust where the evidence establishes that a trust was not intended. *O'Connor v. Burns, Potter & Co.* 9

7. The use of the words "held in trust" in letters and receipts, and the use of symbols representing such words in the books and records of the party alleged to be a trustee, constitute evidence of a trust relation. They are not conclusive, however, and may be explained. *O'Connor v. Burns, Potter & Co.* 9

8. The use of the words "for safekeeping" and "investment" in an agreement is not controlling in determining whether the party charged is a trustee or an agent. They will be considered together with all the other facts and circumstances in determining that question. *O'Connor v. Burns, Potter & Co.* 9

9. The power to "invest or re-invest the funds from time to time and buy, sell or exchange any of my securities at such times and prices as your best judgment may dictate" is consistent with both an agency and trust relation. It also may be considered with all the other evidence in the case in determining that question. *O'Connor v. Burns, Potter & Co.* 9

10. Where the legal title and control of the property involved are not transferred, an essential element of a trust is lacking. *O'Connor v. Burns, Potter & Co.* 9

11. Where the evidence shows that the title to securities was transferred only for purposes of convenience, control remaining with the owner to be exercised when and if he desired, a trust relation is not ordinarily created. *O'Connor v. Burns, Potter & Co.* 9

12. Agreement for handling of securities, when viewed with all the evidence and circumstances shown by the evidence, is held to be a managerial agreement and not a trust. *O'Connor v. Burns, Potter & Co.* 9

13. The high degree of care required of a trustee cannot properly be imposed upon a managerial agent except by contract. *O'Connor v. Burns, Potter & Co.* 9

14. 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. *Jenkins v. Jenkins* 113

15. The law is well established that each case is to be determined from the facts, circumstances, and conditions, as presented therein. *Jenkins v. Jenkins* 113

16. A high degree of proof is required in order to establish a trust by parol evidence. The proof must be clear, convincing, and satisfactory. *Parrott v. Hofmann* 249

17. The county court is without jurisdiction to interpret instruments creating trusts or to determine the rights of rival claimants of trusts and matters of like import. *In re Trust Estate of Myers* 255

18. The Administrative Testamentary Trust Act confers only concurrent jurisdiction of the county court with the district court in supervision over administration of testamentary trusts. *In re Trust Estate of Myers* 255

19. A precatory trust may be charged against property devised to another absolutely, provided the intention of the testator to so charge it appears from the will. *Tucker v. Heirs of Myers* 359

20. When, by will, property is given absolutely to a person, and the same person is by the testator "recommended," "entreated," "requested," "wished," or "desired" to dispose of that property in favor of another, the recommendation, entreaty, request, wish, or desire will be held to be imperative and to create a trust, if the subject and objects of the trust are certain. *Tucker v. Heirs of Myers* 359

21. Administrative Testamentary Trust Act vests judicial discretion in the county court to require a bond of a trustee where the court determines that a bond is required by a change in the circumstances or situation of the trustee or for other sufficient reason, notwithstanding the fact that the testator directs in his will that no bond be required. *In re Estate of Grainger* 555

22. Where the county court has exercised its discretion and determined that a bond is required, the question on appeal is whether or not there has been a clear abuse of that discretion. *In re Estate of Grainger* 555

23. The burden of proof is upon one seeking to establish

and enforce a constructive trust to establish the same by a preponderance of evidence, clear, satisfactory, and convincing in character. *Maddox v. Maddox* 626

24. Where one person undertakes as agent to purchase property for another, the other to pay part or all of the purchase price and become owner of all or a part of the property proportionate to his contribution, the purchase thereof by such person in his own name or otherwise for himself gives rise to a constructive trust for the benefit of the other in the agreed proportion, conditional upon reimbursement of the agreed part of the purchase price. *Maddox v. Maddox* 626

25. The statute of frauds does not apply to a constructive trust growing out of an undertaking by one person as agent to purchase property for another, where in violation of his agreement he has taken the title in his own name or otherwise for himself, and refuses to convey after tender of the agreed part of the purchase price. *Maddox v. Maddox* 626

26. The basis for the rule that a constructive trust is not within the statute of frauds in that the principal is not seeking to enforce an oral contract, but to declare and enforce a constructive trust resulting from the violation of confidential and fiduciary duties by the agent. *Maddox v. Maddox* 626

27. Generally, where a party acting as agent or trustee is barred from purchasing property because of a confidential or fiduciary relationship, the husband or wife of such party is equally barred and no advantage can be gained by purchasing the property and taking the title thereto in the name of such husband or wife. *Maddox v. Maddox* 626

Vendor and Purchaser.

1. An option contained in a lease is not one of the terms of the original tenancy which will be incorporated into the tenancy created by a tenant holding over after the expiration of the lease unless, by apt language therein, it is so provided. *Wright v. Barclay* 94

2. In the ordinary contract for the sale of real estate, equity will not regard time as of the essence, but it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested

by the agreement as a whole, construed in the light of the surrounding circumstances. *Dodge v. Galusha* 753

3. Where one contracts as owner with a broker or agent for the sale of real estate he may not defend an action for commission for sale thereof on the ground that he had no interest in the real estate. *Sohler v. Christensen* 843

Waters.

1. By statute, a public power district is liable for seepage when and if it accrues, damages therefor to be recovered in one action. *Smith v. Platte Valley Public Power and Irrigation District* 49

2. The measure of damages for any injury caused to lands by seepage is the difference in the fair market value thereof, if any, immediately before and immediately after the seepage, taking into consideration all the uses to which the land was put and for which it was reasonably adaptable. In addition thereto recovery may be had for damages to any annual crops growing thereon at the time. *Smith v. Platte Valley Public Power and Irrigation District* 49

3. In an action for damages to growing crops alleged to have been caused by seepage resulting from the construction and operation of an irrigation canal it is necessary to establish a causal relationship between the water in the canal and that causing the seeped condition on plaintiff's lands. *Smith v. Platte Valley Public Power and Irrigation District* 49

4. A cause of action for damages arising from seepage accrues when the lands are visibly affected thereby. In establishing the damage thereto the owner is entitled to show the manner and extent to which the lands have been affected. In doing so the owner may show the quantity and quality of the crops produced thereon both before and after the seepage, up to the time of trial. *Smith v. Platte Valley Public Power and Irrigation District* 49

5. Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining landowner where it was not wont to run according to natural drainage. *Andersen v. Town of Maple* 103
Jack v. Teegarden 309

6. 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, whether derived from the surface or springs, and it then becomes the running water of a stream and ceases to be surface water. *Jack v. Teegarden* 309

7. A watercourse is generally defined as a stream of water with a well-defined existence which makes it valuable to the riparian owners along its course. To such streams riparian rights attach. *Jack v. Teegarden* 309

8. Where an artificial channel is substituted for the natural channel of a stream, or created in such circumstances as indicate that it is designed to be permanent, riparian rights may attach to it. *Jack v. Teegarden* 309

9. For injury arising from unlawful diversion of flowing water injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act. *Jack v. Teegarden* 309

10. By virtue of statute, an owner of land may, without liability in damages, drain the same in the general course of natural drainage by constructing and maintaining in a reasonable and proper manner, and wholly on his own land, an open ditch or tile drain, discharging a reasonable quantity of water therefrom into a natural watercourse upon his own land or into a natural drainway thereon, whereby such water may be carried into some natural watercourse. *Skolil v. Kokes* 392

11. Where water is impounded upon land by natural conditions whereby a pond is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. *Skolil v. Kokes* 392

12. A proprietor may defend himself against the encroachments of surface water by embankment or dike or otherwise 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. *Skolil v. Kokes* 392

13. Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable. *Skolil v. Kokes* 392
McKain v. Platte Valley Public Power and Irrigation District 497
14. By statute a public power and irrigation district is liable for seepage caused from waters escaping from its works when and if it accrues. *Scherz v. Platte Valley Public Power and Irrigation District* 415
15. An irrigation district is a public corporation and the powers of its officers and directors are limited by the terms of the statute under which the district was created. *Loup County v. Rumbaugh* 563
16. It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there, and this is a continuing duty. *Lee v. Chicago, B. & Q. R. R. Co.* 797
17. Upper riparian owner constructing and maintaining artificial structure affecting flow of waters for temporary purpose advantageous to it is not obligated by lapse of time to maintain structure and conditions produced thereby though incidentally benefiting lower owners. *Lee v. Chicago, B & Q. R. R. Co.* 797

Wills.

1. A motion of proponents on the trial of a will contest made at the close of the evidence of the contestants to withdraw from consideration of the jury the issue of undue influence admits the truth of all material and relevant evidence submitted by the contestants, and they are entitled to have it and all inferences fairly deducible therefrom viewed in the most favorable light in testing the correctness of the ruling of the court granting the motion. *In re Estate of Bainbridge* 142
2. In determining whether or not the court on motion of proponents was justified in withdrawing from consideration of the jury the issue of undue influence at the close of the evidence of the contestants on the

trial of a will contest, the Supreme Court will wholly disregard the evidence of the proponents in opposition to the evidence of the contestants. *In re Estate of Bainbridge* 142

3. The essential elements of undue influence sufficient to defeat a will are that opportunity to exercise it exists; that the testator was susceptible to such influence; that there was a disposition to exercise it for an improper purpose; and that the result clearly appears to be the effect of such influence. *In re Estate of Bainbridge* 142

4. The burden is on contestants in a will contest to produce evidence tending to prove each of the four essential elements of undue influence as a prerequisite to their right to have the issue submitted to a jury for determination. *In re Estate of Bainbridge* 142

5. Undue influence sufficient to defeat a will must be referable directly to the will and be of such a nature as to control the will and action of the testator in the making of his will. *In re Estate of Bainbridge* 142

6. Undue influence is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, and mental condition, and the opportunity existing for the exercise of improper control. *In re Estate of Bainbridge* 142

7. If a will contains unnatural provisions, it deserves close scrutiny. *In re Estate of Bainbridge* 142

8. The fact that a beneficiary was a comparative stranger to the testator is a suspicious circumstance to be considered on issue of undue influence. *In re Estate of Bainbridge* 142

9. The county court has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves. *In re Trust Estate of Myers* 255

10. The jurisdiction of the county court in the construction of a will is limited to a construction for the benefit of the executor in carrying out the terms of the will but no such construction is binding on the heirs, legatees, or other persons interested in the distribution of the corpus of the estate. *In re Trust Estate of Myers* 255

11. It is the court's duty in the construction of a will to give effect to the true intent of the testator so far as it can be ascertained from the whole instrument, if such intent is consistent with applicable rules of law. *Tucker v. Heirs of Myers* 359

12. A precatory trust may be charged against property devised to another absolutely, provided the intention of the testator to so charge it appears from the will. *Tucker v. Heirs of Myers* 359
13. In the contest of a will on the charge that the testator was mentally incompetent to make it, the burden is on the proponent throughout the litigation to prove by the greater weight of the evidence the testamentary capacity of the testator at the time the will was made. *In re Estate of Hunter* 704
14. The elements of mental capacity to make a will are that the testator understands the nature of his act in making the will, the nature and extent of his property, the proposed disposition of it, and the natural objects of his bounty. *In re Estate of Hunter* 704
15. A defeated litigant in a will contest is not entitled to a trial de novo on appeal from the judgment of the district court. The existence of an issue of fact in such a contest is determined in the Supreme Court by the sufficiency of the evidence to sustain a verdict of the jury. *In re Estate of Hunter* 704
In re Estate of Wahl 812
16. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If the testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will. *In re Estate of Wahl* 812
17. The burden is on the proponent of a will to prove the execution of the will and the testamentary capacity of the testator. If the proponent makes a prima facie case as to testamentary capacity it then devolves upon the contestant to overcome the presumption arising therefrom, after which the burden of going ahead and proving testamentary capacity by a preponderance of the evidence devolves upon the proponent. *In re Estate of Wahl* 812
18. It must appear that a witness, lay or expert, in giving his opinion as to mental capacity of a testator to make a will had in mind the quality of mental capacity essential to the making of a valid will. *In re Estate of Wahl* 812
19. Where the testator is not claimed to have been generally insane, but controlled by insane notions with respect to a particular subject, the question to be determined is whether he was the victim of such

delusions as controlled his actions and rendered him insensible to the ties of blood and kindred. *In re Estate of Wahl* 812

Witnesses.

1. The former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the present trial. What the witness testified to on the first trial constitutes hearsay on the second trial, and cannot be introduced as substantive testimony by the party calling him unless it came within some well-established exception to the rule regarding hearsay evidence. *Dolen v. State* 76
2. Testimony as to a transaction or conversation had with a person since deceased is inadmissible in any civil action or proceeding in the result of which the witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation. *Rose v. Kahler* 532
3. An expert or other witness with such knowledge and experience as to qualify him to form a reasonably intelligent judgment may state his opinion as to the amount and extent of damages sustained, where he details the elements of damage or the items on which the estimate thereof is based. *Elliott v. Swift & Co.* 787
4. Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse. *Elliott v. Swift & Co.* 787
5. A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based. *In re Estate of Wahl* 812
6. It must appear that a witness, lay or expert, in

giving his opinion as to mental capacity of a testator to make a will had in mind the quality of mental capacity essential to the making of a valid will. *In re Estate of Wahl* 812

Workmen's Compensation.

1. With respect to the provisions of the Workmen's Compensation Act, the public has an interest in its due enforcement and observance which it is the duty of the court to protect, even without regard to the wishes of the parties. *Miller v. Schlereth* 33
2. The Workmen's Compensation Act creates new remedies and new liabilities. The manner in which it operates is to be found under the legislation itself. *Miller v. Schlereth* 33
3. In all questions under the Workmen's Compensation Act, it is the duty of the Supreme Court to avoid rules of technical construction as much as possible, and to determine the intention of the Legislature from the language of the act as a whole, rather than from the loose words or phrases of isolated paragraphs. *Miller v. Schlereth* 33
4. The provisions of the Workmen's Compensation Act are exclusive of all other liability as to those subject to it. *Miller v. Schlereth* 33
5. In entering into an agreement under the Workmen's Compensation Act to discharge the employer from all liability for a permanent disability of the employee upon payment of a lump sum in lieu of periodical payments, the parties are not at liberty to make a settlement at variance with statutory terms. *Miller v. Schlereth* 33
6. Statute requires that a copy of any settlement shall be filed with the compensation court and no settlement shall be binding unless it is in accord with the provisions of the Workmen's Compensation Act. *Miller v. Schlereth* 33
7. Statute requires in part that all settlements by agreement of the parties with the approval of the compensation court shall be final and not subject to readjustment, provided, however, no settlement shall be final unless there is conformity with the provisions of the act, a finding by the compensation court, the district court, or appellate court. *Miller v. Schlereth* 33
8. Where in a compensation case a rehearing before the compensation court is waived and appeal had

direct to the district court, the trial is de novo in the district court, and the court shall have the authority to try, hear, and determine the cause as in equity. *Miller v. Schlereth* 33

9. When the district court is authorized to try a workmen's compensation case de novo as in equity, statutory provisions for vacation or modification of judgment at subsequent term are applicable. *Miller v. Schlereth* 33

10. A party's right of action for negligence against a third person with whom he has no contractual relation as employer and employee is not a right given by statute, but a common-law right previously existent and preserved thereby. *Rehn v. Bingaman* 196

11. The term "third person," as used in Workmen's Compensation Act, means any person other than the employer or those whom the act makes an employer, and thus includes fellow employees. *Rehn v. Bingaman* 196

12. It is the policy of the Supreme Court to give a liberal construction to the workmen's compensation law so that its beneficent purposes may not be thwarted by technical refinement of interpretation. *Solheim v. Hastings Housing Co.* 264

13. Where a retrial has been had before the full compensation court, the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding. *Solheim v. Hastings Housing Co.* 264

14. On any appeal to the Supreme Court in a workmen's compensation case the cause will be considered de novo upon the record. *Solheim v. Hastings Housing Co.* 264

15. In order to entitle an employee to recover under the compensation act he has the burden of establishing that the injury arose out of and in the course of his employment for the party from whom he seeks such recovery. *Solheim v. Hastings Housing Co.* 264

16. Where an employee, in the performance of his duties, is required to travel and an accident occurs while he is so engaged it arises out of and in the course of his employment and within the scope of the Workmen's Compensation Act. *Solheim v. Hastings Housing Co.* 264

17. In order to constitute a joint employment there must have been some joint arrangement between

the two employers as to the employment by each. In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment or term of service, there cannot be any joint employment. *Solheim v. Hastings Housing Co.* 264

18. An executive officer of a corporation is not, as such, its employee in the ordinary use of the word and, in the absence of express statutory provisions so providing, does not come within the provisions of the Workmen's Compensation Act covering only employers and employees. *Solheim v. Hastings Housing Co.* 264

19. A person holding the position of an executive managing officer and, at the same time, holding a job as an employee and performing the work thereof should be allowed to draw only compensation based on wages received by him in the latter capacity. *Solheim v. Hastings Housing Co.* 264

20. The provisions of the Workmen's Compensation Act with reference to allowances made to an employee for board, lodging, or similar advantages, although the money value of such advantages is fixed by the parties at the time of hiring, contemplate that such allowances shall represent a real and reasonably definite economic gain to the employee, and so intended by the parties, before it can be considered as wages for the purpose of computing compensation under the act. *Solheim v. Hastings Housing Co.* 264

21. When the claimant, although only an executive officer of a corporation, is actually required to and does perform duties of an employee within the contemplation of the act and is injured in an accident while so engaged he is entitled to compensation thereunder. *Solheim v. Hastings Housing Co.* 264

22. Under the workmen's compensation law any appeal from the judgment of the district court is prosecuted in accordance with the general laws of the state regulating appeals in actions at law, the only exception being the period of time in which the appeal should be perfected. *Meester v. Schultz* 614

23. All of the provisions of the Code of Civil Procedure are applicable and controlling in a workmen's compensation case as they are in any other civil action equitable in nature. *Meester v. Schultz* 614

24. In a proceeding under the workmen's compensation law, where the evidence is in irreconcilable conflict, the Supreme Court, upon a trial de novo, may con-

sider the fact that the district court gave credence to testimony of some witnesses rather than to contradictory testimony of other witnesses. *Meester v. Schultz* 614

25. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Meester v. Schultz* 614

26. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment. *Meester v. Schultz* 614