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LORETTA MALONE VIELEHR, APPELLANT, V. CECIL F. MALONE, APPELLEE.

63 N. W. 2d 497

Filed March 26, 1954. No. 33469.

1. **New Trial.** The purpose of a new trial is to enable the court to correct errors that occurred in the conduct of the trial.
2. ———. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
3. **Limitations of Actions: Pleading.** The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.
4. ———: ———. The statute of limitations must be pleaded either by answer or demurrer.
5. ———: ———. When a petition shows on its face that the action therein stated is barred by the statute of limitations a general demurrer will raise the defense.
6. ———: ———. When it is not apparent from the face of the petition that the action is barred, the statute of limitations, as a defense, must be raised by an answer.
7. **Trusts.** Where the title to real estate is conveyed inter vivos subject to payments to be made to third persons it constitutes an implied or constructive trust as between the trustee and the cestui que trust and may be enforced by them directly by a suit brought in their own names.
8. **Attorney and Client.** Parties to litigation, if they so desire, have the right to present and defend their own interests without the assistance of an attorney but when they do so their rights are subject to and will receive the same consideration as if they had been represented by an attorney.
9. **New Trial: Evidence.** When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon by the district court when reviewing its own proceedings on motion for a new trial.

APPEAL from the district court for Kearney County: FRANK J. MUNDAY, JUDGE. *Reversed and remanded with directions.*

Dryden, Jensen & Dier, for appellant.

James E. Addie, for appellee.

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

WENKE, J.

Loretta Malone Vielehr brought this action in the district court for Kearney County against Cecil F. Malone. The purpose of the action is to establish a constructive trust on certain real estate transferred to defendant by his mother Mary J. Malone, who was also the mother of plaintiff, and for an accounting of the rents and profits therefrom since the mother's death on July 29, 1948. The trial court awarded plaintiff relief to the extent of a one-half interest in and to Lots 5 and 6 in Block 7 and the north one-half of Lot 3 in Block 14, all in the original town of Minden, Nebraska, on condition that plaintiff pay one-half of the funeral expenses of the mother, which amount it fixed in the sum of $327.99 with interest at 5 percent from date of the decree until paid. Defendant filed a motion for new trial and plaintiff has appealed from the sustaining thereof.

The purpose of a new trial is to enable the court to correct errors that occurred in the conduct of the trial.

An order granting a new trial will be scrutinized in this court with the same care as one denying a new trial. While there is no burden in the sense of a burden of proof on either party, the burden is on both parties to assist the court to a correct determination of the question or questions presented. If there is no basis for the sustaining of a motion for new trial the same should not be sustained.

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

If the trial court gives no reasons for its decision then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to our examination with the contention there was no prejudicial error. The duty then rests

upon the appellee to point out the prejudicial error, or errors, that he contends exists in the record and which he contends justifies the decision of the trial court.

See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772; Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547.

Appellee suggests the petition fails to state a cause of action. Since the appellant's petition otherwise states a cause of action this contention is apparently based on the fact that nothing is pleaded to toll the running of the statute of limitations of 4 years, the mother having died on July 29, 1948, and this action was not commenced until December 24, 1952.

In regard to constructive trusts we have said: "In the case of a constructive or implied trust, except where the trust is imposed on the ground of actual fraud which is not immediately discovered, or there has been a fraudulent concealment of the cause of action, the statute begins to run in favor of the party chargeable as trustee as soon as the trust relation is created, or from the time when the wrong is done by which the trustee becomes chargeable, or the time when the beneficiary knew or ought to have known thereof and can assert his rights; not from the time when demand is made on the trustee, or the trust is repudiated by him, for no repudiation of an implied or constructive trust is ordinarily necessary to mature a right of action and set the statute in motion." Bend v. Marsh, 145 Neb. 780, 18 N. W. 2d 106.

It is true we have held: "A petition may be attacked at any stage of the proceedings on the ground of its insufficiency in statement of a cause of action." Latenser v. Misner, 56 Neb. 340, 76 N. W. 897. See, also, Edney v. Baum, 70 Neb. 159, 97 N. W. 252. "Where such an attack on the pleading is delayed until in this court on appeal, it will be liberally construed." Latenser v. Misner, *supra.*

But, in regard to the statute of limitations, we said in Dufrene v. Anderson, 67 Neb. 136, 93 N. W. 139, in dis-

cussing this question: "We have not overlooked the cases holding that, where the petition fails to state a cause of action, it may be assailed at any stage of the proceeding, and that it may be assailed for the first time in this court on appeal. But those are cases in which the plaintiff could not, as a matter of law, under any circumstances, recover on the state of facts pleaded. But this case is not of that character. The defense, we have seen, is one that is waived, unless properly and opportunely interposed. It was not thus interposed in this case; hence if it existed, * * *, it is waived."

The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded. Atchison & Nebraska R. R. Co. v. Miller, 16 Neb. 661, 21 N. W. 451; Dufrene v. Anderson, *supra.* It must be pleaded either by answer or demurrer or it will be considered as waived. Hadley v. Corey, 137 Neb. 204, 288 N. W. 826; Kissick Const. Co. v. First Nat. Bank of Wahoo, 46 F. Supp. 869.

When a petition shows on its face that the action therein stated is barred by the statute of limitations a general demurrer will raise the defense, that is, it is subject to a general demurrer. Dufrene v. Anderson, *supra;* Newman Grove State Bank v. Linderholm, 68 Neb. 364, 94 N. W. 616; Bank of Miller v. Moore, 81 Neb. 566, 116 N. W. 167; Carden v. McGuirk, 111 Neb. 350, 196 N. W. 698; Brainard v. Hall, 137 Neb. 491, 289 N. W. 845; Bend v. Marsh, *supra.*

When it is not apparent from the face of the petition that the action is barred, the statute of limitations as a defense must be taken care of by answer. Hanna v. Emerson, Talcott & Co., 45 Neb. 708, 64 N. W. 229.

As stated in Kissick Const. Co. v. First Nat. Bank of Wahoo, *supra:* "* * * the statute of limitations does not operate by its own force as a bar but operates rather as a defense to be pleaded by the party relying upon it."

It cannot be considered here on this appeal for the reason that no issue in regard thereto was raised by the

parties in their pleadings. Atchison & Nebraska R. R. Co. v. Miller, *supra.*

We come then to the appellee's suggestion that the allegations of the petition are not sufficiently sustained by the proof as a matter of fact.

"'A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property 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.' O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540." Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637.

"Where the title to real estate is conveyed inter vivos subject to payments to be made to third persons, it constitutes an implied or constructive trust as between the trustee and the cestuis que trust, and may be enforced by them directly by a suit brought in their own names." Maca v. Sabata, 150 Neb. 213, 34 N. W. 2d 267. See, also, Fox v. Fox, 77 Neb. 601, 110 N. W. 304.

To engraft such a trust on the legal title to real estate by parol evidence requires a high degree of proof. Maca v. Sabata, *supra*; Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899; Bruce v. Cadman, 110 Neb. 500, 194 N. W. 726. That is, the burden is on the party or parties claiming the estate of a deceased person, or a part thereof, under an alleged oral agreement, to prove the same by clear, satisfactory, and convincing evidence. Jenkins v. Jenkins, *supra;* Paul v. McGahan, 156 Neb. 656, 57 N. W. 2d 283; Rush v. Heinisch, 157 Neb. 545, 60 N. W. 2d 608.

However, each case must necessarily be determined from the facts, circumstances, and conditions as presented therein. Jenkins v. Jenkins, *supra.*

Before proceeding with a discussion of the facts we shall first discuss the status of certain evidence in the record which comes within the following rules:

"Declarations derogatory to the title of an ancestor,

made by him after he transferred title, are not admissible as an exception to the hearsay rule merely because the grantee acquired the property without a monetary consideration. * * *." Johnson v. Petersen, 101 Neb. 504, 163 N. W. 869, 1 A. L. R. 1235. See, also, Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500.

Hearsay testimony which is incompetent is not made admissible by reason of the death of the person who made the statement sought to be proved. Colbert v. Miller, *supra.*

As to certain testimony of the appellant relating to conversations and transactions had with the deceased Mary J. Malone it was incompetent under section 25-1202, R. R. S. 1943. Colbert v. Miller, *supra;* Broeker v. Day, 124 Neb. 316, 246 N. W. 490.

Up until the filing of his motion for new trial appellee acted as his own counsel, although the trial judge and appellant's counsel frequently suggested that he do otherwise and employ counsel. That appellee had a right to do so is without question. Section 7-110, R. S. 1943, provides: "Plaintiffs shall have the liberty of prosecuting, and defendants shall have the liberty of defending, in their proper persons."

As stated in Ackerman v. Southern Arizona B. & T. Co., 39 Ariz. 484, 7 P. 2d 944: "Under the law one may be his own attorney if he wants to be. A layman * * * who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney * * *."

We think the correct rule is as follows: Parties to litigation, if they so desire, have the right to present and defend their own interests without the assistance of an attorney but when they do so their rights are subject to and will receive the same consideration as if they had been represented by an attorney.

Appellee made no objection to this evidence, consequently, the following principles are applicable thereto:

Where testimony is offered and admitted in evidence

without objection being made thereto, error cannot be predicated thereon by the district court when reviewing its own proceedings on motion for a new trial nor will we consider any error predicated thereon on appeal. Greenberg v. Fireman's Fund Ins. Co., *supra;* Hansen v. Estate of McDougal, 126 Neb. 538, 253 N. W. 674.

Failure to object to testimony disqualified under section 25-1202, R. R. S. 1943, waives the right to exclude such testimony. Perry v. Neel, 126 Neb. 106, 252 N. W. 812.

Hearsay evidence, admitted without objection, may be sufficient to sustain a finding of the existence of facts. Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488.

Appellant and appellee are the only children of John H. and Mary J. Malone. The Malones lived in Minden, Nebraska, where appellant must have been born in about 1891 as she testified she was 62 years of age at the time the case was tried. Just when appellee was born is not shown. Appellant lived at home until she was 22 years of age or until about 1913. She first moved to Lincoln, Nebraska, then to Omaha, Nebraska, and, in 1931, moved to Chicago, Illinois, where she has lived ever since. She was married on August 24, 1948. Appellee has apparently never married and has always lived in the parents' home except for about 2½ years during the years 1942, 1943, 1944, and 1945 when he was working in the Ordnance Plant at Sidney, Nebraska. The father died on October 2, 1926, and the mother on July 29, 1948, she being 76 years of age at the time of her death.

The father owned Lots 4, 5, and 6 in Block 7 and the north half of Lot 3 in Block 14, all in the original town of Minden. The original Malone home was located on Lot 4 and a business property was located on the north half of Lot 3 in which the father carried on his business. By deed dated December 26, 1925, the father conveyed all of this property to the mother. In December 1926 the mother built a new house on Lots 5 and 6 which she

thereafter occupied as her home, living there up until the time of her death. On March 25, 1933, the mother executed a deed to appellee for all of this property. However, this deed was not recorded by appellee until August 5, 1948, or after the mother's death. In the meantime, on March 9, 1939, the mother executed and delivered to Nels O. Brant and Christine Brant a deed to Lot 4 in Block 7, original town of Minden. This was given in part payment of a quarter section of land which was deeded to appellee. Subsequently, on December 3, 1948, appellee executed a deed to the then owners of Lot 4. This was apparently done in view of Lot 4 being included in the deed from his mother which he had recorded on August 5, 1948.

Appellant testified that when she was home on August 22, 1934, for her mother's birthday that she, her mother, and appellee had a general conversation about the family affairs; that in the presence of herself and the mother appellee told her that the mother had put the property in his name by deeding it to him; that this was done so he could handle the business for her and that after she (the mother) died he was to divide whatever was left of the mother's estate with appellant; and that he then said he would carry out this arrangement.

During all the years, up until the mother's death, the family seems to have been on a very friendly basis. Appellant frequently visited in the family home and corresponded with her mother weekly. During these years the arrangement above referred to was discussed between the members of the family, including appellee, and was fully understood as appellee assured both his mother and appellant he would carry out this arrangement, which we find the evidence establishes. It was not until in September 1950 that he refused to do so. We think appellant is entitled to have it enforced.

While other properties are referred to in appellant's petition and in the evidence, no discussion thereof is

here necessary in view of the manner in which this cause comes here for review.

It is our opinion that there was no basis for the trial court's granting a new trial and that it was in error in doing so. We therefore reverse its order granting a new trial and vacating and setting aside its decree awarding appellant a one-half interest in Lots 5 and 6 in Block 7 and north half of Lot 3 in Block 14, all in the original town of Minden, Nebraska, conditioned on appellant paying appellee the sum of $327.99 with interest at 5 percent from date of the decree, with directions that such decree be reinstated. Costs are taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF GARDNER R. BINGER, DECEASED. EVA BINGER ET AL., APPELLEES, V. RALPH D. BINGER ET AL., APPELLANTS.

63 N. W. 2d 784

Filed March 26, 1954. No. 33487.

1. **Marriage.** If parties enter into a marriage ceremony invalid for legal disability, and both before and after removal of the impediment they continuously cohabit and hold themselves out as husband and wife while domiciled or residing in this state, their relationship will be held to be meretricious from its inception, because common-law marriages in this state are invalid unless entered into prior to adoption in 1923 of section 42-104, R. R. S. 1943.
2. ———. Furthermore, it will not be held that such parties have entered into a common-law marriage if they made temporary sojourns or trips into Colorado or some other common-law state where they simply cohabited and held themselves out as husband and wife, without intending to or changing their domicile or residence to that jurisdiction, and without intending to or entering into a common-law marriage contract in that state in conformity with its laws.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Reversed and remanded with directions.*

D. O. Dwyer and *W. L. Dwyer,* for appellants.

Smith & Lebens, Sam C. Zimmerman, Cline, Williams, Wright & Johnson, Harold Elliott, and *Van Pelt, Marti & O'Gara,* for appellees.

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

CHAPPELL, J.

The question for decision in this case is whether or not Eva J. Binger, hereinafter called plaintiff, was the surviving widow of Gardner R. Binger, hereinafter called decedent, who died intestate April 9, 1952. The issue arose in the administration of decedent's estate. Separate petitions for determination of heirship were filed therein by the administrator and by plaintiff who claimed that she was decedent's common-law wife by virtue of the laws of Colorado. Answer to the petition of plaintiff denying generally was filed by Ralph D. Binger, Leila I. Fernbaugh, and LaVerna Binger Bolz, the children of decedent and Lavina N. Binger, his wife, who died January 9, 1943. Such children will be hereinafter called defendants. Plaintiff and decedent had no children the issue of their alleged marriage.

After hearing upon appeal to the district court whereat voluminous evidence was adduced, that court rendered its judgment which, insofar as important here, reversed and set aside the judgment of the county court and found and adjudged that plaintiff was the surviving widow of decedent, entitled to share in his estate in accord with the laws of this state, and that his next of kin and sole heirs at law were plaintiff and defendants. Defendants' motion for new trial was overruled and they appealed, assigning that the judgment was contrary to the evidence and law. We sustain that assignment.

The pertinent facts are not in dispute. Plaintiff, a trained businesswoman of intelligence and ability, lived in Omaha, Nebraska. Decedent was an unmarried busi-

nessman who lived in Weeping Water, Nebraska. Plaintiff met him there in April 1943, while she was visiting friends over the week-end. Subsequently, by prearrangement, he called upon plaintiff several times at her home in Omaha. She was then married to one Henry A. Grieb who was still living at the time of this trial.

On August 2, 1943, plaintiff filed a petition for divorce from Henry A. Grieb in the district court of Douglas County. Service was had upon him and he entered a voluntary appearance. Thereafter, on September 17, 1943, plaintiff was granted a decree of absolute divorce. It awarded her the custody of their two sons, 17 and 15 years of age, together with an allowance of $50 a month, of which $25 was alimony and $25 was for the support of their youngest child. Such payments were required to be made until he reached the age of 21 years. In that connection, only the older son subsequently survived. Plaintiff was also awarded a home belonging to the parties in Omaha, and the proceeds from the sale of a 1937 Nash sedan with which to pay court costs and legal expenses. The decree concluded with this statement: "This Decree shall not become final, except for purposes of appeal, until six (6) months from date hereof. Dated at Omaha, Nebraska, this 17th day of September, 1943."

There is no direct evidence that decedent ever knew of such divorce decree, but it may be reasonably inferred that he did know about it. Nevertheless, plaintiff and decedent continued their associations and during the first part of October 1943, he proposed marriage and she accepted. He bought her a wedding ring and on October 29, 1943, they drove to Kansas City, Missouri. There they obtained a marriage license and had a marriage ceremony performed by a justice of the peace. In the application for such marriage license decedent, as Ralph G. Binger instead of Gardner R. Binger, subscribed and swore upon oath that he was "Ralph G. Binger of Lincoln, County of Lancaster and State of

Nebr," and that plaintiff was "Eva J. Grieb of Cushing, County of Howard and State of Nebr," and that they were both over 21 years of age, single, unmarried, and might lawfully contract and be joined in marriage. Attached thereto also was the affidavit of plaintiff stating that she was the person named in such application and that she was over 21 years of age, single, unmarried, and might lawfully contract and be joined in marriage. In that connection, it will be observed that at that time plaintiff lived in Omaha, Douglas County, Nebraska, that decedent lived in Weeping Water, Cass County, Nebraska, and that plaintiff had only been divorced 42 days. Thus, she was yet the wife of Henry A. Grieb who was still living, and she could not lawfully have contracted a marriage with anyone. As a matter of fact, such marriage to decedent was void, and no contention is made here that it ever had any legality. It should be noted that there is no explanation or reason given for their purported marriage in Missouri except that they knowingly attempted thereby to circumvent the laws of Nebraska.

After the marriage ceremony aforesaid, they registered at a hotel in Kansas City as Mr. and Mrs. Binger, and there cohabited as husband and wife. They left the next day for Weeping Water, thence to Omaha where they stayed in plaintiff's home over the week-end. Plaintiff continued to work for a short time in Omaha, after which she moved to Weeping Water and continuously thereafter resided in decedent's home where they cohabited and held themselves out as husband and wife until his death occurred. While there she assisted decedent in his business venture, and at the time of this trial was still assisting the administrator of decedent's estate in the operation thereof. There never was any marriage ceremony performed as required by law after the removal of plaintiff's disability.

Since 1923 and the effective enactment of what is now section 42-104, R. R. S. 1943, common-law marriages in

this state have not been recognized as having any validity. Ragan v. Ragan, *ante* p. 51, 62 N. W. 2d 121. Therefore, the ceremony in Kansas City gave their purported marriage no validity, and the mere fact that both before and after plaintiff's legal impediment had been removed they continued to reside and cohabit in Nebraska as husband and wife and hold themselves out in this state as such could give their marriage no validity either by statute or at common law. Collins v. Hoag & Rollins, 122 Neb. 805, 241 N. W. 766. In such situation, their relationship would be meretricious from its inception.

In that connection, however, plaintiff argued that after her legal impediment had been removed, there was a common-law marriage which we should recognize by virtue of the law and decisions of Colorado, concededly a common-law state.

That contention is predicated upon section 42-117, R. R. S. 1943, which provides: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state." The question is then whether or not under the circumstances of this case there was any valid common-law marriage in Colorado, which this state should recognize. We conclude that there was not.

Plaintiff claims that there was a common-law marriage in Colorado because upon three pleasure trips respectively, one in October 1947, one in June 1950, and one in September 1951, she and decedent twice attended conventions and once visited relatives in Colorado for 3 or 4 days each trip. On such occasions they either registered at a named motel as husband and wife, or stayed with relatives, where they slept in the same bed, cohabited, and were introduced to or by friends and relatives as husband and wife, after which they returned to their home in Weeping Water. No claim is made that they ever actually resided or had a domicile in Colorado or in any other state except Nebraska.

There is no evidence that any of such trips to Colorado were made for the purpose of changing their domicile or residence to that jurisdiction or contracting a common-law marriage while they were in that state, or that while there any agreement was ever made by them to become husband and wife, or that they ever thought that such was necessary to give their marriage any validity.

As a matter of fact, plaintiff's own evidence discloses that neither she nor decedent during his lifetime ever thought of relying upon a common-law marriage. Plaintiff assumed to do so only after death of decedent, and the invalidity of their ceremonial marriage was discovered. It was simply an afterthought when necessity appeared, in order to share in decedent's estate. She testified on cross-examination that: "We considered we were married at all times. * * * from Kansas City on? A. Yes ma'am." Shortly after decedent's death she talked to the attorney for the administrator. In that respect, she testified: "Q And at the time that you talked to him you told him about this ceremonial marriage in Kansas City, didn't you? A. Because he asked me certain questions. Q. Yes, but you told him about it? A. After he had asked me the questions. Q At that time you didn't mention anything about these trips to Colorado constituting a common law marriage, did you? A Certainly not; I had other things to think about. Q But you didn't at that time, when you were telling Mr. Elliott about it, you didn't at that time claim that you were married by reason of any trips to Colorado, did you? A Well, we didn't—that was never discussed."

Generally speaking, a claim of common-law marriage, especially when one of the parties is dead, should be regarded with suspicion and closely scrutinized. Ordinarily, in such a case, in order to establish a common-law marriage, all the essential elements of such a relationship must be shown by clear, consistent, and convincing evidence. It is a contractual status in which

the state is interested as a party and the question of its existence must be determined from the facts and circumstances of each particular case. 55 C. J. S., Marriage, § 45, p. 911.

As provided in Colorado Statutes, Annotated, 1935, ch. 107, § 1, p. 55: "Marriage is considered in law a civil contract, to which consent of the parties is essential."

In Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 P. 26, 124 Am. S. R. 96, quoting from Taylor v. Taylor, 10 Colo. App. 303, 50 P. 1049, it is said: " 'By the statutes of Colorado, marriage is declared to be a civil contract, and there is only one essential requirement to its validity between parties capable of contracting, viz: consent of the parties. * * * It follows, therefore, that a marriage contract between parties of contracting capacity which possesses the one essential prerequisite may be valid, although no provision of the statute as to its solemnization may have been followed or attempted. In other words, in this state a marriage simply by agreement of the parties, followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute what is termed a common-law marriage, may be valid and binding. * * * It is also agreed that in cases where the contract or agreement is denied and cannot be shown, its existence may be proven by and presumed from evidence of cohabitation as husband and wife and general repute. Cohabitation as here used means something more than sexual intercourse.'

"Quoting from Yardley's Estate, 75 Pa. St. 211, the court further says: 'It is not a sojourn, nor a habit of visiting nor even remaining with for a time. None of these fall within the true idea of cohabitation as a fact presumptive of marriage. To cohabit is to live and dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell with him.' "

The opinion also quoted the following with approval: "In Case v. Case, 17 Cal. 598, the court said: 'Cohabitation attended with other facts is merely a circumstance from which marriage in fact may be presumed, but where facts are proved from which a contrary presumption arises, all former evidence falls or at least is neutralized.' "

Such opinion also cited with approval numerous authorities, including Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. R. 722, wherein it is said: "Courts cannot but look with suspicion upon a claim of marriage founded upon evidence of cohabitation and conduct which is consistent with the fact of actual marriage, where the evidence affirmatively shows that at the time such cohabitation and conduct commenced, there was in fact no marriage, and that such cohabitation and conduct was meretricious and in violation of law. When such fact is shown, the effect of the evidence upon the question of a marriage in fact at the date of the commencement of such unlawful cohabitation and conduct, is entirely destroyed; and in order to establish a marriage subsequent to the commencement of such unlawful and meretricious conduct, by continued cohabitation, conduct and declarations of the parties, or by reputation, there should be some affirmative evidence showing that the subsequent relations of the parties were changed, and that that which was meretricious and unlawful in its commencement had been rendered lawful."

In Peters v. Peters, 73 Colo. 271, 215 P. 128, 33 A. L. R. 24, the court said: "The habit and repute of marriage are not an essential of the legality of the relationship but merely evidence of an essential, i. e. consent. Admitting the existence of the contract and its consummation, and the absence of habit and repute, the law will uphold the marriage relation. Admitting the habit and repute of marriage and the absence of consent and contract, the law will hold the relationship adulterous."

Ordinarily, in Colorado, continuous cohabitation and

holding themselves out as husband and wife by parties resident there, after the removal of an impediment to a ceremonial marriage entered into by them in good faith without any attempt to commit a wrong, raises a presumption of marriage. Poole v. The People, 24 Colo. 510, 52 P. 1025, 65 Am. S. R. 245; Mock v. Chaney, 36 Colo. 60, 87 P. 538; Davis v. People, 83 Colo. 295, 264 P. 658; Rocky Mountain Fuel Co. v. Reed, 110 Colo. 88, 130 P. 2d 1049; Clark v. Clark, 123 Colo. 285, 229 P. 2d 142.

Plaintiff relies upon the above cases, but they are all distinguishable. The parties therein all lived in and were bona fide residents of Colorado where as such they, in good faith, intending to be married, continuously cohabited, and held themselves out as husband and wife in that state for long periods of time. Here the parties, who were at all times bona fide residents of this state where common-law marriage is invalid, simply took short pleasure trips across the state line without ever intending to contract or contracting a common-law marriage in Colorado as required by its laws.

Allen v. Allen, 121 Neb. 635, 237 N. W. 662, relied upon by plaintiff, is also distinguishable. Plaintiff therein, whose husband disappeared and had not been heard from for 6 years, entered into a marriage ceremony with defendant in good faith in Colorado "where both plaintiff and defendant were then engaged in business, and were bona fide residents" after which concededly they cohabited and held themselves out to the world as husband and wife for 6 years. In such case we concluded that there was a valid marriage in Colorado.

Riddle v. Peters Trust Co., 147 Neb. 578, 24 N. W. 2d 434, relied upon by plaintiff, is also distinguishable. That case involved the legitimacy of children of parties who had, in 1916, entered into a marriage ceremony in California when one of the parties was under legal disability because of marriage to another. However, then and after such impediment had been removed in 1917,

the parties, who were engaged in the theatrical business, continuously for many years lived, cohabited, and held themselves out as husband and wife in at least 7 states, including Colorado and Nevada which both recognized common-law marriages. In fact, as late as 1930 the mother of the children involved had obtained a divorce from the father, in which proceeding both parties had recognized their relationship as husband and wife, and that the children involved were the issue of that relationship. In such situation, we concluded that there was a valid marriage and sustained legitimacy of the children.

No case in Colorado or in this state comparable in vital or controlling respects with that at bar has been cited or found. However, there are a few comparable cases from other jurisdictions. For example, in Taegen v. Taegen, 61 N. Y. S. 2d 869, the parties were both bona fide residents of New York, where common-law marriages were invalid, as they are in this state. As in the case at bar, one of the parties still had a living, undivorced spouse, so they went to Maryland where a ceremonial marriage was performed, immediately after which they returned to New York where they lived together, cohabited as husband and wife, and were known to their friends and acquaintances as such for at least 8 years. Recognizing that the ceremonial marriage in Maryland was invalid, as the Kansas City marriage in this case was also invalid, the woman sought to establish that a common-law marriage occurred in New Jersey after the impediment to the ceremonial marriage had been removed by divorce. That contention was based upon the fact that upon three occasions, each of 3 or 4 days duration, they made visits to New Jersey, a common-law state. On two such occasions they stayed at hotels where they registered as man and wife and cohabited as such. On the other occasion, they visited a married couple, where the man introduced plaintiff as his wife.

In that connection, the court said: "There is not a

scintilla of evidence that on any of those visits to New Jersey, or at any other time or place other than as a part of the Maryland ceremony, Mary and Walter ever said to each other, in words or substance, that they thereby agreed to or did take each other as husband and wife; and that there was such a statement between them is rendered highly improbable by the fact that, wickedly or stupidly or too confidingly, each assumed that the Maryland ceremony constituted a valid marriage and no question as to the validity of such marriage ever was raised in their minds until discussion with lawyers took place in 1944, shortly before Mary brought her action for divorce. * * * Furthermore, as already stated, New York did not authorize such agreements at any of the times here involved, and therefore such agreement, even if found to have been made, would not result in a valid marriage unless it be found to have been made in New Jersey. Under the circumstances here disclosed I cannot find that any such agreement was made anywhere."

In Cruickshank v. Cruickshank, 82 N. Y. S. 2d 522, a male resident of New York, under disability for want of age which he misrepresented in order to obtain a marriage certificate, entered into a marriage ceremony with a divorcee in California. In a suit by his father to annul the marriage, the woman claimed that a valid common-law marriage resulted from an overnight stopover in Texas where they registered at a hotel as man and wife, cohabited, and held themselves out to others as such. In the opinion it is said: "A common-law marriage may not be established in Texas by temporary visits or stop-overs in that state. The Court so held in Kelly v. Consolidated Underwriters, Tex. Civ. App. 1927, 300 S. W. 981. In the above case, after disposing of the above contention by the plaintiff, the Court did hold that a common-law marriage was entered into by Joe Kelly and Louisa Lane. This was, however, by virtue of a subsequent period of *actual residence by the*

parties in Texas and not based on the periods of temporary stays in the State of Texas. This latter holding was affirmed in Tex. Com. App. 1929, 15 S. W. 2d 229. (Italics supplied.)

"The sixteen hour stop-over in the State of Texas by Robert and Josephine Cruickshank was not of their choosing. Their holding themselves out as man and wife by so registering in a Texas hotel in which the rest of their party stayed for the night was by virtue of a ceremonial marriage performed in California. It was not an act which was intended to result in a new status—a common law marriage. * * * The presumption of law is that having been married in California their stay in Texas and their holding out as man and wife there was by virtue of that marriage, and it is unreasonable to say that the stop-over resulted in a common-law marriage or further 'substantiated' the prior marriage as contended by counsel for the defendant, Josephine M. Cruickshank. This Court therefore holds that no valid common-law marriage between Robert and Josephine resulted by reason of their acts at the time of the sixteen hour stop-over in the State of Texas."

In State ex rel. Smith v. Superior Court, 23 Wash. 2d 357, 161 P. 2d 188, the court said: "We concur in the view of the trial court that where parties cohabit illicitly in the state of their residence and who happen to temporarily sojourn—only a few days in the case at bar—in a state where common-law marriage is recognized, even if during those few days they hold themselves out as man and wife those parties cannot by that conduct alone become legally man and wife.

"Parties who live for years in illicit relationship in a state in which they were domiciled will not find themselves married to each other if they happen to sojourn for a short time and hold themselves out as man and wife in a state where common-law marriage is recognized."

In Norcross v. Norcross, 155 Mass. 425, 29 N. E. 506,

it is said: "But there was no evidence that the parties while in New York entered into any contract of marriage between themselves. The substance of what was proved is, that the parties, without being married, were living together as husband and wife in Massachusetts, and while doing so they twice went to New York together and continued in the same apparent relation, at one time for three days, and at another for one week. We have not been referred to any decision in New York which holds that these facts would either constitute marriage there, or afford a conclusive presumption of it; and we are slow to believe that acts which in Massachusetts were illicit will be deemed matrimonial merely by being continued without any new sanction by residents of Massachusetts while transiently across the State line. Randlett v. Rice, 141 Mass. 385, 394." See, also, Blodgett v. Blodgett, 109 Wash. 597, 187 P. 340; 35 Am. Jur., Marriage, § 227, p. 332.

As late as Ragan v. Ragan, *supra,* which involved a claim of common-law marriage, this court said: "In order to establish mutuality of consent by conduct, the evidence must show that they cohabited as man and wife and held themselves out as man and wife *in the community of their residence.*" (Italics supplied.)

The authorities heretofore cited are perfectly logical, just, and controlling in the case at bar. Under the circumstances appearing herein, this court does not believe that there was any common-law marriage in Colorado which we should recognize or give any validity.

For reasons heretofore stated, we conclude that plaintiff is not the surviving widow of decedent. Therefore, the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MYRON D. NOBLE ET AL., APPELLANTS, V. THE CITY OF LINCOLN ET AL., APPELLEES, CHARLES M. SUTHERLAND ET AL., INTERVENERS-APPELLEES.

63 N. W. 2d 475

Filed March 26, 1954. No. 33490.

1. **Appeal and Error: Judgments.** The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and for purposes of the litigation settles conclusively the matters adjudicated expressly or by necessary implication.
2. ———: ———. The law of the case applies to not only questions actually and formally presented but to all questions existing in the record and necessarily involved in the decision.
3. **Elections: Estoppel.** If the conduct of a political subdivision has been such as to estop it to assert the right to insistence upon the general rule that courts will not usually inquire into the validity of an election in advance a court may enjoin an election proposed to be held within the subdivision.
4. **Municipal Corporations: Estoppel.** An action may be had to test the validity of a proposed amendment to the charter of a home rule city before adoption thereof on the ground of estoppel if the municipality acting in its municipal capacity has gained a clear and decided advantage by the acts relied upon.
5. **Municipal Corporations: Injunctions.** If the governing body of a home rule charter city issues and sells bonds, levies taxes, and makes substantial expenditures incidental to the construction of the project including purchase of a site for it by virtue of an amendment to the charter of the city which did not require a further vote of the people, an election thereafter for submission to the voters proposals to repeal all provisions of the charter concerning the project, to pay any unsatisfied expense incurred on account of it from money received from the bonds and taxes, to use the balance thereof for an incidental project for the city at a location different than the site acquired as the voters direct at another election, and to devote the site purchased for the project to general municipal purposes, the effect of which would be to defeat the successful completion of the project as first directed by vote of the people may be enjoined.
6. **Parties.** Any person who has or claims an interest in the matter in litigation may become a party to an action by a proper pleading without leave of court at any time before the trial of the case commences.
7. ———. The interest required as a prerequisite of intervention

is a direct and legal interest of such character that the person seeking to intervene will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.

8. ———. The ultimate facts must be alleged by the party seeking to intervene in an action evidencing his interest in the matter in litigation. A statement that he has an interest therein is a conclusion and insufficient.

9. **Municipal Corporations: Officers.** A taxpayer may not generally intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials.

10. **Judgments.** A showing of cause for not performing a duty required by a final judgment of a court is that the party obligated to perform it has promptly, diligently, and as effectually as the situation permits attempted to perform it but has been prevented by something beyond his control.

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

Davis, Healey, Davies & Wilson and *Robert A. Barlow, Jr.*, for appellants.

John H. Comstock and *Jack M. Pace*, for appellees.

H. B. Muffly, for interveners-appellees.

Clinton J. Campbell, amicus curiae.

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

BOSLAUGH, J.

This case was brought by appellants to have judicially declared the rights and obligations of the mayor and city council of Lincoln, a home rule charter city, under certain existing charter amendments; to have declared the duty and obligation of the appellees to proceed with the construction of a city auditorium in accordance with plans made and steps taken under the terms of the charter amendments; to enjoin appellees from holding an election to ascertain whether or not the amendments referred to above should be changed so as to nullify cer-

tain provisions thereof under and by virtue of which large expenditures of money had been made and require the location of any auditorium building constructed on a site other and different than the one acquired by virtue of the authority of the existing charter amendments; and for a mandatory injunction requiring appellees to construct the auditorium on the site which had been acquired for that purpose. Appellees interposed a general demurrer to the petition of appellants in the district court. It was sustained and the case was dismissed. The first appeal was from that action of the district court. The record presented on that appeal is sufficiently recited in the opinion and a detailed statement of the matters before the court will be omitted from this opinion. Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578. The defendants in the trial court are referred to above and hereinafter as appellees.

Appellees argued in this court that the right of a city with a home rule charter to amend it is a substantial right and when a petition sufficient for submission of an amendment to the charter is filed with the city the courts have no authority to interfere with or prevent the holding of an election upon the proposed amendment; that a city of that character in the matter of the voting on an amendment to its charter is a legislative body and it acts legislatively; that the courts will not, prior to the adoption of an amendment, consider or determine the constitutionality of a proposed amendment; and that the electors of such a city may not be estopped from amending its charter. This court recognized and stated the general rules that courts will not, before passage of legislation, enjoin it or consider its validity or constitutionality and that courts will not inquire into the legality or constitutionality of an election before it is held or restrain it at the suit of a taxpayer unless it is established that the adoption of the proposal intended to be voted on would immediately destroy or irreparably damage special property rights or interests peculiar to the taxpayer and not

enjoyed by the public at large. This court also stated and discussed what were termed recognized exceptions to the general rules, to wit: Where the passage of the legislative act would be followed by some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, when it would cause a multiplicity of suits, when the acts or conduct of the corporation have been such as to estop it to assert the right to application and operation of the general rules, and that in this jurisdiction where by amendment to a home rule charter bonds for the project have been voted and directions given to the city council to acquire a site and to construct the project thereon without a further vote of the people, an election thereafter the purpose whereof is to select a site the effect of which would be to defeat the prompt and successful completion of the project as directed by the previous vote of the people may be enjoined.

The language of the court concerning the applicability of the first exception to this case is: "That this would be true according to the allegations of the petition there can be little doubt. * * * The total of all funds expended would be irretrievably lost for the purposes for which they were raised and expended except possibly the amount invested in the site." The statement of the court concerning the third exception noted is: "Under the theory of estoppel action may be had to test the validity of a proposed amendment before adoption thereof when a municipality acting under its municipal capacity has gained a clear and decided advantage by the act or acts relied upon. In such case equity will prevent it from retaining the advantage and at the same time denying its binding force and effect." The court characterized the fourth exception to the general rule as something more than an exception: "It contains also a declaration of substantive right and legislative power. It declares that once power has been extended as it has been in instances such as this one and the power has

been exercised to the extent of directing the city to issue bonds and to select a site the matter of selection of a site is no longer a subject of referendum and that a referendum election may be enjoined. State ex rel. Ballantyne v. Leeman, *supra.* * * * It is true that the action there was directed at a proposed referendum upon a city ordinance and not an election upon a proposed charter amendment, but in view of the expression of the court in that opinion this does not appear to be of controlling importance." The court concluded that the record presented questions proper for determination in a judicial proceeding and expressed its conclusion in this regard by this language: "Again assuming that this amendment would be invalid if adopted we conclude that under the exceptions to the general rule that questions presented by the petition are proper for consideration at this time, that is, before submission of the proposed amendment to a vote of the people." The decision on the first appeal of this case is stated in this language: "The conclusion arrived at, therefore, on the facts as set forth in the petition and under the noted exceptions to the rules that the courts will not in advance of passage or adoption of legislation enjoin or inquire into the validity or constitutionality thereof, is that a situation has been presented which calls for a judicial declaration that the holding of the contemplated election would be invalid, and that an injunction to restrain the holding of such election is proper. On the same basis it is concluded that the city council should be declared to be under a duty and obligation to proceed with the construction of an auditorium pursuant to the named amendments to the city charter now in existence and on the site which has been procured for that purpose." The decree of the district court was reversed and "the cause remanded with directions to enter a decree in accordance herewith." The mandate to the district court stated that this court found that the holding of the contemplated election would be invalid; that an injunction to restrain

the holding of such election is proper; that the city council should be declared to be under a duty and obligation to proceed with the construction of an auditorium pursuant to the amendments of the city charter now in existence and on the site which had been procured for that purpose; and that this court had reversed the judgment and remanded the cause with directions to enter a decree in accordance with the opinion of this court, a copy of which was attached to the mandate. Noble v. City of Lincoln, *supra*. The district court on May 7, 1953, rendered and entered judgment upon and in accordance with the mandate and it has since been effective and final.

Appellants on June 19, 1953, filed a petition in this case. It incorporated therein as a part of it the record of all the proceedings had since the commencement of this litigation. It set out the tax levies made by virtue of the charter amendments concerning the construction of the city auditorium in Lincoln for each of the years 1940 to and including 1952; the amount of taxes collected each of the years for the auditorium fund, a total of $958,209.01; the expenditures pursuant to the charter amendments under the terms therein set forth of funds received by the city from tax levies and the sale of bonds, a total of $358,936.09; and it alleged outstanding general bonds of the city by virtue of the charter amendments in the amount of $550,000 containing the representation that they were issued for the purpose of acquiring real estate abutting on Fifteenth Street between K and R Streets in the city as a site for erecting thereon a building for an auditorium and other public purposes, equipping, and furnishing it, and for the purpose of opening and widening Fifteenth Street above described. It asserted that no plan had been approved by appellees and no contracts had been let for the erection of the auditorium building. Appellants asked a judgment of the court for further relief requiring that appellees proceed with the construction of an auditorium building

in accordance with the existing charter amendments relating thereto within such reasonable time as the court designated.

The facts alleged by appellants were substantially admitted by appellees and they asserted that since August 17, 1950, the date the mandate was filed in the district court, they had proceeded in an orderly and objective manner towards the construction of an auditorium on the site procured for that purpose; that since that date they had taken no action contrary to or in violation of the order of this court; that all their actions toward the ultimate construction of the building were in compliance with the charter amendments and the order of the court; that judgment was entered on the mandate on May 7, 1953, and 34 days thereafter the petition of appellants for a further order in the case was filed; that petitions have been filed with the city seeking an election to determine whether or not the provisions of the city charter for the construction of an auditorium should be repealed; that petitioners have requested an election be held upon the proposals stated in the petition; and that the petitions are legal and sufficient to require appellees to cause an election for the purpose requested.

Appellants replied to the answer by denial of its contents except appellants admitted the authenticity of the exhibits attached to the answer, and they alleged that any election as requested in the petitions referred to in the answer of appellees would be void for the reasons set forth to the other proposal in the original amended petition of the appellants.

A hearing was had and the district court found against appellants and dismissed their petition. The present appeal is from that action of the court.

The conclusion of the court on the first appeal of this case that the city council of Lincoln was obligated to proceed with the construction of a building for an auditorium and other public purposes as authorized by amendments to the charter on the site procured there-

fore was the result of and was based upon several legal principles. One of them was that funds authorized by popular vote for a specific purpose may not be lawfully diverted and devoted to any other purpose whatsoever, in the absence of a sufficient change of condition subsequent to the authorization granted therefor, because they constitute trust funds and may usually only be used for the purpose for which authorized. This was supported and emphasized in the opinion by quotations as follows: "In addition to the reasons specified above, it would seem that the appropriation of the moneys for a purpose other than that for which it was raised would be an illegal and improper diversion of said fund." People ex rel. Osborn v. Board of Trustees, 119 Misc. 357, 196 N. Y. S. 459. "Funds raised by a bond issue for a specific purpose by popular vote can not be diverted to any other purpose whatsoever. They constitute trust funds to be used only for the purpose for which the bonds were voted. * * * Good faith with the voters requires that these funds should be used in paving State-aid roads which had been designated at the time of the passage of this resolution and which were in existence at the date of the election." Marks v. Richmond County, 165 Ga. 316, 140 S. E. 880.

The purpose for which the funds were authorized in this instance was limited not only to the improvement of a designated portion of a street of the city and the erection of a building for public purposes but it was also restricted to a site for the building adjacent to the described part of that street. The purpose expressed in the authorization includes the location of the building, and the authority to carry out the purpose provides for trust funds usable only for the purpose for which they were voted to improve Fifteenth Street and to construct a building for an auditorium and other purposes on the site acquired therefor. The decision of the court in this case was not merely that a proposed election to amend the charter of the city so as to change

the location where an auditorium is to be built is illegal but it was also implicitly a holding that any election which would defeat the purpose as stated above would be illegal. In this regard it makes no difference whether the defeat of the purpose was intended to be accomplished by amendment or by repeal. The right to amend an authorization made by vote of the electors, such as a change of the location of a building from a site acquired for it in the manner and within the area designated in the authorization, is indistinguishable from the right to repeal or rescind it.

What is said herein does not mean that authority granted by the electors of a city may not in any situation be subsequently altered or rescinded by another election. It may be conceded that an authorization by the electors of a city to its governing body to undertake a project for the city at the expense of the taxpayers thereof may be changed or rescinded by another vote of the people before substantial indebtedness has accrued or expenditure been made because of it or if such a change of conditions intervenes that the project cannot be completed on the terms imposed by the grant of authority or if completed the project, because of the new conditions, would be inappropriate for or incapable of performing the service contemplated or of accommodating the activities intended to be carried on by virtue of it. A decision concerning that subject, however, is not appropriate because there is no situation of that character in this case. Appellees assert that there is no restriction upon the number of elections that may be had in the city of Lincoln on any subject appropriate to a home rule charter.

The pending petitions seeking another election concerning the auditorium matter request a vote of the electors of the city on the proposals to repeal the parts of the charter which provide for the construction of an auditorium on the site acquired for that purpose by the city council acting upon authority granted it by the

charter. Stated differently the repeal sought is all charter provisions concerning the construction of a building for auditorium purposes in Lincoln. The petitions contain, however, an important additional proposal. It is that in the event that a vote is sufficient to accomplish the repeal above alluded to "then the city council is hereby directed to place all money collected under said sections in a separate fund, to be used for the retirement of all outstanding bonds and obligations against the said Auditorium funds, and any surplus remaining shall be by the said city council placed in a reserve or trust fund, to be held and used only for the purpose of erecting an auditorium as may be directed by the voters of the city at an election where the question of the disposition of said funds shall be submitted. That any property heretofore acquired for auditorium purposes, be and the same hereby is set aside and dedicated for general municipal purposes." Any intention that the quoted language respects the holding of the court in this case on the first appeal that the funds in question are trust funds is futile, since the fund designated therein a "trust fund" may be "used only for the purpose of erecting an auditorium as may be directed by the voters of the city at an election where the question of disposition of said funds shall be submitted." This is obviously intended to provide that the fund can only be used to erect an auditorium as directed as to the location thereof and as to all other matters affecting it "by the voters of the city at an election" to be held at some future time. This is precisely what this court said in the first appeal of this case would be illegal since the voters have already directed that the funds be used for the purpose of erecting an auditorium, the improving of a part of Fifteenth Street, and the site for the building has long since been acquired strictly as authorized. Any election as suggested by this provision to decide the disposition of the funds if the proposal were adopted would necessarily include, even if it was not confined to, the

selection of a location for the building to be used for auditorium purposes. This is evident from the last sentence of the proposal that "any property heretofore acquired for auditorium purposes, be and the same hereby is set aside and dedicated for general municipal purposes." The word property therein is not otherwise defined but it clearly is intended to describe real property since the previous portion of the proposal disposes of "the fund" for use in the construction of an auditorium building. The petitions last filed seeking another election are an effort to do by repeal and amendment of parts of the charter what was adjudicated by this court herein could not be done by amendment alone. That this is an invalid distinction and is impossible of success is demonstrated by what is said in the opinion in this case and in State ex rel. Ballantyne v. Leeman, 148 Neb. 847, 32 N. W. 2d 918, where it was held that a proposed ordinance of the city of Omaha to select a site for its proposed auditorium by virtue of authority previously granted by a vote of the electorate of the city was not subject to a referendum election. The court in the opinion in this case made this comment with reference to the Omaha auditorium case: "It is true that the action there was directed at a proposed referendum upon a city ordinance and not an election upon a proposed charter amendment, but in view of the expression of the court in that opinion this does not appear to be of controlling importance. The ground of the determination was that after the power of selection was conferred on the city council the matter of selection became an executive function and not legislative and could not be interfered with by a further vote of the people of the city."

Another election concerning the subject of this litigation for the purposes stated in the petitions last filed may not be had because these propose that the real estate purchased by the city council as a site for the building, authorized to be constructed in compliance

with the mandate of the voters of the city by the application and use of funds provided for that specific purpose as the location of the auditorium building and to accommodate the activities the building was intended to house and serve, be dedicated to general municipal purposes. The site was property authorized to be acquired and it was purchased for a specific purpose and it cannot, under the circumstances of this case in which no change of conditions since the authority was granted is shown, be diverted and devoted to "general municipal purposes" or any other purposes whatsoever. It is impressed with a trust and good faith with the voters and the taxpayers of the city requires that it be used for the purpose for which it was acquired.

Likewise the proposed election may not be held because of estoppel of the city to hold another election wherein the issue would be to nullify the specific purpose previously adopted after taxes have been levied and collected, bonds issued and sold, real estate purchased and condemned, and a part of the work intended executed at a cost and expenditure of more than $300,000 by virtue of the mandate of the voters. In the opinion of the court in this case on the occasion of its first appearance many authorities were referred to in support of the conclusion that under the doctrine of estoppel legal action may be maintained to test the validity of proposed legislation before its adoption when a city acting in its municipal capacity had gained a clear and decided advantage by the acts relied upon to constitute the estoppel. Following the citations referred to above the court said: "None of the cases cited bear directly upon the question of the amendment to the home rule charter of a city. They do however point out very definitely that, where a political subdivision has by vote of the people given to the governing body a power and a mandate, and has implemented the power and mandate by authorization of bond issues and collection of taxes, and pursuant to such authorization and mandate steps

have been taken to effect the purposes contemplated, the question of whether or not a subsequent election may be held, the purpose of which is to effect a change in the authorization and mandate, is a matter for judicial inquiry and interpretation."

The opinion in this case further asserts the action could be maintained to test the validity of the proposed legislation of the city then in issue if the passage of it would result in irreparable loss or injury beyond the power of redress by subsequent judicial proceedings. The court found that the facts asserted by appellants, if accepted as true, were sufficient to show that the "total of all funds expended would be irretrievably lost for the purposes for which they were raised and expended except possibly the amount invested in the site."

That opinion recognizes and approves the principle of law that funds procured by taxation or by bonds issued and sold, authorized for a specific purpose by a vote of the electors, may not be legally diverted or devoted to any other purpose because they constitute trust funds and good faith with the electorate requires that they be used only for the purpose stated in the authorization.

The opinion concluded and adjudicated that a situation had been presented which required a judicial declaration that the holding of the contemplated election would be invalid; that the holding of such an election should be enjoined; and that the city council of Lincoln should be declared to be obligated to construct an auditorium in accordance with the amendments to the city charter then in existence on the subject and upon the site which had been purchased for that purpose.

All the material facts alleged by appellants as shown by the record on the first appeal are established in the record presented by this appeal. The matters contained in the opinion became and are the law of the case and they are applicable to and decisive of this appeal except as to the sufficiency of the showing of appellees herein to relieve them from the obligation to comply with the

adjudication made by direction of this court. The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case, and for purposes of the litigation, settles conclusively the matters adjudicated expressly or by necessary implication. It extends and applies not only to questions actually and formally presented but to all existing in the record and necessarily involved in the decision. Weisenmiller v. Nestor, 154 Neb. 839, 49 N. W. 2d 679; Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660; Hensley v. Chicago, St. P., M. & O. Ry. Co., 126 Neb. 579, 254 N. W. 426; Skeffington v. Kearney Savings & Loan Assn., 124 Neb. 175, 245 N. W. 774; Wells v. Cochran, 98 Neb. 725, 154 N. W. 245; Helming v. Forrester, 92 Neb. 284, 138 N. W. 190.

Appellants challenged the petition in intervention by general demurrer. It was overruled. The interveners alleged that they were taxpayers and electors of the city of Lincoln and that they had an interest in the matter in litigation in this suit. There is statutory authority for any one who has or claims an interest in the matter in litigation to become a party to the action. § 25-328, R. R. S. 1943. The interest required is a direct and immediate legal interest of such a character that the person seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. The ultimate facts must be alleged by him evidencing his interest in the matter in litigation and an averment that he has an interest in the subject matter is a conclusion and is not sufficient to permit intervention. Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808; Drainage District v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 582; Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482. Contrary to any claim that there was fraud, inefficiency, or lack of diligence on the part of appellees in their efforts herein to assert and protect the rights of the city, its officers, and inhabitants,

the petition of the interveners asserts that the city of Lincoln is defending the suit "on the basis of its good faith." This negatives any inference of fraud, collusion, or inattention or that their interest in the litigation as taxpayers was not being properly represented. Taxpayers are not qualified to intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150; City of Omaha v. Douglas County, 125 Neb. 640, 251 N. W. 262; State ex rel. Randall v. Hall, 125 Neb. 236, 249 N. W. 756. The demurrer to the petition of the interveners should have been sustained because it did not allege facts showing they had a legal interest in the litigation. The interveners may not complain of, neither were they prejudiced by, the failure of the trial court to grant or deny their petition at the conclusion of the hearing of the matter.

This appeal developed from the petition of appellants for further relief based on the declaratory judgment in this case, the requirement of the trial court that appellees show cause why it should not be granted, the attempt of appellees to show such cause, and the denial of further relief to appellants by the district court. § 25-21,156, R. R. S. 1943. The appellees assert that there are only two issues to be decided: Whether or not the filing by electors of Lincoln of legal and sufficient petitions requesting an election to submit charter amendments to repeal all existing charter provisions relating to a city auditorium is sufficient reason to relieve appellees from further compliance with the judgment rendered in the case as a result of the first appeal. This has been determined adversely to appellees by what has been said herein. The remaining issue as stated by appellees is whether or not the actions of the city council toward the construction of a city auditorium on the site purchased for that purpose are sufficient to sustain the order of the trial court that cause had been shown

by appellees of a character to justify a refusal of further relief to appellants and to warrant a dismissal of their petition.

The findings of the trial court were in substance that legal and sufficient petitions of electors had been filed requesting an election on proposals to repeal the charter provisions pertaining to the construction of an auditorium, and that the city council had taken numerous official actions since the mandate of this court reached the district court on August 17, 1950, "relating to its duties concerning the proposed construction of a City Auditorium." Appellees made no objection to or assault on the opinion or the judgment rendered in the district court by direction of this court. They say that they have had "a continuing planned and pursued course of action to carry out" the order of the court. They produced evidence of more than 35 official acts "all tending toward the completion of an auditorium" at the site they selected and purchased as the location of it. They did not plead an excuse for not complying with the judgment in this case, lack of ability to do so, or that they had been prevented by any fact or condition but they assert that they "had shown cause" why further relief should be denied appellants, that is, that they had been complying with the judgment and that they intended to satisfy its requirements. They assert that they were in a "position to advertise for bids, let contracts and proceed with construction when faced with legal and sufficient petitions requiring them to submit at an election the proposed new charter amendments" to repeal all existing charter provisions authorizing the construction of an auditorium building. They asked this court to extricate them from the dilemma of being obligated by court decree to construct the auditorium on the site acquired for it and the mandate of the law, as it is contended by many, to submit to the electorate the repeal of the charter amendments relating to the building of the auditorium. They did not contend

they should do the latter because no valid judgment has been rendered. They suggested the obvious that they could not do both.

When the mandate was issued in this case, and for some time thereafter, the actual construction of the building was restricted because the government controlled steel and there was a scarcity of other materials. This did not affect preparation and adoption of plans and specifications, the completion of details, and a general program for the erection of the building when the restrictions were removed and the scarcity of materials ceased. The showing of appellees is that an allotment of restricted and scarce materials was not applied for until the middle of October 1952, but there was a resolution of the city council of June 2, 1952, directing the mayor to do so. The application for an allotment of these was granted by the National Production Authority on January 7, 1953, the first allotment to be available during the second quarter of the year. After the approval no action was taken that could not have been accomplished during the last half of 1952. Subsequent to January 7, 1953, when it was learned that steel would be available in April 1953, no significant action was taken toward the construction of the building. The architects filed a cost estimate on March 30, 1953, but nothing was done thereafter to the time of filing of the petition of appellants for additional relief, except a newly appointed auditorium advisory committee made a report on April 20, 1953. Thereafter nothing was "said" about constructing or not constructing an auditorium building until the mayor reported to the city council on June 1, 1953, about the location of the building and the problem of whether or not the city council should submit a charter amendment at another election to have the electorate demonstrate their preference for a location for the building. The record sustains the conclusion that no direct action toward the actual erection of an auditorium building was had after the mandate

of the court was issued in this case except during about 3 months immediately following the decision of the court on the first appeal. There was no such alacrity or enthusiasm for the accomplishment of the work as the determination and adjudication of the court herein contemplated and required of appellees. The disposition of the city authorities to accommodate the desire of a few for another election stagnated, if it did not entirely neutralize, any determination they had to comply with the mandate of the court to construct an auditorium building on the site purchased.

A showing of cause for not satisfying a duty required by a final judgment of a court is that the party obligated to perform it has promptly, diligently, and as effectually as the situation permitted attempted to perform but he had been prevented by the occurrence or existence of something outside of his control. See, In re Estate of Bingaman, 154 Neb. 240, 47 N. W. 2d 435. Appellees did not show cause why further relief sought by appellants should not have been granted. The findings and order of the trial court in this regard are wrong.

The judgment in this case should be and it is reversed and the cause is remanded to the district court for Lancaster County with directions to it to render and enter a judgment in the case enjoining appellees and each of them from taking any action in reference to holding or holding an election as requested by petitions of electors of Lincoln, now on file with the city and described in the opinion, for submission to the voters proposals to repeal all provisions of the charter of the city relating to the construction of a building and equipping it for auditorium purposes; and directing and ordering appellees to proceed with reasonable promptness, the circumstances properly considered, with the construction and erection of a building for auditorium purposes as authorized and directed by existing charter amendments on that subject, on the site which has been purchased

and acquired for that purpose and in harmony with the adjudication hereinbefore made in this case by the district court upon direction of this court.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

I respectfully dissent from the opinion adopted by the majority in this case. I do not think the majority opinion responds properly to the questions presented for consideration and determination. I think it is in essence a long step toward destruction of the constitutional division of the powers of government. To my mind it is an unwarranted invasion of the legislative by the judicial department.

This is an appeal from further proceedings in Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578, wherein the opinion was filed July 13, 1950.

The majority opinion here draws by quotation copiously from the former opinion, but these quotations, taken as they are out of context, and the conclusions based thereon, do not, as I view them, properly reflect the true purport and meaning of that opinion or its result, and do not contain an application of constitutionally and traditionally appropriate principles.

I shall not attempt to set forth in detail what I think are the specific fallacies of the majority opinion. I prefer simply to set forth what I think a proper opinion should contain. This together with the former opinion I think will demonstrate the fallacies of which I make complaint.

The question involved in the former appeal was a single one defined and declared in the opinion as follows: "The question for determination here therefore is as to whether or not the petition states a cause of action."

The adjudication therein was pronounced as follows: "For the reasons herein set forth the decree of the district court denominated journal entry is reversed and the

cause remanded with directions to enter a decree in accordance herewith."

The decree of the district court sustained a demurrer to the petition and dismissed the action. The adjudication here meant, and could not have meant more, that the district court was directed to vacate the dismissal and overrule the demurrer.

This was never done. Had it been done the defendants would have had the right to answer. "Upon a demurrer being overruled, the party who demurred may answer or reply if the court be satisfied that he has a meritorious claim or defense and did not demur for delay." § 25-851, R. R. S. 1943.

There is nothing to indicate that if the defendants had filed an answer it would have been rejected on the ground that it did not set forth a meritorious defense.

After the opinion of this court was filed and on August 16, 1950, a mandate was issued to the district court as follows:

"This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court and finds that the holding of the contemplated election would be invalid and that an injunction to restrain the holding of such election is proper, and finds further that the city council should be declared to be under a duty and obligation to proceed with the construction of an auditoruim pursuant to the amendments to the city charter now in existence and on the site which has been procured for that purpose. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, reversed and cause is remanded with directions to enter a decree in accordance with the opinion of this court this day filed herein; * * *."

No further proceedings were had until April 16, 1953,

when judgment was apparently rendered on the mandate by the district court. This judgment does not appear as such in the transcript but it appears by recital in a further judgment on the mandate entered May 7, 1953, as follows: "'On motion of plaintiffs through counsel in open court, judgment is hereby entered in accordance with the opinion of the Supreme Court filed in this cause.'"

The judgment of May 7, 1953, quotes the mandate and contains, among other things not necessary to quote here, the following: "IT IS THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED by this court, that judgment be and hereby is entered in accordance with said mandate and judgment of the Supreme Court."

No appeal has been taken from this judgment. It has become final and binding upon the parties to it. Kerr v. McCreary, 86 Neb. 786, 126 N. W. 299; State v. Several Parcels of Land, 87 Neb. 84, 126 N. W. 1001.

This judgment amounts to and is an adjudication that the city of Lincoln is required to do and perform in accordance with what this court said were its duties and obligations if the allegations of plaintiffs' petition were true. The city does not contend otherwise. In truth this is admitted by pleadings and briefs filed herein.

One of the effects of this judgment was to judicially declare that from the date of adoption of the amendments to the city charter the city and its duly constituted officers were bound by the amendments and were under a bounden duty to proceed agreeable to the terms and requirements thereof.

Another effect of the judgment was to provide a means of compelling performance of the duty imposed by the amendments.

On June 19, 1953, the plaintiffs filed a petition in the district court denominated Petition for Further Relief, the primary purpose of which was to secure a mandatory order requiring the city and its officers to proceed with the necessary steps to construct, and to start con-

struction of, an auditorium pursuant to the charter amendments. They prayed for an order against defendants to show cause why they should not so proceed.

An order to show cause was issued and in response thereto the defendants filed an answer and showing. In the answer and showing the defendants in substance set forth that efforts, which were reasonable under the circumstances, had been made over the entire period to comply with the charter amendments.

In an effort to show that there should not be an order requiring them to further proceed at this time and that performance should be held in abeyance they pleaded that petitions under law and the charter had been filed seeking an election to determine whether or not the charter amendments involved herein should be repealed. The effect of the answer in this respect is to say that an election on the petitions is proper under law; that if the vote on the petitions was in favor of repeal the amendments would be repealed; that in that event the duty of the defendants would be removed; and that in the light of these eventualities an order of court requiring them to proceed pending the outcome of an election would be premature.

To the answer the plaintiffs filed a reply. By it the issues presented by the petition and answer were generally joined. Further it declared that the proposed election referred to in the answer would be void and a nullity.

Certain parties were permitted to intervene herein but it is not deemed necessary to do more than to note that fact since no adjudication was ever made with reference to them except that they were permitted to intervene.

The case came on for trial to the court at the conclusion of which a decree was rendered. The pertinent part of the decree is a finding that the city of Lincoln and the members of the city council showed sufficient ground for refusal at the time of the further relief sought

by the petition of plaintiffs. Adjudication was made accordingly and the petition dismissed.

From the decree the plaintiffs have appealed.

A bill of exceptions has come to this court but it contains nothing pertinent to the issues involved except a stipulation of fact as follows: "At the present time, almost three years after the said opinion of the Supreme Court (the opinion filed July 13, 1950), no auditorium has been built," and a further stipulation that there had been filed a sufficient petition of electors for the submission of repeal of the amendments of the charter which were involved in the original action.

The consideration and determination of this appeal must depend upon admissions in the pleadings and these stipulations.

This is true since there is nothing else in the record which this court may properly consider in determining whether or not the adjudication of the district court was correct. In effect the case comes here as a case for judgment on the pleadings except to the extent that the judgment may be influenced by the stipulations.

The admissions of pleadings when they are complete, unequivocal, and without controversion will sustain a judgment.

The rule in this respect is stated as follows in 71 C. J. S., Pleading, § 160, p. 333: "A fact alleged in a complaint is sufficiently established by its admission in the answer. As long as it stands on the record a fact admitted by the plea or answer must be taken as true, becomes evidence in the case, and supports a presumption or inference of such other facts as normally follow from the establishment of such fact."

In Fidelity Finance Co. v. Westfall, 127 Neb. 56, 254 N. W. 710, it was said: "Where an allegation in the petition is admitted by the answer, the fact is established for the purpose of the case, and the court cannot disregard it." See, also, Bonacci v. Cerra, 134 Neb. 476,

279 N. W. 173; Barry v. Barry, 147 Neb. 1067, 26 N. W. 2d 1.

The same rule applies in the case of admissions in a reply to an answer or other pleading. Bonacci v. Cerra, *supra;* Provident Savings & Loan Assn. v. Booth, 138 Neb. 424, 293 N. W. 293; In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923; Barnhart v. Henderson, 147 Neb. 689, 24 N. W. 2d 854.

The petition exclusive of the prayer is in 14 paragraphs. The defendants by their answer have admitted paragraphs 1 to 10 inclusive and paragraph 12. This is an admission of all of the substance of what has already been summarized herein as the basis of plaintiffs' claimed right to further relief. The other three paragraphs, one of which is purely formal, are of no pertinence in the determination here.

The only parts of the answer of the defendants other than the admissions are the allegations that valid petitions have been filed for an election upon the question of whether or not the charter amendments in question shall be repealed, that the city has been proceeding toward construction, and a prayer for dismissal and equitable relief.

The reply does not admit the authenticity and sufficiency in form of the petitions for an election but this is admitted in the stipulations contained in the bill of exceptions. Further replying the plaintiffs allege that any such election would be void and a nullity on the basis that the proposed amendment which was considered in the former opinion of this court was declared null and void.

The effect of the reply and stipulations is to say that the defendants were and are under a duty and obligation and bound to proceed with the construction of an auditorium pursuant to the terms of the amendments to the city charter and that injunction was proper to restrain the holding of an election on a proposed amendment the purpose of which was to change the site of the

auditorium from the site designated by the charter amendments.

The further effect is to say that there has been filed a sufficient petition for an election on the question of whether the amendments shall be repealed.

The substantial contention and theory of the defendants with respect to this proposed election is that if the vote in favor of repeal is sufficient then any and all obligations flowing from the amendments and from the judgment on the mandate will be removed.

The substantial contention and theory of the plaintiffs is that the defendants are without legal power or authority to submit the propositions contained in the proposed repealing amendment at an election, and if it should be submitted and approved by the electors it would be null and void.

Specifically insofar as the record is concerned the finding and adjudication of the district court were based upon the theory of the defendants that delay was proper until the proposed election was held and the results ascertained. If any other considerations were involved they are not made to appear by the bill of exceptions or by admissions in the pleadings.

The plaintiffs contend that there can be no amendment or repeal of the amendments providing for the construction of the city auditorium and that an election having that for its purpose would be null and void.

The plaintiffs rely for support of their contention upon our former opinion in this case. The opinion however does not support that contention. A careful reading of that opinion discloses that the making of any such pronouncement was avoided.

The question presented by the petition in that case was that of whether there was a remedy in equity to prevent the city by election to amend the charter amendments by removing from the designated location and empowering the city council to designate a location, where the city of Lincoln by vote of electors had adopted

amendments to its charter providing for the construction of a city auditorium at a designated location, authorizing a tax not to exceed $75,000 annually for a period of 10 years for street widening, purchase of site, erecting the building, and equipping and furnishing the proposed building; in pursuance of which the city issued $1,100,000 in general obligation bonds of which amount $715,000 in bonds were outstanding at the time of the commencement of the action; in further pursuance of which the site contemplated had been purchased for $46,750; in further pursuance of which street improvements at a cost of $270,250 had been made; in further pursuance of which $22,943.50 for architect's study, plans, and specifications had been expended; in further pursuance of which $2,000 as part payment for an ice rink had been spent; in further pursuance of which tax levies in varying amounts from 1940 to 1949 inclusive had been made for the retirement of the general obligation bonds; and in further pursuance of which the city was authorized to issue bonds in the additional amount of $1,500,000 without further consent of the voters.

This court in the former opinion held that there was a remedy in the following statement: "The conclusion arrived at, therefore, on the facts as set forth in the petition and under the noted exceptions to the rules that the courts will not in advance of passage or adoption of legislation enjoin or inquire into the validity or constitutionality thereof, is that a situation has been presented which calls for a judicial declaration that the holding of the contemplated election would be invalid, and that an injunction to restrain the holding of such election is proper."

It therefore becomes necessary to look elsewhere for authority for the determination of this question.

The authorities cited and the reasoning advanced by the defendants support a conclusion generally that that which may be put into a city charter by amendment

properly adopted may be in the same manner removed. We think the conclusion contended for in this respect by the defendants must be sustained.

Article XI, section 2, of the Constitution of Nebraska, authorizes the adoption of a charter for its own government by any city having a population in excess of 5,000 inhabitants. Article XI, section 4, of the Constitution, makes provision for amendments to the charter. The section contains no limitation as to the subject matter which shall be contained in an amendment. The section also provides for repeal. It provides that repeal shall be by electoral vote the same as amendment.

The people of the city of Lincoln in the adoption of their charter acted legislatively and an election the purpose of which is to determine whether or not there shall be an amendment thereof would be legislative action. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Noble v. City of Lincoln, *supra.*

"It is a general rule that the courts will not in advance of passage or adoption of legislation enjoin such legislation or inquire into the validity or constitutionality thereof." Noble v. City of Lincoln, *supra.*

Exceptions to this general rule have been noted in Noble v. City of Lincoln, *supra.*

We do not think the exceptions noted in that opinion may be said to have controlling significance here where the proposal is for the abandonment of the entire auditorium project by repeal of the amendments providing for it.

It is true that elements regarded as basic in the exceptions to the general rule noted therein may exist here but the opinion did not turn on basic elements contained in the noted exceptions. It turned upon alleged facts, which, if true, would cause irreparable loss and damage, not by an abandonment of the primary purpose but by changing an incident of that purpose.

Here on the other hand the aspect of the proposal is entire and is not limited to an incident, and the purpose

and consequences of the proposed repeal cannot be said factually or presumptively factually to be known. They can only be arrived at by conjecture and speculation.

Under these circumstances it appears that the general rule and not any exception should be controlling.

Under the general rule the courts may not enjoin the enactment of legislation validly presented at an election and may not encroach upon legislative processes and speculate as to whether or not the enactment will be passed, or if passed, what questions may arise in the future involving its validity. 28 Am. Jur., Injunctions, § 72, p. 267, § 176, p. 365, § 177, p. 366; Schroeder v. Zehrung, 108 Neb. 573, 188 N. W. 237; Goodland v. Zimmerman, 243 Wis. 459, 10 N. W. 2d 180; People ex rel. Fitnam v. City of Galesburg, 48 Ill. 485; People v. McWeeney, 259 Ill. 161, 102 N. E. 233, Ann. Cas. 1916B 34; Lamb v. B., C. R. & M. R. Co., 39 Iowa 333.

We hold therefore the duly constituted officers of the city of Lincoln may properly and legally submit, by proper petition, to the electors of the city the question of whether or not the amendments providing for the construction and location of a city auditorium shall be repealed.

We further hold that if the question shall be submitted on valid petition and that the proposition is carried by a sufficient vote that such vote would effect a repeal, and in that event the present duty to construct an auditorium would no longer exist.

Thus by reason of the judgment on the mandate the defendants are under an obligation to proceed with the construction of an auditorium. Also they are under a mandate imposed according to law by reason of the filing of the petitions for an election to submit to the people of the city of Lincoln the question of whether or not the obligation to build the auditorium shall be withdrawn.

If they are required to proceed at once, in reason and of

course, expense would be entailed. If on the holding of the election the voters shall validly withdraw the obligation to construct the auditorium, again in reason and of course, this expense would occasion a loss which could never be retrieved.

It would appear therefore that justice and equity and a due regard for the best interests involved should permit a further delay in the performance of the obligation of the city to build the auditorium sufficient to permit the holding of an election based on the petitions on file with the city. Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N. W. 619.

WENKE, J., concurs in this dissent.

CHARLES M. EVANS, APPELLANT, V. MARY MESSICK ET AL., APPELLEES.

63 N. W. 2d 491

Filed April 2, 1954. No. 33446.

1. **Trial.** A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Automobiles.** The driver of an automobile entering an intersection of two streets or highways is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger.
3. ———. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident.
4. ———. The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery.

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

E. H. Evans, for appellant.

Crosby & Crosby, for appellees.

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

MESSMORE, J.

This is an action at law brought by Charles M. Evans, plaintiff, in the district court for Lincoln County to recover property damage resulting from a collision between an automobile owned by him and being driven by his son Stanley Evans, and an automobile owned by Mary Messick and being driven by her husband John Messick, defendants. The collision occurred in a street intersection in the city of North Platte. At the conclusion of the plaintiff's evidence and at the conclusion of all of the evidence the defendants moved for a directed verdict and a dismissal of plaintiff's petition. The trial court overruled the motions for directed verdict but sustained the motion to dismiss the plaintiff's petition. At the conclusion of the defendants' evidence the trial court sustained the motion of the plaintiff to dismiss the cross-petitions of the defendants. From this order dismissing the plaintiff's petition, the plaintiff appeals. We refer to the parties as they were designated in the district court.

The pleadings of the parties may be summarized as follows. The plaintiff, in his petition, charged the defendant John Messick, the operator of Mary Messick's car, with negligence in the following respects: That the same was being driven at a high and excessive rate of speed in excess of the lawful speed limit and without regard to the traffic conditions existing at such time and place; that this driver did not maintain proper and sufficient lookout for existing traffic; that said reckless operation was condoned by the defendant owner of the automobile, and she failed to heed

conditions and to take necessary precautions to avoid the accident; and that by reason of the negligent and careless operation, the defendant's car did run into and upon and did collide with the car of the plaintiff and caused the total destruction of the plaintiff's automobile.

The defendants filed separate answers and cross-petitions. The answers were in effect general denials of the allegations of negligence pleaded in the plaintiff's petition, and alleged that the accident was caused by the negligence of the plaintiff's son. The cross-petitions of the defendants charged the plaintiff's son with negligence in failing to keep a proper lookout for other automobiles approaching the intersection; that he failed to give the right-of-way to this defendant's automobile which had entered the intersection before the plaintiff's automobile; that the plaintiff's son failed to keep plaintiff's automobile under control; and that the collision was caused solely and only by the carelessness and negligence of the plaintiff's son. Defendants prayed for damages.

The plaintiff's reply to the answers and cross-petitions of the defendants was in effect a general denial of the affirmative matter pleaded therein.

The record discloses that the plaintiff, at the time of the collision, was the owner of a 1950 Dodge Coronet four-door sedan which was kept and used for family purposes and will hereafter be referred to as the Dodge car; and that the plaintiff's son Stanley Evans was 17 years of age at the time of the accident, lived with his parents on a ranch 12 miles north of the city of North Platte, was licensed to drive an automobile, and had his father's consent to drive his automobile at the time the accident occurred. The defendant Mary Messick was the owner of a 1947 Chrysler Royal four-door sedan, hereafter referred to as the Chrysler car, which was used as a family car and at the time of the accident was operated by her husband John Messick.

The intersection here involved may be described as

follows: Tenth Street runs east and west in the city of North Platte and is paved with concrete for some distance. Dewey Street is a graveled street which runs north and south. The width of Tenth Street at the intersection involved is 36 feet, and the width of Dewey Street is 36 feet. The intersection is paved with cement. On the southeast corner of the intersection is a residence with a hedge 3½ or 4 feet in height which extends out to where the surveyed sidewalk would be located, to the east on the north side of the house and to the south on the west side of this corner of the intersection. There are also trees planted there. At the time of the accident the hedge and trees were leafed out. On the southwest corner of the intersection is a street light, and on the northwest corner of the intersection is a fire hydrant about 2½ or 3 feet in height. There are no stop signs at this intersection. The accident occurred on August 20, 1950, at approximately 9:30 p.m. The night was dark and clear.

Stanley Evans, the plaintiff's son, testified that he was familiar with the intersection, having driven in that vicinity on several occasions. On the night of the accident he had visited friends on East Tenth Street and was proceeding west on Tenth Street at a rate of speed of 25 miles an hour which he had maintained at all times. As he approached the intersection, he looked over the corner of the hedge south on Dewey Street to about the middle of the block. He could see car lights which to him seemed far enough away that he paid no further attention to this car. He thought he had plenty of time to proceed on across the intersection. He further testified in this respect that after he had looked over the corner of the hedge and seen the lights coming in the middle of the block south on Dewey Street, he thought no more about it and looked north and there was nothing coming from that direction. He did not look south again. He proceeded to cross the intersection and did not diminish his speed. After he saw the lights

of the Chrysler car he went about 40 feet before he came to the intersection. He did not deviate in any direction, but proceeded straight across the intersection. He had his car under control, and if he had had adequate warning, he could have stopped and avoided the accident. Under the circumstances, he could not have prevented the accident. He was using due care at all times. After having approached the intersection as above testified to, the next time the Chrysler car came to his attention, he heard brakes screeching. He slammed on his brakes and the two cars collided.

The evidence shows that the Chrysler car hit the Dodge car at the left front door, caved in the left front door, curled back the left front fender up to the bumper on the left side of the car, and shattered the windshield. The front end of the Chrysler car, the radiator, grille, and hood were caved in and the right front fender was damaged; that is, the whole front of the Chrysler car was damaged. Due to the impact, the Dodge car rolled over completely, going over the fire hydrant, and coming to a stop upon its wheels in the northwest corner of the intersection. It had been knocked in this direction about 49 feet.

Stanley Evans further testified that he was unable to compare the speed of the two cars, but believed that the Chrysler car was traveling faster than he was. The accident occurred a "split second" after he heard the screeching of the brakes.

The Chrysler car was occupied by John Messick who was driving, his wife Mary Messick who sat in the right front seat, Arleta Benham, Mary Messick's sister, who sat on the left side of the back seat, and her husband Dale Benham who sat on the right side of the back seat. This party was on its way to Stapleton to see Mary Messick's father who had suffered a heart attack.

John Messick testified that just prior to the time of the accident they were driving north on Dewey Street. When they came to Ninth Street they slowed down,

almost to a stop, to permit a car traveling on Ninth Street to pass in front of them. Then the speed of the Chrysler car was accelerated to 20 or 25 miles an hour between Ninth and Tenth Streets. As they approached the intersection there were no other vehicles in sight. He looked both ways and could not see any cars coming in either direction, and proceeded into the intersection. He heard his sister-in-law scream, glanced to the right, and saw the Dodge car approaching from the east. He thought the Chrysler car would be hit "square in the middle," but the Dodge car started swerving to the north and was in front of him at the time of the impact. He applied his brakes just after he entered the intersection. As he proceeded north on Dewey Street his vision was obstructed by the trees and hedge on the east side of Dewey Street. He was possibly 10 feet from this hedge, but could not see through it. However, he slowed up enough after passing the hedge so that he could see. He had his foot off the accelerator and did not see the Dodge car. He did not put his foot on the brake while the Chrysler was on the gravel. After the impact the Chrysler turned around in its tracks and headed south, then to the west, and back south. The impact caused the Chrysler car to pull around from the original line of its direction and turn to where it headed back in a southwesterly direction and stop 5 or 6 feet west of the point of impact.

Mary Ellen Messick testified that at the intersection her husband slowed down, then proceeded on to cross the intersection; that her sister screamed; and that the driver of the Chrysler put his foot on the brake and that slowed the car down. At that time they had passed the center of the intersection. When she saw the lights of the Dodge car she believed it was going to hit the Chrysler on the side, and the first thing she knew the Dodge car was in front of the Chrysler. She was thrown out of the right front door onto the pavement a distance of 7 or 8 feet, and received personal injuries.

Arleta Benham testified that she first saw the Dodge car lights after the Chrysler car had cleared the hedge and was in the vicinity where the sidewalk crosses Dewey Street. She screamed, and at that time the Dodge car was about one or two car lengths back of the sidewalk.

Dale Benham testified that he saw a car approaching from the east. It was between the sidewalk and the pavement of the intersection, and was at an angle and approximately in front of the second house on the north side of Tenth Street.

There is no dispute that both of the motorists were traveling on their own right side of the street.

The police captain and another police officer arrived at the scene of the accident shortly before 10 p.m. The police captain testified that when they arrived the Dodge car was 11 feet west of the fire hydrant on the curb in the northwest corner of the intersection, headed southwest at an angle, a little more south than west. Stanley Evans was standing by the Dodge car and the defendants Messick were out of their car. John Messick explained that they were on their way to Stapleton; that his wife's father had suffered a heart attack; and that they were hurrying around and trying to get there. Mary Messick said they "were hurrying too fast." This part of this witness's testimony is denied by John Messick. The Chrysler car was toward the southwest corner of the intersection, headed southwest. The officers determined where the cars came together by skid marks which they measured, and fixed the point of impact in the northeast part of the intersection, north of the center line of Tenth Street. That is, by drawing a line through the center of Dewey Street at the intersection, the point of impact would be 5 or 6 feet east of the center of the intersection. Glass was broken out of the Dodge and scattered across the pavement. The rate of speed in this residential district is 25 miles an hour. The officers traced the skid marks of the Chrysler

car from the point of impact south 49 feet. These skid marks showed that the brakes were applied 10 or 11 feet off the paved portion of the intersection on Dewey Street which is graveled. There were skid marks made by the Dodge car about 7 feet prior to the point of impact. Neither the Dodge car nor the Chrysler car had turned one way or the other at the time of the impact. The hedge at the intersection would obstruct the vision of a driver proceeding north on Dewey Street as he would look east on Tenth Street, and this would be true of a driver proceeding west on Tenth Street approaching the intersection and looking in a southerly direction. The other police officer corroborated this testimony.

The plaintiff assigns as error that the trial court erred in dismissing plaintiff's action upon the motion of the defendants at the close of the evidence; and that the trial court erred in overruling plaintiff's motion for a new trial.

In determining this appeal we bear in mind the following rule: A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. See Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107.

The law provides 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 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. See, Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561; Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67; Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175.

The law also provides that 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 we 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. See, Gorman v. Dalgas, *supra*; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Becks v. Schuster, *supra.*

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 or, as in the instant case, to dismiss the plaintiff's petition. See, Pahl v. Sprague, *supra;* Gorman v. Dalgas, *supra.*

It is true that the plaintiff's car, being on the right of the defendant's car, was in the favored position and had the right-of-way, other things being equal, but that did not do away with the duty of its driver to exercise ordinary care to avoid an accident. See Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585. See, also, Klement v. Lindell, 139 Neb. 540, 298 N. W. 137; Andrews v. Clapper, 133 Neb. 110, 274 N. W. 209; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

We refer to the following facts which indicate the reason for the trial court dismissing the plaintiff's case. The plaintiff's son testified: "I was going east on 10th

Street—west on 10th Street, and I come to the intersection. There is a hedge on the southeast corner. And I could see over the hedge—the corner of the hedge, to about the middle of the block, and I could see car lights and they seemed far enough away, I never paid any more attention, because I thought I had time to proceed on across the intersection and have plenty of time." The plaintiff's car was traveling at a rate of speed at that time of 25 miles an hour. The Chrysler car, when plaintiff's son first saw it, was approximately in the center of the block south of the intersection, proceeding north at a rate of speed of from 20 to 25 miles an hour. The plaintiff's car then traveled a distance of 40 feet to reach the intersection after the one and only time the plaintiff's son looked and saw the Chrysler car. He looked to the south just the one time. After that he looked to the north. A little later than the time he looked to the north the collision occurred. He testified that he was familiar with the intersection and had traveled over it on several occasions. This being true, he must have been acquainted with the fact that the hedge would obstruct his vision to the south of the intersection and would also obstruct the vision of a driver proceeding north on Dewey Street toward the intersection and looking toward the east on Tenth Street.

We believe the case of Nelson v. Plautz, 130 Neb. 641, 265 N. W. 885, is applicable in some respects to the instant case. In the cited case the collision occurred in the intersection of a north and south highway known as the Emerald highway, and a road running northwest and southeast called the Malcolm highway. Neither highway was protected by stop signs. About 100 feet south of the intersection was a railroad track. When the plaintiff's car was on the railroad track the driver looked both ways on the Malcolm highway and saw no car approaching. He could see for a quarter of a mile to the northwest. After he left the railroad track his view of the Malcolm highway was obstructed by tall weeds

for 20 or 30 feet, but when he reached a point 50 feet from the railroad track he could have seen up and down the Malcolm highway. But he never looked again after leaving the railroad track. This court, in considering the facts and circumstances heretofore related, held: "The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is, in the circumstances of this case, more than slight negligence, as a matter of law, and defeats a recovery."

This court has held that the failure of the driver of an automobile, upon approaching an intersection, to look for vehicles approaching the same intersection, where by looking, a collision could be avoided, constitutes negligence more than slight and operates to defeat a recovery. See, Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790; Whitaker v. Keogh, *supra.*

We believe, in the circumstances of this case, the negligence of the plaintiff's son was more than slight as a matter of law, and defeats recovery in behalf of the plaintiff.

For the reasons given herein, we conclude that the trial court did not err as contended for by the plaintiff, and the judgment of the trial court should be affirmed.

AFFIRMED.

HERBERT C. BALLMER ET AL., APPELLANTS, V. ARCHIE F. SMITH, APPELLEE, VINAL MCVICKER ET AL., INTERVENERS-APPELLANTS, EDWIN OWENS ET AL., INTERVENERS-APPELLEES.

63 N. W. 2d 862

Filed April 2, 1954. No. 33461.

1. **Waters.** A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel upon

his land, providing he does so within a reasonable time after the new channel formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part.

2. ———. The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.
3. ———. A riparian owner may not dam, retard, or bank against the floodwaters of a running stream to the injury of lower proprietors.
4. **Trial: Appeal and Error.** A judgment of an equity court, where the court is the trier of facts, unsupported by any competent evidence, cannot stand.
5. **Damages.** The general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages, such as the loss of speculative profits, will not be allowed.
6. **Crops: Damages.** In case a crop is matured the value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market.

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

Bannister & Deines, for appellants.

E. A. Cook, Jr., and *W. A. Stewart,* for appellees.

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

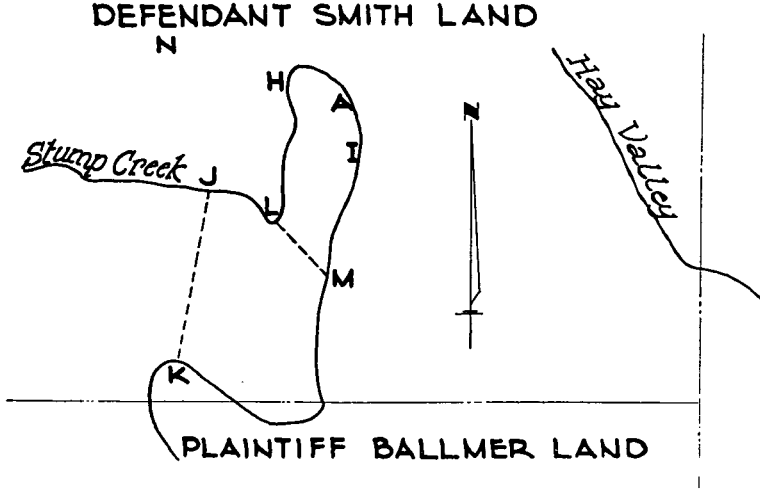
SIMMONS, C. J.

This is an action in equity to enjoin the defendant from making changes in the course and elevation of the banks of a watercourse known as Stump Creek. Plaintiffs secured a restraining order and temporary injunction. Defendant denied the right of plaintiffs to relief and sought a decree authorizing the restoration of the natural ridge of Stump Creek, and that he be authorized

to straighten Stump Creek by making cuts on his own land. He sought damages for loss of crops during the pendency of the action because of the temporary injunction. Before trial landowners along Stump Creek and others along a watercourse known as Hay Valley intervened, some to sustain the position of the plaintiffs and some to sustain the position of the defendant. The litigation remained essentially a contest between the plaintiffs and defendant. The trial court heard the evidence at length and entered a decree generally favorable to the defendant, dissolved the injunction, and allowed damages. Plaintiffs superseded the judgment and appeal here.

The plaintiffs contend that the trial court, in part, made findings of fact and entered a decree not sustained either by the pleadings or the evidence. There is merit in the contention. The matter is here for trial de novo. We so try it, make findings of fact, and direct a decree.

For a clearer and briefer exposition of the facts we include herein a chart showing approximately the streams and cause of this controversy.



The area that need be shown lies all in a quarter section of land owned by defendant Smith. Plaintiffs Ballmers' land lies immediately to the south of defendant's land and plaintiffs Yorks' land lies to the south and east of Ballmers' land and in the Stump Creek valley.

Stump Creek is a watercourse arising several miles to the north, meandering across defendant's land in the manner shown, then entering plaintiffs Ballmers' land, and eventually reaching the North Platte River. The fork of Hay Valley shown on the chart arises on defendant's land. Hay Valley is below the level of Stump Creek. There is a natural bank around the outer rim of Stump Creek. Its lowest point is about at point A on the chart. Several years ago the defendant, or his predecessor in title, built an irrigation lateral running from high ground at the point N following around the outer bank of Stump Creek at H to A to I and then generally toward and beyond point M. This was used to irrigate the land in the southeast corner of defendant's land. There is some contention here that that ditch was on top of the bank. However, the preponderance of the evidence, including an aerial photograph and the testimony of witnesses as to the uneven nature of the top of the bank, sustains a finding that this ditch was below or on the outer side of the bank of Stump Creek.

The evidence also is definite that during the years since 1915, at times of great floods Stump Creek overflowed its banks and in a flood plain the water found its way into Hay Valley. At normal times water remained within Stump Creek. All parties agree that in 1947 and 1948, flood waters ran over the bank at and on either side of A and down into Hay Valley. In 1947, it washed out the irrigation lateral at point A. It was repaired. The lateral was again washed out at point A in 1948, and was not repaired. It does not appear on an air photograph taken in 1951.

Starting in a depression, evidently caused by a cow-

path at point A, the bank there was washed some 3 feet or more wide and to some depth by the 1947 and 1948 floods. If not repaired, it will permit high waters to flow from Stump Creek to Hay Valley and it may be reasonably anticipated eventually establish a permanent channel or cutoff at that point. From point A the flood waters overflowed toward either side distances of from 50 to 100 feet. There is evidence that the bank generally was covered with a natural grass sod. It is washed out at A. There are depressions in the bank at either side of A, over which water ran. There is no satisfactory evidence that the natural level of the banks at those points was materially lowered.

There is evidence that at different times the parties undertook to solve the problems presented by this stream at this point. It appears that plaintiffs were at all times willing that defendant fill the wash at the cowpath so as to bring it to the level of the natural bank on either side. At the trial they affirmatively agreed that such could be done. Defendant in August 1951, desired to rebuild his lateral. There is no showing of a desire to rebuild on its old line. Rather his testimony shows that he desired to fill the wash at A and the other depressions in the bank so as to materially raise the bank level at the low points and run his irrigation lateral on the higher elevation, and thereby irrigate more land in the southeast corner of his land. A declared intention to do that in part produced this litigation.

In Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603, we restated the rules applicable to this situation. They are:

" 'A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel upon his land, providing he does so within a reasonable time after the new channel formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part, * * *.' "

"What is said of restoring a stream to its former channel would likewise be true of keeping the stream in its original channel. But this right is subject to the following: ' "The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another." * * *.' "

The trial court decreed that the "ridge between Stump Creek and Hay Valley (could be) restored to the height as it existed prior to the 1947 and 1948 floods." Plaintiffs assert that this is too indefinite to be enforced. We find no contention in this evidence that the natural bank of Stump Creek was lowered by floods prior to 1947 and 1948. There is evidence that it was built up by earlier floods.

The evidence is that the natural grass sod banks remain intact within a few feet on either side of the wash at point A, commonly referred to in the evidence as the wash at the cowpath.

As to this feature of the case we hold that the trial court should enter a decree granting to the defendant, and his sustaining interveners, permission to fill that wash to a level with the natural grass top in close proximity on either side, and further enjoining the defendant and interveners from in any other wise raising the levels of the top of the bank of Stump Creek. The area that may be filled under the provisions here stated is the wash in the bank of Stump Creek shown by picture Exhibit 5.

The location of the defendant's irrigation lateral and the rebuilding of it is involved in the evidence. We see no reason why defendant should not be permitted to build a lateral along the outer bank of Stump Creek provided that the top of the banks of the lateral shall in

no event be higher than the bank of Stump Creek. Stated otherwise the banks of the lateral shall in nowise obstruct or retard flood waters overflowing the bank of Stump Creek.

Defendant was preparing to implement another change in 1951, which also precipitated this litigation. He proposed to cut a channel from the point L to M in Stump Creek, fill up the old channel northeast of those points, and build a dike and lateral thereon so as to carry irrigation water from the point N across to high land at point M and beyond. The evidence is that such construction would raise the level of the bank of Stump Creek from 2 to 4 feet, and thus materially prevent water flowing into Hay Valley at flood times. The evidence also is that such a construction would materially increase the danger of damage to the plaintiffs and interveners in the lower Stump Creek watercourse area. The trial court by silence denied that request. Defendant does not here seek to have it granted.

The rule is: "A riparian owner may not dam, retard, or bank against the floodwaters of a running stream to the injury of lower proprietors." Beetison v. Ballou, 153 Neb. 360, 44 N. W. 2d 721.

Having by silence denied the right to make the construction L to M the trial court found that the defendant should be permitted to make a change in the channel of Stump Creek from J to K; "That the irrigation lateral from the north to the south and southeast should be permitted to follow the new construction at the same approximate level as the old lateral, and that the construction of such ditch would not interfere with the water flowing in times of excessive rains from Stump Creek to the Hay Valley water course"; and "That the plaintiffs will not be materially damaged by any of such construction." It decreed that defendant could staighten Stump Creek at the point indicated and "may construct his irrigation lateral no higher than the former lateral." There is no evidence in this record that the defendant

intended or desired to build a cutoff along the line J to K; no evidence that a lateral at that location could or would be of benefit to him; no evidence as to the effect of such a construction on the flood waters of Stump Creek; and no evidence of what effect it would have on plaintiffs and their sustaining interveners. In short there is no evidence to sustain the findings so made.

There is no way for these plaintiffs to protect themselves from the effect of this decree. Obviously it must be set aside. The rule is that a judgment of an equity court, where the court is the trier of facts, unsupported by any competent evidence, cannot stand. Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350.

The trial court allowed damages to the defendant and against the plaintiffs in the sum of $597. The temporary injunction enjoined defendant from changing the elevations of the channels and banks of Stump Creek and from erecting any dam, embankment, or lateral above the bank with the exception that defendant was not enjoined from constructing a flume for the purpose of irrigating his corn crop. Defendant sought a recovery of damages alleging that because of the temporary injunction he was prevented from repairing his irrigation lateral. He claimed damages for loss of crops in 1951 and 1952.

The question of liability of the plaintiffs on the bond is not raised here and is not determined. Plaintiffs challenge the sufficiency of the evidence to sustain the judgment.

The evidence stands without dispute that following the 1948 flood, the lateral was not repaired and no irrigation had on the involved area thereafter, although there was no injunction in the matter until August 1951. Defendant testified that to build a flume, which the temporary injunction permitted, would have cost $300 to $400. He did not build it.

Defendant testified that there were 9 to 10 acres that he could not irrigate. He testified as to no measure-

ments but rather to what he thought and 9 acres was no more accurate than 10. He testified as to a "renter" but made no statement as to the renter's interest in the crop. He clearly sought recovery for the entire crop including the renter's undisclosed interest. He testified that the corn in 1951 was not as good quality as that of a later year. It was sold before Christmas in 1951, apparently at market price. He did not testify as to the price received but rather as to the customary price for corn which varied from $1.30 to $1.35 per bushel "in the fall of 1951." He testified that the corn on the land he did not irrigate produced "about" 40 bushels per acre and "around" 80 bushels per acre on his irrigated land. When asked if he picked rows separately on the irrigated and nonirrigated land so as to test the production, he replied that he did not. He was asked if he had any way of computing the difference in production, and stated that "it wouldn't have been worth the difference to have picked it separately." As to his 1952 alleged loss he testified that he wanted to put the land in alfalfa, but wanted to level it first and there was no use in leveling "if Stump Ditch was going to take its course out that way"; that he did not want to put it in alfalfa without watering it or leveling over the rough spots that had been made by the floods, and so he summer-fallowed it; and that his loss could not be determined in dollars and cents. He then, stating a "general opinion on irrigated land," fixed the loss at $40 per acre on "Nine or ten" acres.

We recently in Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350, restated the rules as to proof required in cases of this kind. Two rules therein are applicable:

" 'The general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages, such as the loss of speculative profits, will not be allowed.' "

" 'In case the crop is matured the value is usually proved by showing the market value, less the necessary

cost of harvesting, threshing, and transporting to market.' "

Any judgment for damages under this evidence would be speculative, conjectural, and uncertain.

The judgment of the trial court is reversed and set aside. Defendant's prayer for damages is denied. The cause is remanded with directions to enter a decree permitting defendant, and the sustaining interveners, to fill the washout as defined and limited hereinbefore, and enjoining any raising of the banks of Stump Creek as hereinbefore set out. All costs are taxed to the defendant Smith.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPRAISEMENT OF SECTION SIXTEEN (16), TOWNSHIP TWENTY-SIX (26) NORTH, RANGE FOURTEEN (14), HOLT COUNTY, NEBRASKA. EDGAR JUNGMAN ET AL., APPELLANTS, V. ELMER COOLIDGE ET AL., APPELLEES.

63 N. W. 2d 519

Filed April 2, 1954. No. 33501.

Appeal and Error. When a case is remanded by this court to the district court with directions for its disposition, the district court must obey and perform the mandate of this court.

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

Francis D. Lee and *Van Pelt, Marti & O'Gara,* for appellants.

Julius D. Cronin, for appellees.

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

SIMMONS, C. J.

This is the second appeal of this cause here. See

Jungman v. Coolidge, 157 Neb. 122, 58 N. W. 2d 828. We there held that the district court and this court were without jurisdiction to hear and determine the matter there presented.

Judgment was entered reversing the judgment of the district court and remanding the cause to the district court with directions to dismiss the proceedings. Mandate issued accordingly. The mandate was received and filed in the district court.

The trial court considered the mandate and found that the appeal should be dismissed, and so ordered, taxing costs to the appellants, and ordered execution upon demand of the appellees.

The trial court further found that it was without jurisdiction to hear the cause; that its former judgment was void; that the award made by the appraisers was valid; and ordered the award in the sum of $2,996 paid by the county treasurer of Holt County to the defendants Coolidge.

The trial court further found that the appellants Jungman had instructed the county treasurer not to pay said award to the Coolidges pending the appeal; that the Coolidges had offered to accept the same; that the Coolidges were not responsible for the delay in the payment; and that they were entitled to interest thereon from and after the date of its payment to the county treasurer. It entered judgment thereon for interest against the Jungmans and awarded execution on demand of the Coolidges.

Motion was made to set aside the judgment on the mandate and denied.

Appellants appeal assigning error in that the judgment on the mandate is contrary to the mandate.

The merit of the assignment is patent.

The rule is: "When a case is remanded by this court to the district court with directions for its disposition, the district court must obey and perform the

mandate of this court." Rhoades v. State Real Estate Commission, 153 Neb. 625, 45 N. W. 2d 628.

The judgment of the trial court is reversed and the cause is remanded with directions to comply with the mandate of the court in this cause dated June 26, 1953.

REVERSED AND REMANDED WITH DIRECTIONS.

LESLIE FORREST, SPECIAL ADMINISTRATOR OF THE ESTATE OF LESLIE FORREST, JR., DECEASED, APPELLEE, V. PAUL MASTERS, APPELLANT.

63 N. W. 2d 777

Filed April 9, 1954. No. 33458.

1. **Municipal Corporations: Highways.** In the absence of restrictive applicable statutes or ordinances, a pedestrian has a right to walk longitudinally in a street or highway, and is not as a matter of law guilty of contributory negligence in doing so.
2. **Trial: Appeal and Error.** Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained.
3. **Damages: New Trial.** When it appears in an action for personal injuries that a verdict is apparently the result of passion and prejudice and is inadequate, such verdict will be set aside and a new trial will be granted.
4. **Parent and Child: Damages.** 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.
5. **Damages.** Contributions which are speculative or conjectural may not be properly included in fixing the amount of such damage.

APPEAL from the district court for Washington County: WILLIAM A. DAY, JUDGE. *Reversed and remanded with directions.*

Fraser, Connolly, Crofoot & Wenstrand, for appellant.

Raymond T. Coffey and *George B. Boland,* for appellee.

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

SIMMONS, C. J.

This is an action for damages arising from an automobile accident resulting in the death of plaintiff's intestate. Issues were made and trial had. Defendant requested an instructed verdict which was denied. The jury returned a verdict for plaintiff. Defendant moved for judgment notwithstanding the verdict. The motion was denied. Plaintiff moved for a new trial. It was granted. Defendant appeals assigning error as to both rulings. We sustain the ruling on the motion for a directed verdict, reverse the ruling granting a new trial, and remand the cause with directions.

Neither party assigns error in the instructions, save as to the one for an instructed verdict which was denied. Neither party assigns error in the admission of evidence.

We state the facts necessary to determine the assigned and argued errors.

Deceased was killed by being struck by defendant's automobile. The accident happened shortly after midnight on August 10, 1952, on U. S. Highway No. 30 near Kennard, Nebraska. The highway at the point of the accident is level and without material curves. It runs in what is called an east-and-west direction. The highway is paved with concrete, 20 feet in width, with shoulders 8 feet in width on either side. The pavement was dry, and the weather was clear.

Defendant's car was driven by his 15-year-old son in an easterly direction toward a filling station and restaurant, on the south side of the road, which was open and lighted. The speed of defendant's car was testified to variously as from 45 to 75 miles per hour at the time of the accident.

Plaintiff's intestate, 18 years old, hereinafter called deceased, was one of four boys who were pedestrians going east along the south or right-hand side of the highway. Plaintiff's evidence is that the boys were walking behind each other, with about 50 feet between them, the deceased being third from the front. Defendant's evidence is that deceased and one other boy appeared to be together at the time of the accident.

Both parties agree that there was a truck, consisting of a tractor and trailer unit, going west on its own side of the pavement about the time of the accident. Plaintiff's witnesses put the truck past the point of the accident at the time it happened. Defendant's witnesses and particularly defendant's driver put the passing of the truck and defendant's car as coincident with the accident.

All parties agree that the deceased was hit by the right front of defendant's car, the point of impact being on the right-front fender where the headlight was located. The headlight was broken out. The glass from the headlight was found scattered on the shoulder. None was on the pavement. One of defendant's witnesses put it off the pavement 2 feet.

All witnesses agree that the deceased was thrown through the air by the impact a distance of 50 feet or more and came to rest several feet off the pavement on the right side.

All parties agree that deceased was wearing dark clothing. It is clearly inferable from the evidence that deceased was struck on the right hip.

To sustain his contention for an instructed verdict defendant's first position is that deceased was guilty of negligence as a matter of law barring recovery because he was walking down the road with, and not against, the movement of traffic. As to that the rule is: "* * * in the absence of restrictive applicable statutes or ordinances, a pedestrian has a right to walk longitudinally in a street or highway, and is not as a matter

of law guilty of contributory negligence in doing so." Floyd v. Edwards, 150 Neb. 41, 33 N. W. 2d 555, and cases there cited.

The trial court submitted this cause to the jury under an instruction containing that rule of law. The instruction is not assigned as error here. The rule is: "Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained." Webber v. City of Scottsbluff, 150 Neb. 446, 35 N. W. 2d 110.

Defendant next contends that deceased stepped out in front of the car and was killed as a result solely of his own negligence. Plaintiff's evidence is that in the moment just before the impact deceased was walking east on the shoulder and not on the pavement. Eye witnesses put him there.

Defendant's evidence, by the driver of the car, is that he did not see deceased until a few feet before he was hit; that deceased "popped out" a couple of feet in front of him; that he turned the car 3 or 4 feet to the left to avoid hitting him and could not do so; and that deceased was about in the middle of the road when he was hit. An eye witness, testifying for defendant, said that deceased took "Approximately three side steps" out into the path of the defendant's car "four to five feet out in front of the car." Bearing in mind that defendant's witnesses state the defendant's car was 7½ feet wide; that they put the truck in the west-bound lane of travel at the time of the accident; that defendant does not contend his car was to the left of the east-bound lane of travel; and that that lane is 10 feet wide, it may well be that the jury also concluded that defendant's witnesses put deceased off the pavement and on the shoulder at the moment before the impact. Accepting defendant's calculations of width of car and distance turned to the left, the jury could have concluded that

defendant's car was over the right edge of the pavement before the impact.

Defendant testified that he saw and passed one of the boys walking "a little bit on the shoulder." He never saw the deceased, walking in the same position according to plaintiff's witnesses, until he "popped out" in front of him.

The question of fact would then be did the deceased step out 4 or 5 feet (three side steps) into the immediate front and path of a lighted automobile or was he run down and killed when he was walking along the shoulder of the highway? It is not difficult to understand reasons which the jury may have had for rejecting defendant's evidence. That they did reject it is apparent from the verdict. The evidence is sufficient to submit that question to the jury.

It follows that defendant's motion for a directed verdict and judgment notwithstanding the verdict was properly denied.

The next question is that of whether or not the trial court erred in granting a new trial. The parties here reduce that question to one of whether or not the verdict was adequate under the evidence. See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

The jury awarded plaintiff $750 damages. Plaintiff relies on the rule stated in Mares v. Chaloupka, 110 Neb. 199, 192 N. W. 397, which is: "When it appears in an action for personal injuries that a verdict is apparently the result of passion and prejudice and is inadequate, such verdict will be set aside and a new trial will be granted."

Plaintiff sought recovery of damages on two elements, that is, medical treatment and funeral expenses and loss of regular contributions to the care, support, and maintenance of his father and mother who were his sole and only heirs at law and next of kin.

The plaintiff pleaded $20 for medical expenses, $10

for hospital expenses, and $875 for funeral expenses. He offered bills showing that the total of these items was $890.50. They were received in evidence without objection. We find no evidence that the amounts charged were reasonable. There is mention of that made in the briefs. However, the trial court instructed the jury that in arriving at the amount of damages, they could take into consideration "the medical, hospital and burial expense." At another place the court instructed that they could consider the "reasonable cost of the doctor bills, the hospital expense and burial expenses." Defendant does not assign error on that ground, but rather argues that the jury applied the comparative negligence instruction, which was given, in arriving at its result.

The basic question is whether or not a new trial should be granted for failure of the jury to award substantial damages for loss of contributions for care, support, and maintenance. In that connection the court instructed the jury that they could allow such sum as they found "the deceased might reasonably have been expected to contribute to his parents during his lifetime. * * * in excess of the amount which they would have expended for his maintenance and support * * *."

The rules are: "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.

"Contributions which are speculative or conjectural may not be properly included in fixing the amount of such damage." Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544.

The evidence is that deceased was gainfully employed for periods of several months prior to his death. He made his home with his parents. It is inferable from

the evidence that he controlled his wages and money. He owned his own car. In answer to a question as to what deceased did by way of contributing to her support his mother answered, "he just gave us a certain amount each week from his check. * * * Ten, sometimes twenty a week."

In answer to a similar question the father testified that: "On many occasions he turned in half or maybe two-thirds of his pay. * * * a time or two * * * the full amount * * *. But ordinarily he only paid ten to twenty dollars a week board to his mother"; that that was "the general arrangement"; and that there "was no definite, fixed amount."

The jury might well have concluded from this evidence that deceased's position in the home, so far as finances were concerned, was that of dealing with his parents on a debit and credit relationship and paying for that which he received as board and room. His contributions otherwise were speculative, indefinite, and conjectural.

As we said in Dorsey v. Yost, *supra,* the alleged inadequacy of the verdict does not have merit as a basis for a new trial. The verdict of the jury can be justified under the comparative negligence statute.

The judgment of the district court is reversed and the cause is remanded with directions to enter judgment on the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

JOEL ABRAMS, APPELLEE, V. DELWYN B. LANGE, APPELLANT, IMPLEADED WITH CALVIN HAVORKA, DOING BUSINESS AS HAVORKA MOTOR COMPANY, APPELLEE.

63 N. W. 2d 781

Filed April 9, 1954. No. 33466.

1. **Trial.** A verdict of a jury will not be vacated on the ground of

irregularity if a construction is possible which will make it effective rather than void.

2. ———. A verdict will be declared void for uncertainty only where it is so uncertain that it cannot be clearly ascertained what, if any, issues were passed upon by the jury.
3. ———. A verdict must conform to the pleadings with respect to the names and descriptions of the parties and must be sufficiently definite to make certain the person or persons against whom it is rendered.
4. **Trial: Appeal and Error.** If a verdict is sufficiently clear to be understood and as understood disposes of a plaintiff's cause of action as to less than all defendants in a case where the plaintiff may maintain action against one or all, the verdict will be upheld.
5. **Trial.** The verdict of a jury in favor of one of two or more defendants is not a verdict in favor of the other defendant or defendants, but as to him or them is merely a failure of the jury to find on the issues.

APPEAL from the district court for Cedar County: SIDNEY T. FRUM, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Deutsch & Jewell, for appellant.

Mark J. Ryan and *Clem & Gasser,* for appellee.

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

YEAGER, J.

This is an action for damages by Joel Abrams, plaintiff, against Delwyn B. Lange and Calvin Havorka, doing business as Havorka Motor Company, defendants. In the action the defendant Lange filed a cross-petition in which he sought to recover damages from the plaintiff and from the defendant Havorka.

There was a trial to a jury at the conclusion of which a verdict was returned as follows: "We, the Jury duly impanelled and sworn in the above entitled cause do find for the defendant Delwyn B. Lange on his cross-petition and against the plaintiff thereon and do fix the amount of defendant Delwyn B. Lange's recovery on

his cross-petition against the plaintiff at the sum of $none, and do find against the defendant Delwyn B. Lange and in favor of defendant Calvin Havorka on defendant Delwyn B. Lange's cross-petition."

The court made a finding as to the meaning of the verdict and entered judgment on the verdict accordingly.

The finding is that the verdict was a general one in favor of the defendants.

The judgment was that the plaintiff's petition be held for naught and that the cross-petition of the defendant Lange be held for naught.

The plaintiff duly filed a motion for new trial which was sustained. From the order sustaining the motion for new trial the defendant Lange has appealed. The defendant Havorka has not appealed. The parties will be referred to for convenience by their respective names.

The basis of the order vacating the verdict and judgment and granting a new trial does not appear but it is reasonable to assume that it was that the verdict was confusing and in terms did not fully dispose of all of the issues presented for determination.

On its face the verdict effectually disposes of Abrams' cause of action against Lange, although not in specific terms. It does so by the finding in favor of Lange and against plaintiff on Lange's cross-petition. The verdict also disposes of Lange's cross-action against Havorka but it does not dispose of Abrams' cause of action against Havorka.

Havorka does not here complain of the action of the court in setting aside the verdict, therefore it follows that no matter what happens herein as to the verdict Abrams is entitled to a new trial as to him.

The primary question for determination here is that of whether or not the verdict is so uncertain and indefinite as to leave the meaning of the verdict in doubt as to the portion other than that dealing with the cause of action of Abrams against Havorka.

There are other grounds on which Abrams contends

he was entitled to a new trial but from an examination of the record they are found to be without merit.

Without summarizing, it may well be said that there was sufficient evidence to sustain a verdict in favor of Lange on Abrams' cause of action, and for the purposes of this appeal that is the only evidentiary question in which Abrams has an interest.

There is a general and collective complaint that the verdict is contrary to the instructions; that the instructions on the burden of proof are confusing; that the court failed to instruct adequately on concurrent negligence; and that the court gave repetitious instructions on the absence of permanent injury. None of these assignments has substantial merit.

Another assignment is that the court erred in submitting the question of contributory negligence on the part of Abrams. This is without merit. There was ample evidence upon which to submit this question to the jury.

Another is that the court erred in submitting the question of Lange's counter-claim against Havorka to the jury. This is also without merit. The question was properly submissible on the evidence of the parties adduced on the trial.

Returning to the question of the character of the verdict this jurisdiction has no clear precedents leading to an appropriate determination.

As a general rule under precedents of other jurisdictions a verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void. It will be declared void only where it is so uncertain that it cannot be clearly ascertained what, if any, issues were passed upon by the jury. 64 C. J., Trial, § 874, p. 1065. It must conform to the pleadings with respect to the names and descriptions of the parties and must be sufficiently definite to make certain the person or persons against whom it is rendered. 64 C. J., Trial, § 877, p. 1070.

Under these rules it is not essential to the validity of a verdict in an action against more than one defendant that the verdict shall dispose of plaintiff's cause of action as to all of the defendants. If it is sufficiently clear to be understood and as understood disposes of a plaintiff's cause of action as to less than all defendants in a case where the plaintiff may maintain action against one or all, the verdict will be upheld.

In Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948, it was said: "It has been held in this state that a verdict of the jury against one of two defendants is not a verdict in favor of the other defendant * * *, but as to him is merely a failure of the jury to find upon the issues." This decision was approved by reference in Bosse v. Marye, 80 Cal. App. 109, 250 P. 693.

The same principle was announced in Melzner v. Raven Copper Co., 47 Mont. 351, 132 P. 552; Dunbaden v. Castles Ice Cream Co., 103 N. J. Law 427, 135 A. 886; and Inter State Motor Freight System v. Henry, 111 Ind. App. 179, 38 N. E. 2d 909.

The verdict, in the light of these principles, cannot be said to be irregular. To the extent that it reaches in the disposition of the issues and the parties it is reasonably clear and comprehensible. The disposition as to the parties named therein is full and complete and it is responsive to the issues as defined by the instructions which have already been approved herein. The state of the record at the time the verdict was returned left the action of Abrams against Havorka without disposition.

Thus prior to the entry of judgment on the verdict Abrams was left with a cause of action against Havorka. By the judgment which was rendered on the verdict the cause of action against Havorka was taken away.

By the order granting a new trial this right to prosecute his action against Havorka was restored as well as the right to try his case again against Lange.

In the light of what has been said the trial court cor-

rectly granted a new trial as to Havorka. We think however that the court erred when it granted a new trial to any other party. To the extent that the order granting a new trial goes beyond the grant as against Havorka it appears to run contrary to the rule as announced in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, as follows: "Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

Within the meaning of this pronouncement Lange is entitled to the verdict which was returned in his favor.

That part of the order sustaining the motion for new trial of Abrams' action against Lange and of the cross-action of Lange against Abrams and Havorka is erroneous and should be overruled. The portion which grants to Abrams a new trial against Havorka is correct and should be affirmed.

The judgment is affirmed in part and reversed in part, and the cause is remanded with directions to render judgment in accordance herewith.

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

THE VILLAGE OF NIOBRARA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE, V. KVIDA A. TICHY ET AL., APPELLANTS.

63 N. W. 2d 867

Filed April 9, 1954. No. 33467.

1. **Municipal Corporations.** The fixing of boundaries of a municipal corporation is a legislative function.
2. **Courts: Municipal Corporations.** The authority of the court in proceedings for the annexation of territory to a municipality is restricted to a consideration and determination of whether conditions exist which justify the annexation.

3. **Municipal Corporations.** The power of a village to enlarge its corporate area by virtue of section 17-407, R. S. 1943, is limited to annexing contiguous territory.
4. ———. The terms contiguous territory and adjacent territory are used synonymously and interchangeably in the statute on the subject of annexation of territory to the corporate area of a village.
5. ———. Territory sought to be annexed to a village by virtue of section 17-407, R. S. 1943, is contiguous to it if a substantial part of the boundary of the territory is coexistent with a part of the boundary of the village.
6. ———. The requirement of continuity of territory in this regard is mandatory and a municipality seeking to have annexation of territory to its corporate area must allege and establish it.
7. ———. A village is not authorized either to consent to annexation of territory platted by its owner that is not contiguous to the village or to attempt to take the territory into the village as a part of its corporate area by ordinance.
8. ———. A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional provision or legislative enactment.
9. ———. Power delegated by the Legislature to a municipal corporation to extend its boundaries by annexing territory must be exercised in strict accord with the statute conferring it.
10. ———. The subdivision into lots and blocks of territory contiguous to but outside the corporate limits of a municipal corporation, the filing of a plat thereof by the owner, the dedication of the streets and alleys shown thereon to the public, and the taxation of the subdivision for municipal purposes do not annex and make it a part of the municipality.
11. **Municipal Corporations: Judgments.** If a municipal corporation takes action to include lands within its limits sufficient to acquire jurisdiction of the matter its action may not be collaterally attacked because of irregularities in its proceedings, but if it does nothing to acquire or exercise lawful jurisdiction in the matter, or if what it attempts to do is so deficient as to be void, any claim that the land in question is a part of the corporate area of the municipality may be collaterally contested.

APPEAL from the district court for Knox County: LYLE E. JACKSON and FAY H. POLLOCK, JUDGES. *Reversed and remanded.*

W. Keith Peterson and *Neely, Otis & Cockle*, for appellants.

Merritt C. Warren, Leo M. Williams, and *Roscoe L. Rice,* for appellee.

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

BOSLAUGH, J.

This appeal developed from a proceeding instituted by the Village of Niobrara to annex to its corporate area outlying territory claimed to be contiguous to the village. The trial court granted annexation of the larger part of the area which the village sought to acquire as a part of its corporate territory, denied annexation of the remaining part, and denied the motion of appellants for a new trial. Appellee has not cross-appealed.

The real estate involved herein, the part thereof adjudged to be annexed to and to become and be a part of the corporate area of the village, and the part thereof refused by the trial court to be annexed to the village are respectively described in the record of this case in the district court and in this court by metes and bounds. The long and involved descriptions are not repeated. The area annexed to the village is 94.3 acres of land. It consists of 54 parcels of different size separately owned. There are 12 business buildings on 4 commercial sites and 38 dwellings. About 113 people reside in the area.

The territory annexed to and made a part of appellee is within and constitutes a part of the area of the Niobrara Rural Fire Protection District, a political subdivision of the state, organized and authorized to furnish fire protection for the property of the district. The expense and costs of the maintenance and operation of the district are provided by an annual tax not to exceed one mill upon the taxable property therein. §§ 35-501 to 35-517, R. R. S. 1943. The enlargement of the boundaries of the village to include this area subjects the property therein to taxation by the village for the cost of fire protection provided and furnished by it. § 18-1201, R. S. Supp., 1953. Appellants because of these facts

argue that the judgment is invalid; and that the effect of it is to remove the territory annexed to the village from the rural fire protection district or to violate constitutional provisions "respecting the remission of taxes from said territory to said district" or to violate constitutional provisions "respecting the uniformity of municipal tax levies in respect to persons and property."

Any intention or effort of the court to remove the territory involved in this appeal from the area of the rural fire protection district was futile for obvious reasons. The district is not a party to this litigation. Its boundaries, rights, and affairs were immune from any effective action of the court in these proceedings. Any matter concerning the boundaries of the fire protection district was not and could not have been the subject of inquiry herein because the fixing of boundaries of a political subdivision of the state is legislative. Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056; Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490. The method for detaching territory from a rural fire protection district and thereby changing its boundaries is provided by statute. § 35-515, R. R. S. 1943. That method is exclusive. There is no mention in the record of remission of any tax levied for the benefit of the fire protection district. The judgment herein does not and could not have that effect. This statutory proceeding for the annexation of real estate to a village is not appropriate or competent for the trial and decision of any issue as to liability of the area to taxation or the lawfulness of any tax levied thereon. The jurisdiction of the court in proceedings of this character is restricted to an inquiry into and a determination of whether the conditions exist which authorize the annexation sought. Wagner v. City of Omaha, *supra*.

It is alleged by appellee in the petition that the area sought to be annexed is contiguous to the Village of Niobrara. This is traversed by the answer of appellants. A municipal corporation may not, without the sanction

of the state by constitutional provision or legislative enactment, annex territory to its corporate area or change its boundaries. The authority given it by its charter is strictly construed. Wagner v. City of Omaha, *supra;* Annotation, 64 A. L. R. 1341; 2 McQuillin (3d ed.), Municipal Corporations, § 7.13, p. 288. The power of a village to enlarge its corporate area is limited to annexing "contiguous territory." § 17-407, R. S. 1943; Village of Wakefield v. Utecht, 90 Neb. 252, 133 N. W. 240. Continuity of territory is a condition of the right to have annexation in a majority of jurisdictions. Annotation, 62 A. L. R. 1011; 37 Am. Jur., Municipal Corporations, § 27, p. 644. The terms "contiguous territory" and "adjacent territory" are used synonymously and interchangeably in the statute on the subject of annexation of territory to a municipality. §§ 17-407, 17-409, 17-410, R. S. 1943. The statute providing for detachment of territory from a village limits its operation to territory within and "adjacent to the corporate limits." § 17-414, R. S. Supp., 1953. It has been determined by this court that the word adjacent in this statute means contiguous or coexistent. In Jones v. City of Chadron, 156 Neb. 150, 55 N. W. 2d 495, it is said: "It is indispensable that the petition in this kind of a proceeding should show by statement of fact that the territory sought to be detached is within the municipality and that a substantial part of the boundary thereof is adjacent to a segment of the boundary of the city or village. Adjacent as used in this statute means contiguous or coexistent with." The requirement of continuity of territory in this respect is mandatory and a municipality seeking to have the advantage of annexation of territory to its corporate territory must allege and establish it. § 17-407, R. S. 1943; Jones v. City of Chadron, *supra.*

Appellee asserts that it has established that the area annexed by the judgment of the trial court is contiguous to the south and west boundaries of what is described

as Starr's Addition and is contiguous to the north and west boundaries of what is identified as Cooley's Addition. The additions each consist of 40 acres of land. The appellants say that this does not establish that any of the area annexed was contiguous to any boundary of or territory within the village. The evidence on the issue of continuity of territory is not in dispute. It consists of documents and plats made exhibits in the case. The territory referred to as additions to the Village of Niobrara and additions to West Niobrara are parts of Sections 9 and 16, Township 32, Range 6 West of the 6th P. M., Knox County.

The east half of the northwest quarter of Section 16 was platted as "West Niobrara Addition to Niobrara, Nebraska," and the plat was filed in the office of the county clerk July 19, 1881. The northwest quarter of the northwest quarter of Section 16 was platted as "Starr's Addition to West Niobrara," and the plat was filed in the office of the county clerk August 4, 1881. The southwest quarter of the southwest quarter of Section 9 was platted as "Cooley's Addition to West Niobrara," and the plat was filed in the office of the county clerk July 21, 1887.

Taxes were levied for appellee on the property within the area of the respective additions for the years stated as follows: West Niobrara, 1881, and thereafter; Starr's Addition, 1882, and thereafter; and Cooley's Addition, 1890, and thereafter.

Appellee took no action to annex the northeast quarter of the northwest quarter of Section 16 to the Village of Niobrara. The board of trustees did, by a majority vote, attempt to consent to the annexation of the southeast quarter of the northwest quarter of Section 16 and attempted by ordinance to bring it within the village. The board of trustees of the village by a majority vote attempted to consent to the annexation of the northwest quarter of the northwest quarter of Section 16 but the ordinance passed by it did not describe that land but

did describe the northwest quarter of the northeast quarter of Section 16. Appellee took no action to annex the southwest quarter of the southwest quarter of Section 9 to the Village of Niobrara. The result then is that the evidence fails to show that the north half (northeast quarter of the northwest quarter of Section 16) of what was platted as "West Niobrara Addition" has been annexed to or made a part of the Village of Niobrara. It fails to show that "Cooley's Addition to West Niobrara" has been annexed to or made a part of the village. The only ordinance of appellee in evidence intended to show the annexation of territory to the village does not describe the territory platted as Starr's Addition to West Niobrara, that is, the northwest quarter of the northwest quarter of Section 16, but it does describe the northwest quarter of the northeast quarter of Section 16. The ordinance did not recite, and appellee did not find, that Starr's Addition and Cooley's Addition were contiguous to the Village of Niobrara. The result is that Starr's Addition and Cooley's Addition were never contiguous to the Village of Niobrara and were not authorized to be annexed to it by action of the board of trustees, by ordinance or otherwise.

A village is not permitted to consent to the annexation of platted territory not contiguous to it or to attempt to take the territory into the village by ordinance. § 17-405, R. S. 1943. In 37 Am. Jur., Municipal Corporations, § 27, p. 644, the author says: "The annexation of outlying territory to a municipality is commonly conditioned by the statute authorizing the proceeding on the situation of the territory to be annexed, it being required to be adjacent or contiguous to the municipality. Under such statutes if the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect. * * * The legal as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, * * * a collective body * * * that is, a body of people collected or gathered to-

gether in one mass, not separated into distinct masses, and having a community of interest because residents of the same place * * *. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. Contiguity is generally required even in the absence of statutory requirement to that effect." See, also, Wagner v. City of Omaha, *supra;* Jones v. City of Chadron, *supra;* Annotation, 62 A. L. R. 1015; 2 McQuillin (3d ed.), Municipal Corporations, § 7.15, p. 294.

The making and filing of a plat of a subdivision of land by the owner, the dedication of streets and alleys shown on the plat, the continuous exercise by the municipality of authority thereafter over such platted area, and taxation of the territory and property thereon for municipal purposes do not annex the platted area and make it a part of the village or extend the corporate limits of the village. The reason for the insufficiency of either or all of these to have that effect is that they or any of them is not the exercise of the jurisdiction given the municipality to annex territory to it. The rule is stated in Wagner v. City of Omaha, *supra:* "A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature and where so conferred must be exercised in strict accord with the statute conferring it." In Hemple v. City of Hastings, 79 Neb. 723, 113 N. W. 187, it is said: "The subdivision into lots of property contiguous to but outside the corporate limits of a city, and the filing of a plat of such subdivision by the owner thereof, does not have the effect of changing the boundaries of the city so as to include therein such property." That was an action for injunction to prevent the collection of taxes levied upon the property constituting the platted area described as an addition to the city of Hastings. It was objected that the suit could not be

maintained because it was a collateral attack. In reference thereto the court said: "It is contended by the defendant that the question whether this land was within or without the city limits cannot be determined in a suit to declare the taxes invalid. It is said that to so proceed is to attack collaterally the validity of the organization; * * *. If the city of Hastings had instituted proceedings to include the land in question within its limits, and had gone so far as to acquire jurisdiction, the decision in such case could not be collaterally attacked, no matter how erroneous it might have been. In this case there was no attempt to acquire or to exercise jurisdiction, and the principle relied upon by the defendant has no application to the facts." Chicago, B. & Q. R. R. Co. v. City of Nebraska City, 53 Neb. 453, 73 N. W. 952, was a suit to enjoin the collection of taxes levied upon the west half of the bridge of the railroad across the Missouri River. The city relied upon an ordinance which provided that the territory described therein should be and was included in the corporate limits of the city. The ordinance did not comply with any statute giving authority to the class of cities of which Nebraska City was one to annex territory to the corporate area. It is said therein: "It is a familiar doctrine that municipal corporations can exercise only such powers as are conferred by law, either expressed or implied. Where the statute points out the mode of procedure for the extension of the boundaries of a city, the same must be substantially followed, else it will be of no validity." See, also, Waubonsie Bridge Co. v. City of Nebraska City, 123 Neb. 832, 244 N. W. 793; School District No. 30 v. School District of the City of Grand Island, 63 Neb. 44, 88 N. W. 120; Annotations, 129 A. L. R. 261, 18 A. L. R. 2d 1260.

Appellee stresses an ordinance of the Village of Niobrara passed September 10, 1924, as proof of its corporate area and boundaries. It is described as "An ordinance defining the corporate limits of the Village of Nio-

brara * * *." The body of the ordinance contains language to the effect that the additions described and discussed herein should be and they were declared to be a part of the Village of Niobrara and that corporate limits of the village were extended to include them. The ordinance did not recite, and the appellee did not find, that any of the additions referred to therein were contiguous to the Village of Niobrara. This ordinance did not comply with any method provided by law for the annexation of territory to a village. The ordinance is not significant in determining whether the territory annexed by the judgment of the trial court was contiguous to any boundary of appellee. The conclusion stated in Chicago, B. & Q. R. R. Co. v. City of Nebraska City, *supra,* concerning an ordinance of this character was: "The adoption of said ordinance was wholly insufficient to change the boundaries of the municipality. * * * The ordinance was therefore in and of itself ineffectual to extend the limits of the municipality. * * * It is suggested that the boundaries of the city were enlarged so as to include the said strip of land 160 feet wide lying immediately east of the platted territory, by ten years' adverse usage by the city authorities. Doubtless, the mayor and council entertained a different view, else the ordinance to which reference has been made would most likely never have been adopted. They hardly would have attempted to annex territory which was already regarded as embraced within the boundaries of the city." What was said therein was reexamined, approved, and followed in a subsequent case involving an almost identical situation, in which it was contended that the city had exercised continuous use and dominion over the land in question for more than 50 years. Waubonsie Bridge Co. v. City of Nebraska City, *supra.* In School District No. 30 v. School District of the City of Grand Island, *supra,* the court said: "An ordinance defining the boundaries of a city can not be accepted as evidence of the annexation of contiguous territory, not included in the cor-

porate limits prior to the passage of such ordinance." The opinion in that case makes this pertinent observation: "* * * while the city and the inhabitants of so much of plaintiff's territory as is within the limits of the city as defined by said ordinance might be estopped, as between themselves, from questioning their relation on account of matters alleged in the petition, such estoppel could not be urged against a third person who had done nothing to recognize the relation which plaintiff claims existed between this territory and the city."

The record fails to show that any part of the territory sought to be annexed to the Village of Niobrara is contiguous to it or any part of the boundary of the area is coexistent with a part of the boundary of the village.

The judgment should be and it is reversed and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

WM. W. GRAHAM ET AL., APPELLANTS, V. GRAYBAR ELECTRIC COMPANY, INC., A CORPORATION, ET AL., APPELLEES.

63 N. W. 2d 774

Filed April 9, 1954. No. 33518.

1. **Municipal Corporations.** The validity or invalidity of spot zoning depends upon more than the size of the spot.
2. ———. The fact that property which is zoned residential is near property which is zoned first industrial does not make the ordinance illegal.
3. **Constitutional Law.** 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 firm, business, or individual.
4. **Constitutional Law: Municipal Corporations.** The zoning of property is permissible under the police power and its exercise may not be denied on the ground that individual property rights may be adversely affected.

5. **Municipal Corporations.** 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.*

William W. Graham, for appellants.

Truman W. Morsman, Neal H. Hilmes, Morsman, Maxwell, Fike & Sawtell, Edward F. Fogarty, Bernard E. Vinardi, and *Herbert M. Fitle,* for appellees.

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

SIMMONS, C. J.

This is an action in which property owners of the city of Omaha are plaintiffs and property owners and the city of Omaha are defendants. It involves a zoning ordinance. Plaintiffs sought an order permanently enjoining the city from granting a building permit and the defendant property owners from obtaining a building permit for the erection of industrial buildings and roadways on their property and for equitable relief.

Graybar Electric Company and the city of Omaha demurred generally for the reason that plaintiffs failed to plead facts sufficient to state a cause of action. The trial court sustained the demurrers and dismissed the action. Plaintiffs appeal. We affirm the judgment of the trial court.

The demurrers admit these facts which are alleged.

Defendant Graybar is a Nebraska corporation. The city of Omaha is a Nebraska municipal corporation.

In 1924 the city enacted a comprehensive zoning ordinance. Plaintiffs are the owners of property designated as "Residential" in the ordinance. Graybar is purchasing property, from the defendant Morton, which is

designated as "1st Industrial" under the ordinance. Plaintiffs seek to prevent the use of this property for commercial purposes.

All of the area within a radius of a mile of plaintiffs' property ("small spots" excepted) is zoned residential and "almost" entirely built up and improved with family residences.

Plaintiffs allege that the ordinance is "spot" zoning; that Graybar's property is a "small area * * * lying East of the right-of-way of the Omaha Belt Railway"; and that to permit the defendants to use their property for industrial purposes will depreciate the value of plaintiffs' property and result in irreparable loss and injury. They allege conclusions of law as to the illegality of the ordinance.

Attached to plaintiffs' petition is a map of the city of Omaha, showing among other things that property adjacent to the line of the Omaha Belt Railway is zoned first industrial throughout a large part of the course of that railway through the city.

Plaintiffs contend that the ordinance is illegal because it is "spot zoning." The basis of this is that Graybar's land is a "small area." No other facts are pleaded. The validity or invalidity of spot zoning depends upon more than the size of the spot. Town of Marblehead v. Rosenthal, 316 Mass. 124, 55 N. E. 2d 13.

The fact that property which is zoned residential is near property which is zoned first industrial does not make the ordinance illegal. Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537.

Plaintiffs contend that the ordinance is illegal because it reduces the value of their property, invades property rights, deprives them of their property in violation of the state and federal Constitutions, and is an unlawful exercise of the police power. It is axiomatic that every exercise of the police power in respect to the use of land is likely to affect adversely the property interests of somebody. Spector v. Building Inspector of Milton,

250 Mass. 63, 145 N. E. 265; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388. Contentions of this character have been considered and answered in Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N W. 2d 634, wherein we held: "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 firm, business or individual."

And again in Davis v. City of Omaha, 153 Neb. 460, 45 N. W. 2d 172, where we held: "The zoning of property is permissible under the police power and its exercise may not be denied on the ground that individual property rights may be adversely affected."

Plaintiffs plead that they had petitioned the city and the Omaha Planning Commission for the zoning of Graybar's property as residential, and that no action has been taken. From their briefs it seems that plaintiffs consider that the power of an equity court in this matter is co-equal and coincident with the power of the city; that if the city fails to rezone, an equity court may in effect do so by injunction; and that the court has the power to determine whether or not Graybar's property should remain zoned as first industrial or rezoned as residential.

As to that the rules are:

"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, 151 Neb. 895, 39 N. W. 2d 828.

"The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary." Davis v. City of Omaha, *supra.*

We conclude that the judgment of the trial court in

sustaining the demurrers was not erroneous. It is affirmed.

AFFIRMED.

GREGORY DRIEKOSEN, APPELLEE, V. BLACK, SIVALLS & BRYSON, INC., A CORPORATION, ET AL., APPELLANTS.
64 N. W. 2d 88

Filed April 16, 1954. No. 33449.

1. **Trial.** A motion for directed verdict or its equivalent must, for 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 have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence: Trial.** In a jury case involving issues of negligence, where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court.
3. **Negligence.** A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.
4. ———. If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence.
5. **Negligence: Trial.** In an action based on negligence the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for a jury.
6. ———: ———. A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way,

but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed.

7. ———: ———. Where contributory negligence is pleaded as a defense, but there is no competent evidence to support the same, it is prejudicial error to submit such issue to the jury and requires the granting of a new trial.

8. **Sales: Negligence.** A vendor and the manufacturer or supplier of a chattel who know or have reason to know that it is likely to be dangerous when used and which is purchased as safe for use in good faith reliance upon their professions or representations of safety, competence, and care, are subject to liability to the purchaser or to others whom they should expect to share in or be in the vicinity of its use, for damages proximately caused by their failure to exercise reasonable competence and care to supply the chattel in a condition safe for use.

APPEAL from the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

Maupin & Dent and *Edwin D. Crites*, for appellants.

John H. Keriakedes and *Perry & Perry*, for appellee.

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

CHAPPELL, J.

Plaintiff Gregory Driekosen brought this action against defendants Black, Sivalls & Bryson, Inc., hereinafter designated as B. S. & B., and Dale O. Larson and Charles H. Brown, Jr., doing business as Larson and Brown Equipment Company, a partnership, hereinafter designated as L. & B., or the partners, seeking to recover substantial damages resulting from the explosion of an installed propane gas system sold to plaintiff and alleged to have been negligently installed by defendants in plaintiff's home. The action was specifically alleged to be and was ex delicto in character.

For his cause of action plaintiff alleged, insofar as important here: That defendant B. S. & B. was engaged in the manufacture, wholesale, and distribution of pressure vessels, fittings, piping, and related merchandise for the sale and installation of propane gas systems

for the furnishing of heat and power, and that its authorized dealer, defendant L. & B., was engaged in retailing said equipment and merchandise and installing the same, and in the sale of propane gas for use therein. That defendants knew or should have known that propane gas to be used in the equipment for its propane gas system so furnished by them was a dangerous substance, having volatile and explosive characteristics, and defendants knew or should have known that if such gas were permitted to leak from any part of said system it would follow along any submerged pipings or fittings into the residence of persons using such gas and system. That on or about November 5, 1947, after defendants had been informed by plaintiff of the purposes for which it was to be used, plaintiff purchased from L. & B. as authorized dealer for B. S. & B., a complete B. S. & B. propane gas system, which was installed by L. & B. in his acreage home about 1 mile south of Hay Springs, Nebraska. That at time of purchase and installation thereof and prior thereto, defendants each, for the purpose of inducing plaintiff to purchase and install such propane gas system, orally, expressly, and falsely represented that said system was constructed of long-lasting, top-quality materials, and that their skilled workmen L. & B. would provide the necessary fittings and copper tubing and do all the work of skilled installation. Further, also, that during the late summer and fall of 1947, defendants and each of them cooperated and joined in causing to be published a series of advertisements in the Hay Springs News respectively therein representing the quality, safety, and adequacy of such a system, for the purpose of inducing plaintiff and others to purchase B. S. & B. propane gas systems from them. That plaintiff relied upon defendants' representations aforesaid, and their skill and judgment in the purchase and installation of the system, but, without warning plaintiff of the danger involved, they negligently installed it in such manner that it was unsafe and de-

fective because the piping was unfit for the purposes and soil in which it was laid, and was not fit for the purposes for which it was sold to defendant, and the piping and system were negligently and improperly installed, which caused the piping to corrode, rust, and fall apart, thereby permitting the dangerous propane gas supply to be discharged therefrom into his residence at a point underground, beyond plaintiff's ability to observe or anticipate. That as a direct and proximate result of such negligence and unlawful acts, propane gas was discharged from the system into plaintiff's residence in such quantities that on May 22, 1949, the gas became ignited, exploded, and completely destroyed and burned plaintiff's residence and its contents, caused his wife to suffer severe burns over her entire body which required medical and hospital care and caused her death on May 24, 1949, and caused his two minor daughters and a minor son to be severely burned and injured, requiring medical, hospital, and nursing care. Plaintiff prayed recovery from defendants of such sum as would reasonably compensate him for his damages, to wit, the loss of his residence and its contents; the medical and hospital expenses for his wife; the necessary funeral and burial expenses for her; the loss of her consortium; and the hospital, medical, and nursing expenses for his children.

Defendant B. S. & B. answered, admitting that it was a corporation authorized to do business in this state; that a fire occurred in plaintiff's residence owned by him on May 22, 1949; that plaintiff's wife died on May 24, 1949; and that plaintiff was at that time the father of two minor daughters and a minor son. Otherwise, it denied generally and alleged that the burning and destruction of plaintiff's residence and contents, the death of plaintiff's wife, and injuries to his children, were solely and proximately caused by the negligence of plaintiff and his wife and parties other than said defendant, and that the negligence of plaintiff and his wife was more than slight

as compared with the negligence of said defendant. Defendant L. & B. filed an answer comparable in material respects with that of defendant B. S. & B. except that it set forth and charged specific allegations of negligence by plaintiff and his wife, which we do not deem it necessary to repeat here. Both defendants prayed for dismissal and costs.

Plaintiff's reply to such answers, insofar as important here, denied generally all material allegations therein which did not admit the allegations of his petition, and renewed the prayer of his petition.

Upon the trial of such issues to a jury, whereat voluminous evidence was adduced, it returned a verdict for defendants, and judgment was rendered thereon. Thereafter, plaintiff's motion for new trial was sustained, the verdict and judgment were set aside, and plaintiff was granted a new trial primarily upon the ground that instructions Nos. 9 and 16 with relation to contributory negligence given by the court, did not correctly state the law as to all items of damage claimed by plaintiff and were prejudicial to the claim of plaintiff or a portion thereof.

From such order and judgment defendants appealed to this court. They filed separate briefs. However, each assigned substantially, but in somewhat different language, that: (1) The trial court erred in granting a new trial upon the ground that instructions Nos. 9 and 16 were prejudicially erroneous; and (2) in any event the trial court erred in failing to sustain their respective motions for directed verdict made at the conclusion of plaintiff's evidence and renewed at conclusion of all the evidence, upon the ground that plaintiff had failed to establish by any competent evidence that defendants were negligent or that any negligence on their part was the proximate cause of the explosion and damages. Therefore, they argued that the verdict of the jury for defendants was the only one that could have properly been awarded as a matter of law under the pleadings and

evidence, so there could have been no prejudicial error in the manner in which the case was submitted to the jury. We conclude that the assignments should not be sustained.

At the outset defendants argued that plaintiff erroneously relied in his petition upon a double theory of liability, that is, in tort for alleged negligence by defendants and also in contract for alleged breach of either an express or implied warranty. Rather, as we view it, plaintiff's action was simply one for negligence in which he relied upon express oral and written representations made by both B. S. & B. and L. & B., in order to directly and expressly fix the duty imposed upon them by law which they were required to properly perform without negligence when for an agreed paid price they furnished and installed the system.

With regard to plaintiff's petition, it is said in 1 Am. Jur., Actions, § 50, p. 442: "The character of an action as one in tort or one ex contractu must be determined by the nature of the grievance, rather than by the form of pleading. Consideration must be given to the facts constituting the cause of the complaint." As stated in 1 Am. Jur., Actions, § 51, p. 443: "It is also well-settled law that one may sue in tort when there has been negligence in the performance or nonobservance of a contract, and not in contract, as the injury in such a case results, not from a breach of contract, but from negligence in the performance of it; for accompanying every contract is a common-law duty to perform the thing agreed to be done with care, skill, reasonable expediency, and faithfulness, and a negligent failure to observe any of these conditions is a tort as well as a breach of contract." See, also, 52 Am. Jur., Torts, § 27, p. 380, § 102, p. 442.

As stated in 52 Am. Jur., Torts, § 26, p. 379: "Where a contractual relationship exists between persons and at the same time a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort. In such case, the tor-

tious act, and not a breach of the contract, is the gravamen of the action; the contract is the mere inducement creating the state of things which furnishes the occasion for the tort."

In 46 Am. Jur., Sales, § 802, p. 928, it is said: "The theory most frequently invoked as the basis of the liability of the seller of an article for personal injuries to the buyer resulting from a defect in or the defective condition of the article sold is upon the ground of negligence, and in such cases it is of course necessary to establish the elements of actual negligence, namely, a breach of duty on the part of the seller toward the person complaining of the defect, and an injury to the person to whom that duty is owed proximately resulting from the breach of duty on the seller's part."

In the light of defendants' other contentions, we turn to a discussion and disposition of their assignments. In doing so, we have in mind the elementary rule that a motion for 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, who is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence.

Also, as held in Kuska v. Nichols Construction Co., 154 Neb. 580, 48 N. W. 2d 682: "In a jury case involving issues of negligence, where different minds may draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court.

"If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the

subsequent mischief will be held to be the result of the original negligence." See, also, Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N. W. 2d 769, wherein it was held that: "A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.

"In an action based on negligence the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for a jury."

The evidence is in many material respects in conflict, but the record discloses competent evidence from which it could reasonably be concluded as follows:

During the summer, in July and into the fall, until about October 20 or 25, 1947, plaintiff had several conversations with one of the defendant partners at their place of business and in plaintiff's home, wherein this partner attempted to convince plaintiff that he should purchase an installed B. S. & B. propane gas system in plaintiff's home. Some of such conversations followed and referred to the appearance, wording, and plaintiff's reliance upon certain advertisements in the Hay Springs weekly newspaper, which were read and relied upon by plaintiff and his wife. In that connection, B. S. & B. furnished and prepared mats for such advertisements which were forwarded by them to L. & B., who published them. One such conversation aforesaid was with a factory representative of B. S. & B. and one of defendant L. & B. partners, its authorized dealer, who were both present at the time the conversation took place in Hay Springs.

Insofar as important here, the conversations were as follows: Plaintiff stated to the partner that he wanted

" 'a good substantial system put in.' " With regard to the B. S. & B. system, the partner said: " 'We got one of the best.' * * * 'We are dealing with a good, reliable outfit, and an old, established outfit that has years behind them of making' * * * compression vessels * * * or equipment * * * a good, reliable, dependable system * * * it's a life time system." With regard to the installation, the partner promised that it "would be put in good, with all the proper copper and fittings so it would work right and do a good job * * *." It would " 'be put in good and safe.' "

The factory representative of B. S. & B. told plaintiff "they have an established and have an advertised system * * * in the local territory, and they got their parties here established in business, which is going to take care of the people that buy their system, and they will be responsible, skilled, good installation; and as in case * * * something goes wrong, you can always call your local man to check, repair and fix those." Plaintiff said to him, " 'The way your ad reads, it would be a good installation; * * *.' " To which the representative replied: " 'We have got our men here, * * *. Our skilled, good installation workers.' * * * 'We got stations' * * * 'Wyoming, Nebraska, Kansas.' * * * 'We ain't just a small outfit.' "

All of the advertisements, the mats for which were prepared by B. S. & B. and furnished to L. & B who published them, first conspicuously headlined the merits of the "BS&B Propane System" and had a conspicuous, attractive, seal-like design or trademark thereon, stating that L. & B. was an "authorized BS&B dealer."

Insofar as important here, the first advertisement also said: "BS&B Propane systems are constructed of long lasting, top quality materials by one of America's oldest pressure vessel manufacturers. Come in today . . . let us help you tailor your Propane System to fit your needs, the BS&B way. * * * Clean, healthful heat all over the house * * *. Warm and safe, regardless of weather

. . . automatically! * * * Let Us Show You . . . Come in Today!"

The second advertisement said: "Look for the superior BS&B features when you buy . . . X-ray perfect, double-welded seams, hydrostatically tested, dehydrated and sealed against moisture. Each System includes BS&B Tank, necessary fittings and copper tubing to the installation. Our skilled workmen do all the work. Put a BS&B Propane System at the top of your improvement list now!"

The third advertisement said: "BS&B Propane Systems last a lifetime. Provide a 'gas well' in your back yard! The BS&B trademark is your assurance of perfection in design, weld, and fittings."

The fourth advertisement said: "Remember, Propane gas does it better because * * * It's safe * * * You are welcome to use our knowledge and experience in helping you achieve a really modern home . . . the BS&B Domestic Propane Gas way."

The fifth advertisement said: "Use modern tested methods in cooking, baking, canning. Do it better, do it easier . . . with your new automatic kitchen range and a BS&B Domestic Propane Gas System. Let us show you how easy it is for you to live the modern way . . . starting now! * * * No unpleasant fuel odor."

Plaintiff was induced by the aforesaid representations and defendants' skill and judgment upon which, as they well knew, he relied, to purchase the B. S. & B. system from L. & B. sometime between October 20 and 25, 1947, and it was installed by them in his home. In doing so they furnished a hot water heater, a furnace, and a gas supply tank, together with the necessary fittings and copper tubing to connect the tank to them and a gas stove already owned by plaintiff, which was located on the first floor. The hot water heater and furnace, located in the basement, had automatic shut-off pilot lights, and about 1½ or 2 weeks before the explosion, the furnace had been completely shut off and

disconnected by one of the L. & B. partners. B. S. & B. furnished L. & B. collect several gas tanks and related equipment, including 1,000 feet of identical copper tubing in July 1947, but whether or not any part of such tubing was used in plaintiff's installation could not be definitely ascertained, although not denied by defendants, since the copper tubing used was taken out of L. & B.'s warehouse in original packages where they had theretofore stored some such tubing purchased elsewhere. However that question as we view it is not controlling here.

About October 20 or 25, 1947, plaintiff left Hay Springs to visit his father who was ill in another state, and when he returned on November 5, 1947, the system had already been installed by L. & B., except for a few minor details. Its installation was supervised by one of the partners who was a college-trained civil engineer. When installing the system, they placed the supply tank above ground in plaintiff's back yard, about 24 feet from his residence. They connected the tank and the residence with 99.93 percent copper tubing, a product authorized to be used by Rule B-7 (a), p. 47, 1945 Laws, Rules, and Regulations, Department of Fire Prevention, State of Nebraska, promulgated and distributed by the State Fire Marshal, which contained standards for the storage and handling of liquified petroleum gases. Such tubing, however, was not first insulated by L. & B. or B. S. & B. to prevent corrosion, as required by good safe practice generally known and practiced for many years, and in such condition the pipe was buried underground up to about 6 or 8 inches from plaintiff's residence at a depth of only about 14 inches, in violation of rule B-7 (g), p. 48, of the rules and regulations aforesaid, which required that it "shall be buried below the established frost line and *in no case less than 2 ft. below ground unless otherwise protected.*" (Italics supplied.) True, there is no rule of the department which specifically says that piping buried underground shall be first in-

sulated against corrosion, but rule 2.20 (e), p. 69, requires that "Underground containers" shall be appropriately insulated to prevent corrosion before lowered in place underground; and the State Fire Marshall who testified for plaintiff not only said that "Underground containers" were intended to and did include underground piping, but that also in any event it was a well-known, recognized, good practice to insulate the piping in order to prevent corrosion and otherwise protect it.

Within 6 or 8 inches of plaintiff's residence, L. & B. brought the copper piping up through loose dirt and connected it through the wall into plaintiff's residence, thence to the respective household facilities heretofore described. When the installation was completed, one of the partners told plaintiff, " 'If anything goes wrong, don't fool with it, call us. That's what we're here for.' " In speaking of that statement, plaintiff said, "That was my orders," and he obeyed them. Such statement was not denied by defendants.

Plaintiff had a little trouble with the system a couple of times, whereupon he immediately called L. & B., who responded and remedied the trouble. For example, the pilot light on the furnace went out, whereupon L. & B. were called and one of the partners adjusted and lit it again. At another time they replaced some automatic parts on the furnace and lit it, and it worked again. At another time, about 1½ or 2 weeks before the explosion, the furnace door blew off, so one of defendant partners was called at once, who came out and shut off the furnace, and it remained shut off and disconnected thereafter up to and including the time of the explosion on May 22, 1949. One of plaintiff's daughters testified that the furnace door also blew off at another time, but when is not shown. Plaintiff bought his propane gas supply from L & B. until they sold out their business. He then bought the last two or three lots from others, and gas had been placed in the tank by them only a day or two before the explosion, but there is no evidence or contention

here that they were at fault in any manner.

No member of the family had smelled any odor of gas in the house at any time or had any warning thereof prior to the explosion, and in that connection the night before the explosion plaintiff's two daughters slept in a room partitioned off in the basement. They were in fact asleep there at the time of the explosion, which awakened them, and they discovered that their room, clothing, and bed were in flames.

On Sunday morning, May 22, 1949, plaintiff and his wife got up and had coffee together about 7 a. m. Plaintiff then went down in the basement after his milk pails and came up again without noticing any odor of gas or having any warning of danger. As he was leaving the house he passed his wife who was going down into the basement to perform some morning household duties. There she struck a match to light a wood and coal range in the basement, or to burn some trash therein, and when plaintiff was 35 or 40 feet from the house, the explosion occurred. It occurred with such force that it knocked plaintiff to the ground, was heard by people three-quarters of a mile distant, raised up and twisted the house off its foundation, set it on fire, destroyed it together with its contents, and severely burned and injured plaintiff's wife and children. Friends and neighbors came almost at once, knocked down a door in order to remove one of the children, and took the wife and children to a physician where they received first aid. They were then removed to a hospital where the wife died and the two daughters were treated for 27 days, after which they required medical and nursing care for some time.

We find no competent evidence in this record from which it could have been reasonably concluded that either plaintiff or his wife was guilty of any contributory negligence. Certainly it was not negligence for plaintiff's wife to strike a match in the basement of her own home when there was no previous warning of danger.

In that connection, defendants produced a witness who testified that about May 8, 1949, he was working in plaintiff's home and basement in preparation for connecting up and converting to R. E. A. electric current, which was never in fact actually connected or converted. Such witness testified that he smelled no gas in the house, but he thought that he and other men working there had suggested to plaintiff that he should have the system checked because in their opinion there was gas present. However, he did not remember the details of the conversation, and as he recalled it, "I think they were all together there" but "I have no definite memory on it, no." Further, plaintiff denied that there ever was any such conversation with him.

One of the other workmen there was also called by defendants. He testified that on or about May 7, 1949, he smelled gas in the house. However, it was while he was up on a ladder right against the pipe connection. There he could smell a slight odor of gas but when he moved his face a short distance away he could not smell it. He testified that the men working there talked about such gas, but in that connection he said, "I just don't remember whether we mentioned it to Mr. Driekosen or not. I'm sorry, but I just don't remember that we did or we didn't. I know we talked of it and said we should inform him; now, whether we did, that part I couldn't swear to."

It will be recalled also in that regard that a defendant partner, a civil engineer with college training, was in plaintiff's basement and shut off the furnace at about that same time so if there was gas escaping there he should have known about it, but he testified that he had no warning of any leakage of gas in plaintiff's basement, and made no claim that he ever warned plaintiff or plaintiff's wife of any danger thereof. As we view it, any submission of any issue of contributory negligence of either plaintiff or his wife by instructions to the jury, as was done in this case, would, under the

circumstances appearing in this record, be erroneous and prejudicial to plaintiff. It is now elementary that: "Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury." Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439. Also, to do so requires "the granting of a new trial." Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. Such statement and authorities dispose of defendants' first assignment. We conclude that it has no merit.

A day or two after the explosion and fire, plaintiff, the fire chief, and a fireman dug up 3 or 4 feet of the copper tubing buried about 14 inches underground, beginning at a point 6 or 8 inches from the house, and found that the tubing was corroded, disintegrated, and porous, with numerous holes through it from the outside inward, ranging from infinitesimal to as much as ½ inch in size. The pipe was not corroded on the inside. A piece of it more than 1 foot long, offered by plaintiff and properly received in evidence, appears in the record. One piece of that removed was given to the fire chief, and the one received in evidence, together with a sample of soil taken from the point where the pipe was buried, was sent by registered mail to an expert, Mr. W. F. Weiland, a registered professional engineer and full professor of mechanical engineering at the University of Nebraska. Such witness had specialized for more than 30 years, and in doing so had made research of metals, fuels, lubricants, combustion, explosions, and corrosion. He made a scientific analysis of both the soil and tubing with relation to the reasons for its corrosion and disintegration. He thus found that the soil, similar in material respects with several other soils tested by him throughout other parts of Nebraska, contained organic matter, and carbonates, which when liberated gave off carbonic acid; that it also contained iron oxide; and that as an established fact, generally known long prior to 1947, in the decaying process in the presence of water it

evolved volatile, corrosive, organic acids very rapidly chemically corrosive to copper buried as it was here, which, in conformity with good practice generally recognized and used, could have been prevented either by cathodic protection or by insulation with numerous recognized materials generally used for that purpose, which, as long as intact, would keep the copper tubing in good condition with a life expectancy of as much as 50 years. Otherwise it would corrode and fail in any period up to 2 years, dependent upon the extent of alternate wetting and drying of the soil.

He testified that propane gas, odorless in its natural state but generally odorized, was not toxic but was asphyxiating, and that it was a highly dangerous, explosive product with a low limit of inflammability which, with only about 2 cubic feet of it in 100 cubic feet of air, will explode or burn if ignited in any manner.

After foundation was laid therefor, the witness, in reply to a hypothetical question which, contrary to defendants' contentions, was proper in every material respect, gave as his opinion that propane gas in plaintiff's basement caused the explosion. In that connection he said that the gas, being about 1½ times heavier than air, came out through the holes in the corroded copper tubing and slowly seeped down through the drainage in which it was covered or laid. Upon reaching the basement wall the gas seeped directly through the basement concrete blocks or imperfections in the mortar and accumulated in that part of the basement into which it came; and when, by spreading out, its lower limit of inflammability was reached, a flame of some sort ignited the mixture and the explosion resulted therefrom.

Prior experiments and tests made by the witness had demonstrated the fact that propane gas under slight pressure would seep through standard cement blocks. With permission of the court, such an experiment was appropriately performed by the witness in the presence

of the jury, whereat propane gas released by a valvular apparatus at low pressure, seeped through a standard cement block comparable in size with those in plaintiff's basement wall, and was ignited on the opposite side of it, where it burned for 10 or 15 seconds until the gas supply was shut off. We believe that plaintiff adduced competent evidence from which it could have been reasonably concluded that the leakage of gas came from no other facility or part of the system, and that because the piping was negligently supplied and installed by defendants, the gas did seep into plaintiff's basement in the manner claimed by him, which proximately caused the explosion and plaintiff's damages, which are not in dispute here.

Under the evidence aforesaid, we conclude that the question of liability of defendants and each of them was for the jury. Innumerable authorities sustain that conclusion.

In that connection, this court held in Fonda v. Northwestern Public Service Co., 138 Neb. 262, 292 N. W. 712: "'A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed.' Tonkovitch v. Indiana Mining Co., 153 N. W. 811 (187 Mich. 186)."

In Restatement, Torts, § 388, p. 1039, it is said: "One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) and has no reason to believe that those for whose use the chattel is supplied will realize its

dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so." Also, in Restatement, Torts, § 399, p. 1085, it is said: "A vendor of a chattel, manufactured by a third person, who sells it knowing that it is, or is likely to be dangerous, is subject to liability as stated in §§ 388 to 390." As stated in Restatement, Torts, § 401, p. 1087: "A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use."

In that connection, in Restatement, 1948 Supp., § 401, p. 710, it is said: "A vendor of a chattel manufactured by a third person who has reason to know that the chattel is, or is likely to be, dangerous when used by a person to whom it is delivered or for whose use it is supplied, or to others whom the vendor should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them." See, also, Restatement, Torts, § 402, p. 1089, wherein it is said: "A vendor of a chattel manufactured by a third person is subject to liability as stated in § 399, if, although he is ignorant of the dangerous character or condition of the chattel, he could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have."

As stated in 46 Am. Jur., Sales, § 817, p. 943: "Moreover, where the seller of an article reasonably must know that if it is defective it will be imminently dangerous to persons likely to come in contact therewith, a duty rests upon him to use ordinary care to ascertain the condition of the article and see that it is safe, especially where, by representation or warranties that the article is safe, he induces the sale. If he fails to exercise ordi-

nary care to ascertain the safety of the article, so that he actually sells it in an imminently dangerous condition, he is liable for injuries to third persons who he knows will come in contact with the article." See, also, 46 Am. Jur., Sales, § 803, p. 928.

The annotation in 42 A. L. R. 1249 cites and discusses numerous authorities relating to such questions. See, also, 22 Am. Jur., Explosions and Explosives, § 73, p. 197; Annotation, 60 A. L. R. 371; Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N. E. 162, 60 A. L. R. 353; Flies v. Fox Brothers Buick Co., 196 Wis. 196, 218 N. W. 855, 60 A. L. R. 357.

Such citations aforesaid relate primarily to the question of L. & B.'s liability to plaintiff, but some of them, it will be observed, have application also to the question of B. S. & B.'s liability.

In that connection, Restatement, Torts, § 394, p. 1073, says: "The manufacturer of a chattel, which he knows to be, or to be likely to be, dangerous for use, is subject to liability as stated in §§ 388 to 390."

In 46 Am. Jur., Sales, § 823, p. 945, it is said: "A manufacturer of an article likely to cause injury to property may be liable on the ground of fraud to persons with whom he has no contract relations, if he made misrepresentations likely to mislead, or employed artifice, or actively concealed defects, or used other means to throw the user of the article off his guard." See, also, Annotation, 17 A. L. R. 707, citing numerous authorities, where it is said: "Another well-recognized exception to the general rule that a manufacturer of a defective article is not liable for injury to the person or property of one with whom he is not in contractual relations is where there are fraudulent representations made by the manufacturer, upon which the ultimate consumer relies."

As stated in 22 Am. Jur., Explosions and Explosives, § 73, p. 197: "A manufacturer or seller of goods which are not explosives but which by reason of a defect in

their construction are subject to explosion may be liable for injuries either by reason of the dangerous instrumentality doctrine or by reason of representations or warranties or the doctrine of nonliability may be applied in case of sales of goods not dangerous in themselves or in their use. * * * A manufacturer of a defective article who makes misrepresentations as to his product, upon which misrepresentations the ultimate consumer relies, is liable to the consumer for injuries sustained by the explosion of the article."

In Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409, 88 A. L. R. 521, it is said: "The rule in such cases does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article is not safe for the purposes for which the consumer would ordinarily use it. * * * It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable." See, also, Bock v. Truck & Tractor, Inc., 18 Wash. 2d 458, 139 P. 2d 706; Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N. W. 309, 7 NCCA (NS) 790; Lill v. Murphy Door Bed Co., 290 Ill. App. 328, 8 N. E. 2d 714; Annotations, 39 A. L. R. 999, 63 A. L. R. 349, 105 A. L. R. 1510, 140 A. L. R. 249, citing numerous authorities. The annotation to 164 A. L. R. 569, beginning at page 584, traces the basis and growth of the so-called "general rule" that a manufacturer or supplier to a seller for retail is not ordinarily liable for negligence to remote vendees or other persons with whom he has

no contractual relations, and states clearly the controlling rules with relation thereto. As stated at page 591: "Although most of the courts * * * have not gone so far in asserting the nonexistence of the so-called general rule, it may be pointed out that if a manufacturer is excused from liability to a remote vendee for asserted negligence in the manufacture of a particular product or article offered to the consuming public through retailers, he is excused, in so far as any generalization may be stated, (1) because the injury or damage was not caused by any negligence of the manufacturer as a proximate cause; (2) because if there was some injury or damage resulting from the manufactured article, such injury or damage could not reasonably have been foreseen or anticipated by a prudent manufacturer under the circumstances of the case, and the manufacturer did not know, or should not have known, that danger from defective manufacture would be probable." As stated at page 596: "Such rules of tort have been outlined by the American Law Institute in its Restatement of the Law of Torts."

For reasons heretofore stated, we conclude that the judgment of the trial court granting a new trial should be and hereby is affirmed.

AFFIRMED.

JOHN PETERSON, APPELLANT, V. ROBERT G. PETERSON ET AL., APPELLEES.

63 N. W. 2d 858

Filed April 16, 1954. No. 33499.

1. **Frauds, Statute of: Specific Performance.** Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal.
2. ———: ———. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though

proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.

3. ———: ———. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him.

4. ———: ———. The burden in the light of this rule has devolved upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.

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

Edwin T. Mars and *John C. Mullen,* for appellant.

Merrow & Murphy and *Fraser, Connolly, Crofoot & Wenstrand,* for appellees.

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

WENKE, J.

John Peterson brought this action in the district court for Douglas County against the executors of, the trustees under, and the devisees and legatees named in the last will and testament, and codicil thereto, of Edward Peterson, deceased, which last will and testament, and codicil thereto, had been allowed and admitted to probate by the county court of Douglas County. The purpose of the action is to enforce an alleged oral agreement claimed to have been entered into by and between the plaintiff and deceased. After a trial the court found generally for the defendants and dismissed plaintiff's action. Plaintiff thereupon filed a motion for new trial and has taken this appeal from the overruling thereof.

Appellant alleges:

"That on or about the 14th day of October, 1931, Ed-

ward Peterson and John Peterson made an oral agreement, the terms of which are as follows, to-wit:

"That John Peterson release any and all claims or refrain from the prosecution of any claims he may have against Edward Peterson for and by virtue of the loss of his leg and subsequent disability.

"That John Peterson be and act as a companion to said Edward Peterson and perform such personal services as his physical condition might permit, for the duration of Edward Peterson's natural life.

"That in consideration of the foregoing the said Edward Peterson promised and agreed

"1. To provide for the financial requirements of said John Peterson, as to shelter, food, clothing and other expenses incidental to John Peterson's standard of living for the rest of said John Peterson's natural life.

"2. That said Edward Peterson further promised and agreed to make and execute a Last Will and Testament bequeathing and devising unto said John Peterson an amount of money or property, sufficient to provide for the support and maintenance of said John Peterson for the rest of his natural life, in the event that said Edward Peterson should pre-decease said John Peterson, in an agreed amount of $250.00 per month.

"3. To further devise and bequeath aforesaid to said John Peterson, a further sum of money to compensate said John Peterson for the loss of his leg, and for the pain and suffering he would be forced to endure, in the sum of $20,000.00.

"4. To further devise unto said John Peterson a home for himself or in lieu thereof to bequeath him a sum sufficient to purchase such home of the type and value of which said John Peterson had been accustomed to live while with his brother, Edward Peterson."

The last will and testament of Edward Peterson, deceased, together with the codicil thereto, contains no provision for the benefit of appellant to carry out the terms of this alleged agreement nor was any provision made

by the deceased during his lifetime for that purpose.

The district court has jurisdiction of an action for the specific performance of such a contract whether it is to be performed during the lifetime or by will. Kofka v. Rosicky, 41 Neb. 328, 59 N. W. 788, 43 Am. S. R. 685, 25 L. R. A. 207; Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792; Craig v. Seebecker, 135 Neb. 221, 280 N. W. 913; Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793; Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478.

As held in Kofka v. Rosicky, *supra:* "Specific performance of a parol contract will be enforced by a court of equity, where one party has wholly and the other partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed it." See, also, Weber v. Crabill, 123 Neb. 88, 242 N. W. 267; Craig v. Seebecker, *supra.*

The case comes to this court for trial de novo. Casper v. Frey, 152 Neb. 441, 41 N. W. 2d 363; Sopcich v. Tangeman, *supra.*

Each case must, of course, be determined from the facts, circumstances, and conditions established by the evidence. Damkroeger v. James, 95 Neb. 784, 146 N. W. 936; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256; Peters v. Wilks, *supra;* Casper v. Frey, *supra;* Sopcich v. Tangeman, *supra.*

In this regard in Lunkwitz v. Guffey, *supra,* we have announced the following principles as applicable:

"Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal.

"Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.

"The thing done, constituting performance, must be such as is referable solely to the contract sought to be

enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that non-performance by the other party would amount to fraud upon him.

"The burden in the light of this rule has devolved upon the plaintiff (1) to prove an oral contract the terms of which are clear, satisfactory and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract."

See, also, Overlander v. Ware, 102 Neb. 216, 166 N. W. 611; Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Casper v. Frey, *supra;* Nelson v. Glidewell, 155 Neb. 372, 51 N. W. 2d 892; Flessner v. Wenquist, 156 Neb. 378, 56 N. W. 2d 294; Rush v. Heinisch, 157 Neb. 545, 60 N. W. 2d 608.

For the purpose of discussion we shall refer to appellant as John and to Edward Peterson, deceased, as Edward.

John, who was born October 20, 1882, started working for his older brother Edward when he was 15 years of age. Edward was then a contractor and continued in that business up until the time of his death on August 15, 1951. John continued to work on and off for Edward and did so even after he was hurt on September 14, 1931.

In 1931 Edward was a member of the contracting partnership of Peterson, Shirley and Gunther. That year this partnership obtained a contract for some grading on a highway located between Sheridan and Ucross, Wyoming. They sublet this work to L. A. Woodward and Company. John went to work for this subcontractor as a foreman and while working in that capacity on September 14, 1931, he caught his right foot in the chain of a caterpillar tractor. His right foot and leg were so

badly mangled that his right leg had to be amputated just below the knee.

Both employer and employee reported this accident to the clerk of the district court for Sheridan County, as apparently required under the Wyoming workmen's compensation law. On October 29, 1931, John made application and claim for an award for compensation under the workmen's compensation law of Wyoming setting forth L. A. Woodward and Company as his employer and stating that the accident to his right foot occurred while engaged in duties of that employment. The district court for Sheridan County found he was entitled to compensation because of the injury and, on December 24, 1931, awarded him the lump sum of $1,649.25. John assigned the benefits of this award to his employer, L. A. Woodward and Company. Who actually received payment thereof is not shown.

When John returned from the hospital at Sheridan, Wyoming, after his right foot had been amputated, he apparently lived with his sister, Mrs. Rose Holmes, at 502 North Forty-third Street, in Omaha, Nebraska, until sometime in 1938, except while he was working for Peterson, Shirley and Gunther in the Panama Canal Zone and when staying at the Henshaw Hotel while working for the Holmes Recreation Parlors. The partnership of Peterson, Shirley and Gunther had a part of a combination bid made and secured by W. A. Callahan Construction Company for work on Madden Dam in the Panama Canal Zone. This job lasted from the fall of 1931 to the fall of 1934. John worked on this construction work from January to May of 1933, and while doing so lived in one of the company's barracks located on the job. John worked for the Holmes Recreation Parlors in 1933, 1934, 1935, and 1936.

In May 1937 Edward bought a house located at 654 North Fifty-seventh Street in Omaha and he and his family moved into it shortly thereafter. It remained Edward's home until he died. Shortly after the Edward

Peterson family moved into this home John became one of the family, apparently moving in sometime in 1938. John remained a member of Edward's household until he married in September 1948, when he moved out. He apparently never returned. While John lived in Edward's home he was treated and accepted as a member of the family. The relationship between the two brothers appears to have been very close. During this period, from 1938 to September 1948, it appears Edward took care of all of John's needs.

We have examined the evidence adduced and fail to find any evidence of such a contract as John alleges he made. In fact there is no evidence of any contract. But assuming, just for the sake of discussion, that such a contract was made, we find no evidence of its performance by John. In fact the evidence adduced shows the conduct of John and Edward relates more to their relationship as brothers than to the contract which John here seeks to enforce. We think the evidence John adduced wholly fails to meet the requirements of what he was required to prove by clear, satisfactory, and convincing evidence.

In this respect we have not overlooked the testimony of John's numerous witnesses showing Edward's interest in John's welfare and of Edward's often expressed desire and intention to see that he (John) was amply provided for after his (Edward's) death. But all testimony of this character is only evidence of a testamentary intention and, having no relation to any legal agreement or contract and being therefore without consideration, could be abandoned by Edward at any time.

In view of the foregoing we affirm the action taken by the trial court.

AFFIRMED.

BOARD OF EDUCATIONAL LANDS AND FUNDS ET AL., APPELLEES, V. ROGER GILLETT, APPELLANT.

64 N. W. 2d 105

Filed April 16, 1954. No. 33520.

1. **Constitutional Law.** An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed.
2. ———. In that connection, what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never at any time been possessed of any legal force.
3. **Evidence.** All courts must take judicial notice of the public law prevailing within the forum, for that is the evident purpose of their existence.
4. **Courts: Evidence.** The rule which ordinarily precludes a court from taking judicial notice of its own records in other actions does not prevent it from noticing the doctrine or rule of law adopted by the court in the first action and applying that principle under the theory of stare decisis in another action.
5. **Courts: Judgments.** Res judicata and stare decisis are distinguishable in that the former may relate to both law and facts whereas the latter relates to legal principles only; and also in that the former binds parties and privies, whereas the latter governs a decision on the same question between strangers to the record.
6. **Statutes.** An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of government, including the Legislature.
7. **Evidence.** That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. It has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence.
8. **Forcible Entry and Detainer.** A complaint of unlawful and forcible detention, to be good under relevant and controlling section 27-1405, R. R. S. 1943, need not aver facts which show that defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute.
9. ———. A complaint in an action of forcible entry and detainer which accurately describes the premises and distinctly charges

an unlawful and forcible detention thereof by defendant is sufficient.

10. ———. Since the action of forcible entry and detainer under the statute is a civil remedy to recover the possession of premises unlawfully and with force withheld from the plaintiff, it will be sufficient to sustain the charge of forcible detainer, that the party unlawfully in possession refuses to vacate the premises on lawful notice so to do.

APPEAL from the district court for Sioux County: EARL L. MEYER, JUDGE. *Affirmed.*

Ely & Ely, for appellant.

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *W. E. Mumby,* for appellees.

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

CHAPPELL, J.

Plaintiffs, Board of Educational Lands and Funds, State of Nebraska, William Walker, and Antoinette Walker, originally filed this forcible entry and detainer action in the county court of Sioux County against defendant Roger Gillett, seeking restitution of described school lands located in said county and owned by plaintiff State of Nebraska as trustee. Upon trial to a jury of the issues made by plaintiffs' petition and defendant's plea of not guilty, it returned a verdict finding defendant guilty of unlawful detention, and judgment was rendered thereon awarding plaintiffs restitution of the premises and costs. Therefrom defendant appealed to the district court. In that court, defendant's respective motions to strike paragraph VI of plaintiffs' petition, and for judgment on the pleadings, were overruled. Jury trial was waived and by stipulation the cause was tried and heard upon the same pleadings as in the county court. Both parties adduced evidence in their behalf, at conclusion of which the trial court found defendant guilty of unlawful detention and accordingly rendered judg-

ment awarding plaintiffs restitution of the premises and costs.

Defendant's motion for new trial was overruled, and he appealed to this court, assigning as error: (1) That the trial court erred in overruling his motions aforesaid; and (2) that the judgment was not sustained by the evidence and was contrary to law. We conclude that the assignments should not be sustained.

Plaintiffs' petition specifically described the lands involved. It then alleged, to wit: That they are a part of the lands granted to the state under the Enabling Act of Congress, and that the state is owner thereof as trustee for the use and benefit of the common schools of this state, as provided by said act and the Constitution of this state, under which the Board of Educational Lands and Funds, hereinafter designated as the board, is charged with the control and management of such lands. That plaintiffs William and Antoinette Walker are owners of a lease on said lands issued to them by the board for a 12-year period from January 1, 1952, they having offered the highest and best bid therefor at a public auction held on March 14, 1952. It then alleged substantially that defendant entered into possession of the premises under a 25-year lease assigned to him on May 10, 1937, which expired December 31, 1949; and that pursuant to the provisions of sections 72-240 and 72-240.01, R. R. S. 1943, defendant made application for and was issued a new lease thereon by the board, dated January 1, 1950, for a period of 12 years. In that connection, paragraph VI of plaintiffs' petition then alleged: "That the Supreme Court of Nebraska has declared sections 72-240 and 72-240.01 to be unconstitutional and void and that, therefore, the lease issued by the Board of Educational Lands and Funds under date of January 1, 1950, as above set forth, is a complete nullity and the defendants acquired no rights by virtue of the same."

Thereafter plaintiffs alleged that on May 27, 1952, they caused a legal 3-day notice to vacate the premises to

be served upon defendant and that such period had fully elapsed and determined, yet defendant continued to unlawfully and forcibly detain said premises from plaintiffs, who prayed judgment for restitution and costs.

Defendant's motion to strike paragraph VI from plaintiffs' petition was predicated upon the basis that it was simply "a conclusion of law, argumentative, and not the statement of any traversible fact."

In State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520, this court, after discussing numerous controlling propositions of law, held: "Sections 72-240 and 72-240.01, R. R. S 1943, are violative of the duties and functions of a fiduciary trustee and, as such, contravene Article VII, section 9, of the Constitution of Nebraska." The conclusion therein was that leases issued by the board in pursuance of such sections were void from their inception. A supplemental opinion is reported in 154 Neb. 596, 47 N. W. 2d 526, but it in no manner arrived at a different conclusion.

In Whetstone v. Slonaker, 110 Neb. 343, 193 N. W. 749, this court said: "It is held in Finders v. Bodle, 58 Neb. 57, that an act of the legislature, passed in violation of the Constitution, is void from the date of its enactment, and that 'An unconstitutional statute creates no new rights and abrogates no old ones. It is for all purposes as though it had never been passed.'

"It is held by the United States supreme court in Norton v. Shelby County, 118 U. S. 425, 442: 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'

"Cooley in his work on Constitutional Limitations (7th ed.) at page 259, lays down the rule thus: 'When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has

acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.' "

In State v. Cooley, 156 Neb. 330, 56 N. W. 2d 129, a case comparable in every material respect with that at bar, this court said: "Most of the contentions made here by appellees were raised and determined in Propst v. Board of Educational Lands and Funds, *ante* p. 226, 55 N. W. 2d 653. In fact the appellees' contentions in this case are mostly supported by referring to parts of appellants' brief in the former case. We will not repeat all of these contentions but only cite the holdings in the Propst case which are controlling thereof. In Propst v. Board of Educational Lands and Funds, *supra,* we held:

" 'Application was made in each instance for issuance of the lease, the requirements of the act were complied with, and a 12-year lease, not a 25-year renewal lease, was issued to each of the previous lessees. These were applied for, issued, accepted, and retained knowingly under the act of 1947, by all who were in any way interested in and concerned with them. The judicial declaration that the automatic renewal plan of 1947 was invalid effectively disposed of any and all alleged rights of appellants granted by, applied for, and accepted by them under that act. The law of this state has always been that an unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations. Finders v. Bodle, 58 Neb. 57, 78 N. W. 480; Whetstone v. Slonaker, 110 Neb. 343, 193 N. W. 749; Lennox v. Housing Authority of City of Omaha, 137 Neb. 582, 290 N. W. 451.

" '* * * There was a sufficient distinction between the situation of persons holding leases on state school lands under the statute in force prior to 1947 where oppor-

tunity had been afforded for the presentation of bids by third parties, and those who applied for and accepted renewal leases under the act of 1947 where the making of any bids by third parties was barred, to allow the state to treat them as different classes.

"'* * * It was the decision of the court in the Ebke case that gave the renewal leases their status of legal nullity, and not the action of the board in entering the fact upon its records by its declaration or by its vacation of the previous orders concerning the issuance of the leases. There was nothing the board could do or that appellants could have interposed if they had been present at the meeting of the board when this was done that would have affected the invalidity of the leases. The board did not violate rights by its action because no rights in this regard existed. Due process can only be involved when there are existing rights to be defended.'" See, also, State v. Gardner, 156 Neb. 326, 56 N. W. 2d 135. In Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, cited in the above quotation, writ of certiorari was denied, 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 42.

In both State v. Cooley, *supra,* and State v. Gardner, *supra,* this court concluded that under the facts disclosed by the records therein, defendants as a matter of law were unlawfully holding possession of the premises involved, and that judgments awarding restitution and costs should have been rendered. Therefore, we reversed the judgments of the lower court and remanded the causes with directions to respectively render judgments for the state in accordance with the prayers of their petitions.

Our conclusion is that paragraph VI of plaintiffs' petition was simply a statement of fact, and the order of the trial court overruling defendant's motion to strike was entirely proper in every respect. In that regard also, defendant argued that paragraph VI was at most an ineffectual attempt to plead res judicata, and that there

was a failure to offer any proof to sustain such a plea. In other words, the effect of defendant's argument is to say that our holdings heretofore set forth with relation to unconstitutionality of sections 72-240 and 72-240.01, R. R. S. 1943, and the invalidity of leases involved therein, were binding only on the parties thereto and not upon defendant in this case. The opinions in such cases and quotations therefrom heretofore recited dispel that argument, contrary to his contentions. They established the public law of this forum in that regard, and plaintiffs here were not required to relitigate that issue in order to establish unconstitutionality of such statutes.

In that regard, we take judicial notice of such laws of this forum. The general rule, as stated in 20 Am. Jur., Evidence, § 32, p. 57, is that: "All courts must take judicial notice of the law prevailing within the forum, for that is the evident purpose of their existence, and it is immaterial whether the law in question is written or unwritten." As stated in 20 Am. Jur., Evidence, § 87, p. 106: "It should be noted in this connection, however, that the rule which precludes a court from taking judicial notice of its own records in other actions does not prevent it from noticing the doctrine or rule of law adopted by the court in the first action and applying that principal under the theory of stare decisis in the second action."

Also, in 21 C. J. S., Courts, § 188, p. 304, it is said: "Res judicata and stare decisis are distinguishable in that the former may relate to both law and facts whereas the latter relates to legal principles only; and also in that the former binds parties and privies, whereas the latter governs a decision on the same question between strangers to the record."

As stated in 31 C. J. S., Evidence, § 16, p. 527: "Likewise, from motives of necessity, as well as of public policy, the constitution and public statutes of a state are judicially recognized by all courts of that state. * * * Judicial knowledge of a statute includes the date when it

was introduced in the legislature, when it was passed and approved, and when it went into effect, or was published; when it was suspended or repealed; facts recited or recognized in the statute, authoritative decisions construing it, and 'everything near or remote that determines' what is and what is not a public law of the state or a part of the constitution."

In that connection, as said in 31 C. J. S., Evidence, § 13, p. 519: "Judicial notice takes the place of evidence. Proof is not required of facts of which the court takes judicial notice."

In State ex rel. Norton v. Van Camp, 36 Neb. 91, 54 N. W. 113, this court held: "An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of the government, including the legislature."

As held in Thomas v. Scoutt, 115 Neb. 848, 215 N. W. 140: "The supreme court's interpretation of a constitutional provision is a part of the Constitution itself and is binding on suitors seeking the enforcement of liabilities created by that instrument."

Also, as held in Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682: "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. It has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence."

With regard to defendant's motion for judgment on the pleadings, he argued that plaintiffs' petition failed to state a cause of action. Section 27-1401, R. R. S. 1943, contains the jurisdictional requirements and specifies the parties against whom actions in forcible entry and detainer may be maintained. In that connection, section 27-1405, R. R. S. 1943, provides: "The summons shall not issue until the plaintiff shall have filed his complaint in writing with the justice, which shall particularly de-

scribe the premises so entered upon or detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceful or lawful entry of the described premises. The complaint shall be copied into and made a part of the record."

It has long been established in this state that a complaint in forcible entry and detention is sufficient if substantially in the words of the statute. In such a case, Locke v. Skow, 3 Neb. (Unoff.) 299, 91 N. W. 572, it is said: "The decisions in this state are uniform that the complaint need only be in the general terms of the statute. Blachford v. Frenzer, 44 Neb., 829; Moore v. Parker, 59 Neb., 29; Blaco v. Haller, 9 Neb., 149; Hitchcock v. McKinster, 21 Neb., 148."

In Moore v. Parker, 59 Neb. 29, 80 N. W. 43, it is said: "The complaint is not defective in any essential particular. It accurately describes the premises, and distinctly charges an unlawful and forcible detention of the same by the defendant. The statute requires nothing more." As stated in the syllabus: "A complaint in an action of forcible entry and detainer which accurately describes the premises, and distinctly charges an unlawful and forcible detention thereof by defendant is sufficient."

In that connection also, defendant cited and relied upon section 25-804, R. R. S. 1943, and argued therefrom that plaintiffs' petition herein did not comply therewith by stating facts sufficient to bring the case within the provisions of sections 27-1401 and 27-1405, R. R. S. 1943. Plaintiffs' petition seems to us sufficient even under that section, but such conclusion is immaterial and need not be relied upon because section 25-804, R. R. S. 1943, is not controlling in forcible entry and detainer actions. They are controlled by section 27-1405, R. R. S. 1943. Such was the conclusion of this court, where the same question was raised, in Blachford v. Frenzer, 44 Neb. 829, 62 N. W. 1101. Therein it is said: "A complaint

of unlawful and forcible detention, to be good under this section, need not aver facts which show that the defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute. The legislature designed by the enactment of this statute to provide a summary remedy by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof; or one who, having lawfully entered, then unlawfully and forcibly detained possession. Justices of the peace have original jurisdiction of this class of cases, and it was not the intention of the legislature that the rule which requires a pleader to state the facts constituting his cause of action or defense should be applied to complaints in forcible detainer actions. (Barto v. Abbe, 16 O., 408; Brown v. Burdick, 25 O. St., 260.)." The statement is controlling here.

In the light of such rules, plaintiffs' petition clearly stated a cause of action, and defendant's motion for judgment on the pleadings was properly overruled.

We turn then to the question of whether or not the judgment rendered was sustained by the evidence. We conclude that it was.

The material evidence is not in dispute. In all material respects except names, dates, parties, property, places, and amounts, the facts adduced are identical with those in State v. Cooley, *supra*, which is controlling.

Defendant here lawfully went into possession of the land on May 10, 1937, as assignee of a then valid 25-year lease which subsequently expired December 31, 1949. Such lease provided, inter alia, "* * * that at the expiration of twenty-five years from and after the first day of January next ensuing after the date of this lease, or sooner, with the consent of the Board of Educational Lands and Funds, he will peaceably and quietly leave, surrender, and yield up all and snigular (sic) the said lands and premises." The evidence here is em-

phatic that defendant makes "no claim whatever under the original lease." However, on September 15, 1949, pursuant to the provisions of sections 72-240 and 72-240.01, R. R. S. 1943, defendant made application for and was issued a new lease on the premises by the board, purportedly effective as of January 1, 1950, for a period of 12 years, under which defendant here claims the right to possession. There were then and are now no improvements upon the property except a windmill, water tank, and some fences, of which his "neighbors owned more than half." He paid accruing rentals until January 1, 1952, after which, upon orders of the board, the county treasurer of Sioux County refused to accept the same. However, as heretofore observed, sections 72-240 and 72-240.01, R. R. S. 1943, were unconstitutional, and such lease was entirely void and a nullity from its inception, so that, as held in State v. Cooley, *supra,* defendant, after December 31, 1949, was merely a tenant at sufferance. In such situation, the board on August 13, 1951, ordered and directed that a lease of the lands should be sold at public auction upon notice thereof, as provided by law. Such notice was given that the lease on said lands would be offered for sale at public auction at the office of the county treasurer in Harrison, Sioux County, Nebraska, at 9:30 a. m., March 14, 1952. Thereat defendant was present and bid on the lease, but plaintiffs Walker were highest and best bonus bidders thereon. Of even date, in conformity therewith, they made formal application for a lease, in which application, inter alia, they agreed to pay for the improvements in addition, as provided by law. Such application was approved by the board on April 14, 1952, and they were lawfully issued a 12-year lease on the premises, effective January 1, 1952. Thereafter, defendant refused to surrender possession, so on May 21, 1952, plaintiffs caused a legal 3-day notice to vacate the premises to be served upon defendant, which he refused to obey, and this action followed on June 4, 1952.

In that connection, as early as Estabrook v. Hateroth, 22 Neb. 281, 34 N. W. 634, this court held: "The action of forcible entry and detainer under the statute being a civil remedy to recover the possession of premises unlawfully and with force withheld from the plaintiff, it will be sufficient to sustain the charge of forcible detainer, that the party unlawfully in possession refuses to vacate the premises on lawful notice so to do. Campbell v. Cooneradt, 22 Kans., 704, approved and followed. Myers v. Koenig, 5 Neb, 419."

Also, in Post v. Bohner, 23 Neb. 257, 36 N. W. 508, this court held: "In an action of forcible detention, under the statute, to recover the possession of premises unlawfully withheld, it is sufficient to maintain the action that the party in possession refuses to vacate the premises on lawful notice."

In the light of such facts and cited authorities, we find that defendant, as a matter of law, was unlawfully holding possession of the premises as found by the trial court, and that the judgment awarding plaintiffs restitution was the only judgment which could have been lawfully rendered.

Cases relied upon by defendant are clearly distinguishable upon the facts and applicable law. To discuss them at length herein would serve no purpose except to unduly prolong this opinion.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ELMER CLARK ET AL., APPELLEES.

64 N. W. 2d 112

Filed April 16, 1954. No. 33510.

Constitutional Law. The principles announced in Board of Educational Lands & Funds v. Gillett, *ante* p. 558, 64 N. W. 2d 105, are applicable and control the disposition of the appeal in this case.

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

Clarence S. Beck, Attorney General, and *Robert A. Nelson,* for appellant.

Ely & Ely, for appellees.

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

CHAPPELL, J.

Plaintiff, State of Nebraska, originally filed this forcible entry and detainer action in the county court of Brown County against defendants Elmer Clark, Ben Clark, Wayne Clark, Nettie Lampitt, Melvin Lampitt, and Marion G. Lampitt, seeking restitution of described school lands located in said county and owned by plaintiff as trustee. Upon trial to a jury of the issues made by plaintiff's petition and defendants' plea of not guilty, it returned a verdict against plaintiff and for defendants, finding them not guilty of unlawful detention of the premises, and judgment was rendered thereon at plaintiff's costs. Therefrom plaintiff prosecuted error to the district court attaching a transcript of said proceedings in the county court to its petition in error and making it a part thereof. In said petition it was alleged that the verdict of the jury and judgment rendered thereon was not sustained by the evidence but was contrary thereto and contrary to law. Hearing thereon was had

in the district court, whereat, without objection, the county court files in said cause and a bill of exceptions containing all the evidence adduced by the parties in the county court were offered and received in evidence. Subsequently, the trial court rendered a judgment which found that the judgment of the county court was free from error, dismissed plaintiff's petition in error, affirmed the judgment of the county court at plaintiff's costs, and ordered the judgment certified back to the county court for enforcement as if no error had been taken.

Thereafter plaintiff's motion for new trial was overruled and it appealed to this court, assigning as error: (1) That the trial court erred in finding that the judgment of the county court was free from error; and (2) that the judgment of the district court was not sustained by the evidence and was contrary to law. We sustain the assignments.

Plaintiff's petition filed in the county court specifically described the lands involved. It then alleged, to wit: That they were a part of the lands granted to plaintiff under the Enabling Act of Congress, and that plaintiff is the owner thereof as trustee for the use and benefit of the common schools of this state, as provided by said act and the Constitution of this state, under which the Board of Educational Lands and Funds, hereinafter designated as the board, is charged with the control and management of such lands. That the board issued to Ed M. Kinney (whose name is actually Edd R. Kinney) and Florence M. Kinney a lease to the premises for a period of 12 years from January 1, 1952, they having offered the highest and best bid therefor at a public auction held on October 16, 1951. It then alleged that defendant Elmer Clark had entered into possession of the premises under a 25-year lease on January 2, 1923, which expired on December 31, 1947; and that pursuant to the provisions of sections 72-240 and 72-240.01, R. R. S. 1943, defendant made application for and was issued

a new lease by the board, dated January 1, 1948, for a period of 12 years.

In that connection, paragraph VI then alleged: "That the Supreme Court of Nebraska has declared sections 72-240 and 72-240.01 to be unconstitutional and void and that, therefore, the lease issued by the Board of Educational Lands and Funds under date of January 1, 1948, as above set forth, is a complete nullity and the defendant acquired no rights by virtue of the same."

Thereafter, it was also alleged that defendants Ben Clark, Wayne Clark, Nettie Lampitt, Melvin Lampitt, and Marion G. Lampitt, had entered into possession of the premises without plaintiff's permission or consent. It then alleged that on March 6, 1952, plaintiff caused a legal 3-day notice to vacate to be served upon defendants and each of them, and such period had fully elapsed and determined, but defendants continued to unlawfully and forcibly detain said premises from plaintiff, who prayed for restitution thereof and costs.

The material evidence is not in dispute. The record discloses that on January 2, 1923, a valid school land lease for the premises was issued to defendant Ben Clark, Clarence Clark, and defendant Elmer Clark, for a period of 25 years. On April 9, 1923, Clarence Clark assigned all his interest therein to defendants Ben Clark and Elmer Clark. On November 29, 1940, Ben Clark assigned all his interest to Elmer Clark. Such lease provided: "* * * that at the expiration of twenty-five years from and after the first day of January next ensuing after the date of this lease, or sooner, with the consent of the Board of Educational Lands and Funds, he will peaceably and quietly leave, surrender, and yield up all and snigular (sic) the said lands and premises." Such lease expired on December 31, 1947. However, on August 4, 1947, pursuant to the provisions of sections 72-240 and 72-240.01, R. R. S. 1943, defendant made application to the board for a new lease. On November 29, 1947, his application therefor was approved

and a new lease was issued to him for a period of 12 years purportedly effective from January 1, 1948, under which he still claims the right to possession. He thereafter remained in possession and paid rentals thereon until the first half of 1952, which rentals the county treasurer refused to accept, as ordered by the board. However, it will be observed that sections 72-240 and 72-240.01, R. R. S. 1943, were unconstitutional, and such lease was entirely void and a legal nullity from its inception, so that, as concluded in State v. Cooley, 156 Neb. 330, 56 N. W. 2d 129, defendant Elmer Clark was merely a tenant at sufferance. Also therein this court specifically held: "Anyone dealing with the school lands must be held to do so with knowledge of and subject to the trust obligations of the state and the legislative grant of power to the Board of Educational Lands and Funds as to the terms and conditions of the lease." See, also, State v. Gardner, 156 Neb. 326, 56 N. W. 2d 135; State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520, supplemental opinion, 154 Neb. 596, 47 N. W. 2d 520; Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, certiorari denied, 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 42.

All other defendants herein were concededly subtenants or croppers, charged with notice of and subject to the terms and conditions of defendant Elmer Clark's lease, with no greater rights in the premises than those possessed by him.

In such situation, on August 13, 1951, the board lawfully ordered and directed that a lease of the land should be sold at public auction upon notice given thereof, as provided by law. Such notice was duly given that a lease upon the lands would be offered for sale at public auction at the office of the county treasurer in Ainsworth, Brown County, at 1:30 p. m., October 16, 1951. Defendant Elmer Clark was present at that sale, but did not personally bid on the lease. His brother, defendant Ben Clark, was also present and did bid for himself

and a secret other person who he claims was not Elmer Clark. However, Edd R. Kinney and Florence M. Kinney offered the highest and best bonus bid. Of even date, and in conformity therewith, they made formal application for a lease, in which application, inter alia, they agreed to pay for the improvements in addition, as provided by law. Their application was approved by the board November 13, 1951, and a valid lease was issued to them as of that date for a 12-year period, effective January 1, 1952. The State offered to prove by Edd R. Kinney that an appraisal of the improvements had been made by the county board and that the amount thereof had been paid by him to the county treasurer, but an objection by defendants that the offer was "incompetent, irrelevant, and immaterial" was sustained.

On March 6, 1952, defendants having refused to surrender possession, plaintiff caused a legal 3-day notice to vacate the premises to be served upon defendants and each of them, which they refused to obey, and this action followed April 22, 1952.

In the light of the pleadings and evidence aforesaid, defendants raised, argued, and made the same material contentions in support of the trial court's judgment herein as were made by defendant in Board of Educational Lands & Funds v. Gillett, *ante* p. 558, 64 N. W. 2d 105. The pleadings, issues, and evidence in that case were in all material respects identical with that at bar except only that the names, dates, parties, lands, location, and amounts were different. Since defendant's contentions made therein were discussed at length and decided adversely to him in that opinion, our discussion and conclusions, together with reasons therefor, will not be repeated here. It is sufficient for us to say that they are adopted herein as controlling.

As was done in State v. Gardner, *supra,* and State v. Cooley, *supra,* we conclude as a matter of law, that under the pleadings and evidence disclosed by the record, defendants were unlawfully holding possession of the

premises, and that judgment awarding restitution and costs should have been rendered in favor of plaintiff. We therefore reverse the judgment of the lower court and remand the cause with directions to render judgment for plaintiff in accord with the prayer of its petition. All costs are taxed to defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

ARTHUR A. HEHNKE ET AL., APPELLEES, V. F. E. STARR ET AL., APPELLANTS.
64 N. W. 2d 68

Filed April 23, 1954. No. 33444.

1. **Appeal and Error.** Actions in equity are triable de novo upon appeal to this court, but in a case wherein the trial court has made a personal examination of the physical facts and the credible oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that 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. **Trial: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed upon this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises, providing that the record contains competent evidence to support the findings.
3. **Adverse Possession.** As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land.
4. ———. A person claiming title by adverse possession must to establish it prove open, notorious, exclusive, continuous, and adverse possession of the real estate, claiming title to the same against all persons for the full period of 10 years.
5. ———. One claiming ownership of real estate by adverse pos-

session must recover upon the strength of his title and not because of a possible weakness in the title of his adversary.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Reversed and remanded with directions.*

Atkins, Lyman & Ferguson, for appellants.

Curtis O. Lyda and *Willard F. McGriff,* for appellees.

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

CHAPPELL, J.

Plaintiffs Arthur A. Hehnke and Irene McCoskey Hehnke, husband and wife, and Gerald H. Lyon and Ida E. Lyon, husband and wife, brought this action in equity to determine the true boundary line according to the recorded plat of Goos Tract 15, owned by them, and Goos Tract 14, owned by defendants F. E. Starr and Leva Starr, husband and wife, and to quiet title in plaintiffs to tract 15 as against defendants. Defendants filed an answer and cross-petition also seeking a determination of the true boundary line as surveyed and platted between the two tracts and to quiet title in them to tract 14 as against plaintiffs. Insofar as important here, plaintiffs' reply to defendants' answer and answer to defendants' cross-petition was a general denial and renewal of the prayer of their petition. The primary question for determination was and is the location of the true parallel east and west boundary line between the two tracts, both of which are located in Scottsbluff, Nebraska.

In that regard, the controversy admittedly involved a strip of land 6 feet wide, running lengthwise south of the boundary line of tract 15 as designated upon the recorded plat of Goos Tracts. As conceded in plaintiffs' brief, the primary question was and is whether or not the evidence was sufficient under law to prove that plaintiffs and their predecessors in title to tract 15,

including the strip involved, had been in open, notorious, exclusive, continuous, and adverse possession thereof, claiming title thereto as against the true owner for the full period of 10 years.

After hearing, whereat the parties each adduced evidence in their behalf, the trial court viewed the premises and rendered its judgment, finding and adjudging the issues in favor of plaintiffs and against defendants, fixing the south line of tract 15 at a point 918 feet north of and parallel with the south line of Section 14, Township 22 North, Range 55 West of the 6th P. M. in Scotts Bluff County, and so quieted the title thereto in plaintiffs as against defendants. In that connection, defendants' contention was and is that the true boundary line should have been found and adjudged to be 924 feet north of and parallel with the center of West Twenty-seventh Street, which is the south section line aforesaid, in conformity with the plat of Goos Tracts, duly filed and recorded August 12, 1919.

Thereafter, defendants appealed, assigning substantially that the judgment was not sustained by the evidence and was contrary to law. We sustain the assignment.

We examine the record in the light of the language appearing in Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387, wherein we said: "Applicable here is the following from Probert v. Grint, 148 Neb. 666, 28 N. W. 2d 548: '"When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929, § 20-1925 (this section being now 25-1925, R. S. 1943). But in a case wherein the trial court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their

manner of testifying, and must have accepted one version of the facts rather than the opposite." City of Wilber v. Bednar, 123 Neb. 324, 242 N. W. 644. See, also, State v. Delaware-Hickman Ditch Co., 114 Neb. 806, 210 N. W. 279; Greusel v. Payne, 107 Neb. 84, 185 N. W. 336.

" ' "The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings." Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N. W. 2d 488.' See Carter v. Parsons, 136 Neb. 515, 286 N. W. 696."

The oral evidence is voluminous and the record contains numerous exhibits, including deeds, a contract for a deed, the recorded plat, surveys, and photographs illustrating the situation. Herein we can only summarize controlling portions of the evidence. It appears that tract 15 is north of tract 14. Both tracts face west along Avenue D, and beyond per adventure of a doubt, as shown by the recorded plat, in the light of which a survey was made by the county engineer and surveyor, who took actual measurements upon the ground, the south boundary line of tract 15 is 924 feet north from and parallel with the south line of Section 14, which is the center of West Twenty-seventh Street. The testimony of plaintiffs' civil engineer, who was not a land surveyor, so concedes but attempts to say that by reason of a stake found at the northwest corner of tract 10, which was never established by competent evidence as a proper monument, the boundary line should actually be 918 feet north of the center of West Twenty-seventh Street. Such contention is not sustained by any competent evidence. The only possible justification for establishing the line at such point must be, if at all,

upon the basis that plaintiffs and their predecessors lawfully obtained title to the strip involved by adverse possession. However, neither the evidence nor applicable law can sustain such conclusion.

In that regard, on September 24, 1932, Dessie Bowen received a special warranty deed to: "Goos Tract No Fifteen . . . . (15), Scotts Bluff County, Nebraska, according to the recorded plat thereof, same being a subdivision of the S½SW¼ of Sec 14 Tp 22 N R 55 W 6th P.M." Thereunder she took possession of tract 15 and doubtless occupied and used some or all of the strip in dispute for at least part of the time, until she died testate on March 22, 1947. Final decree in her estate was filed January 6, 1948, in which the assets of her estate, including tract 15, were assigned under the terms of her will to a son, Franklin Lee Bowen, an undivided one-half; to a son, John Denver Bowen, an undivided one-fourth; and to another son, George Watson Bowen, an undivided one-fourth. In that regard, on November 15, 1947, by warranty deed Franklin Lee Bowen, single, and the other two sons together with their respective spouses, conveyed: "Goos Tract numbered fifteen (15), Scotts Bluff County, Nebraska according to the recorded plat thereof, being a subdivision of the S½SW¼ of Section 14, Township 22 North, Range 55 West of 6th P.M." to plaintiffs, "Arthur A. Hehnke and Irene McCoskey Hehnke, husband and wife." Thereunder they took possession of tract 15, a part of which was or theretofore had been fenced, including a part or all of the strip in dispute, and claimed it as their own, which defendants disputed, and the possession of such strip by plaintiffs was never thereafter continuous or exclusive, since it appears that defendants also used it or a part thereof at various times for their own purposes. Finally, in April 1952, defendants had a survey made by the county engineer and surveyor and upon ascertaining the true line, they thereafter took possession of it as their own for themselves alone, which

was the occasion for this action, filed by plaintiffs on August 1, 1952.

In the meantime, on May 27, 1950, plaintiffs Hehnke entered into a written sale and purchase contract with plaintiffs Lyon of: "Goos Tract Numbered Fifteen (15), Scotts Bluff County, Nebraska, according to the recorded plat thereof, being a subdivision of the South One-half of the Southwest Quarter (S½SW¼), Section Fourteen (14), Township Twenty-two (22), North, Range Fifty-five (55), West of the 6th P. M., ScottsBluff County, Nebraska." Thereunder plaintiffs Lyon took possession of tract 15 in much the same manner and with the same result as that heretofore recited with relation to plaintiffs Hehnke.

On the other hand, with regard to tract 14, it will be observed that on March 7, 1935, by warranty deed to an undivided one-half interest and an executor's deed to the other one-half interest, John D. Bowen, a son of Dessie Bowen, a predecessor of plaintiffs, through whom they claimed title to the strip by reason of tacking her alleged adverse possession, concededly became the owner of tract 14. The son took possession thereunder, used water to irrigate the east end of his tract 14 from an irrigation lateral claimed by plaintiffs to have been located within tract 15 along the south line thereof, and for a time at least the east ends of both tracts 14 and 15 were used as one parcel. We note here then that there is no evidence whatever in this record that Dessie Bowen ever actually notified or brought home to her son John D. Bowen, defendants' grantor, that she ever claimed the strip here involved adversely to him. In that connection, under such circumstances it has long been the rule in this jurisdiction that the mother's possession, even though she may have occupied and used all of the strip until April 29, 1942, was during such period presumptively permissive and not adverse. As stated in Chase v. Lavelle, 105 Neb. 796, 181 N. W. 936: "The rule is thus laid down in 1 R. C. L. 756, sec. 85: 'As a general

rule an adverse possession cannot be predicated on the possession of the parent as against a child, or on the possession of a child as against its parent.' And in 2 C. J. 157, sec. 283, it is said: 'Possession by a child of land belonging to his parent will not ordinarily be considered adverse.' This text is supported by the following adjudicated cases: Hunt v. Hunt, 3 Met. (Mass.) 175, 37 Am. Dec. 130; Silva v. Wimpenney, 136 Mass. 253; Dunham v. Townshend, 118 N. Y. 281; Haggard v. Martin, 34 S. W. (Tex. Civ. App.) 660; O'Boyle v McHugh, 66 Minn. 390; McCutchen v. McCutchen, 77 S. Car. 129, 12 L. R. A. n. s. 1140. The rule is well stated in O'Boyle v. McHugh, supra, as follows:

"'As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land.'" Such opinion was cited, among others, and quoted from with approval in Maxwell v. Hamel, 138 Neb. 49, 292 N. W. 38. See, also, Walter v. Walter, 117 Neb. 671, 222 N. W. 49. The statements are controlling here.

In the light thereof and the situation presented here, it appears that Dessie Bowen, the mother, could not from March 7, 1935, to April 29, 1942, be lawfully held to have occupied the strip in dispute herein adversely against her son John D. Bowen, who during such period owned tract 14.

In that connection, in November 1940, John D. Bowen, the son, rented tract 14 to defendants Starr and they thenceforth occupied the same as his tenants until April 29, 1942, when John D. Bowen and Helen M. Bowen, husband and wife, by warranty deed, transferred: "Tract Fourteen (14), Goos Tracts, being a subdivision of the south Half of the Southwest Quarter (S½SW¼) of Section Fourteen (14), Township Twenty-two (22)

Range Fifty-five (55), West of the Sixth P.M. in Scotts Bluff County, Nebraska" to defendants "F. E. Starr and Leva Starr, husband and wife." Thereunder they continued thenceforth in possession of tract 14 and used the strip here involved or a part thereof on various occasions for their own purposes, although plaintiffs claimed it as their own and also used the same or a part thereof on various occasions for their own purposes.

In Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117, this court said: "A person claiming title by adverse possession must, to establish it, prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years. In Curren v. Certain Parcel of Land, 149 Neb. 477, 31 N. W. 2d 405, it is said: 'To secure a title by adverse possession, the plaintiff must prove open, notorious, exclusive, continuous, and adverse possession of the real estate for the full period of ten years.' See, also, Foltz v. Brakhage, 151 Neb. 216, 36 N. W. 2d 768; Garner v. McCrea, supra.

"It is virtually undenied by any authority, and is asserted by a great majority of cases, that an essential element of adverse possession is that it shall be exclusive. In Hanlon v. Union P. Ry. Co., 40 Neb. 52, 58 N. W. 590, this is affirmed: 'In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations.' In Smith v. Hitchcock, 38 Neb. 104, 56 N. W. 791, this court said: 'To constitute an adverse possession of land, such as, if it continued for ten years, would establish title in the occupant, it is necessary that he should actually hold the land as his own during that period, in opposition to the constructive possession of the legal proprietor.' See, also, Hoffine v. Ewings, 60 Neb. 729, 84 N. W. 93; Knight v. Denman, 64 Neb. 814, 90 N. W. 863; Annotation, 15 L. R. A. N. S. 1196; 2 C. J. S., Adverse Possession, § 47, p. 566; 1 Am. Jur., Adverse Possession, § 141, p. 875." In that case we also specifically held: "One claiming own-

ership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of his adversary." Such statements are controlling here.

Plaintiffs actually have no paper title to the strip involved, and upon any theory of tacking or otherwise they have not established by any competent evidence that they lawfully acquired any title thereto by adverse possession. In that connection, also, plaintiffs did not by "proper plea" put in issue that the alleged boundary line claimed by them had "been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years" as required by section 34-301, R. R. S. 1943, and in any event they did not prove the same by any competent evidence as required by Hakanson v. Manders, *ante* p. 392, 63 N. W. 2d 436.

On the record and in the light of authorities heretofore cited, we conclude that the judgment of the trial court was contrary to the facts and law having application thereto. Therefore, the judgment should be and hereby is reversed and the cause is remanded with directions that the trial court shall render judgment for defendants as prayed in the first paragraph of the prayer of their answer and cross-petition. All costs are taxed to plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF NELLE O'DONNELL, DECEASED. MARY ELIZABETH SCHLITZ ET AL., APPELLANTS, V. CLARA M. TOPP ET AL., APPELLEES.

64 N. W. 2d 116

Filed April 30, 1954. No. 33447.

1. Wills. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a 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. ———. In order that a will may be rejected on the ground of incompetency of the testator the evidence of the contestant must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will.

3. ———. 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 obstacle 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.

4. ———. Although competent evidence of the testator's condition of mind long before, closely approaching, and shortly after the time of execution is admissible, it is received only to assist in revealing his state of mind at that time.

5. ———. Whether or not a testator was justified in making the provisions of a will is of no concern to the courts, provided the testator had the mental capacity to make a valid will.

6. **Witnesses: Evidence.** 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.

7. **Wills.** 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.

8. ———. The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.

9. ———. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.

10. ———. The burden is on contestants to produce evidence tending to prove each of the four elements constituting undue influence as a prerequisite of their right to have the issue submitted to a jury for determination.

11. ———. Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that

it was exercised at the very time the will was executed.

12. **Wills: Trial.** It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Spear & Lamme and *Murphy & Murphy,* for appellants.

Richards, Yost & Schafersman and *E. L. Mahlin,* for appellees.

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

MESSMORE, J.

This is a will contest in which the validity of an instrument purporting to be the last will and testament of Nelle O'Donnell, deceased, is involved. This appeal is from an order directing a verdict in favor of the proponents of the will and ordering the will admitted to probate.

Contestants allege that Nelle O'Donnell did not have testamentary capacity to make a will on July 2, 1947. They further allege that the purported will was the result of undue influence of the proponents upon Nelle O'Donnell prior to, at the time of making the will, and continuously thereafter up to the date of death of the testatrix; and that for this reason the purported will is not that of Nelle O'Donnell.

The proponents, Clara M. Topp and Adolph J. Topp, and their children Clarence S. Topp and Mabel J. Waters, are the chief beneficiaries of the will, to the exclusion of the contestants.

In determining this appeal, the following rule is applicable: The proponents' motion for directed verdict must be treated as an admission of the truth of the com-

petent evidence adduced by contestants and all proper inferences to be drawn therefrom. See In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

In addition, the following rule is applicable: It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict or discharge the jury and render judgment for proponents. See, In re Estate of Benson, *supra;* Nebraska Methodist Hospital v. McCloud, 155 Neb. 500, 52 N. W. 2d 325.

In considering this question it is necessary to have in mind certain legal principles governing testamentary capacity as follow: The mental capacity of a testator is tested by the state of his mind at the time he made the 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 Inda, 146 Neb. 179, 19 N. W. 2d 37; In re Estate of Benson, *supra.*

The record shows that Mathew O'Donnell, Sr., and his wife Katherine, located on an 80-acre tract of land 3 miles northwest of Colon in Saunders County in 1885. They subsequently acquired an additional 320 acres of land in the same county. They had five children: Nora who was born in 1876 and died in August 1916, without issue and leaving no estate; Mathew Jr., born in 1878; Nelle, the testatrix, born in 1879; Hugh, born in 1882; and Josephine, born in 1885. In 1911, the family moved to 720 East Military Avenue in Fremont, Nebraska, which place remained the home of the family up until the time of the death of the testatrix on December 11, 1952, when she was 73 years of age. She was 68 years of age when

the will in question was made. Katherine O'Donnell died December 25, 1919, and Mathew Sr., died on February 7, 1929. By his will, made in 1923, he gave to his children then living, Josephine, sometimes referred to in the record as Josie, Hugh, and Nelle, all of his property except 80 acres of land which he gave to his grandchildren, the contestants here. In 1926, by a codicil to his will, he rearranged the bequests of real estate which resulted in his giving his grandchildren 80 acres of land which was not as good in productivity as that originally given to them in the will. The will and codicil were contested by the grandchildren. We will make reference to this matter later in the opinion.

Josephine O'Donnell died in July 1930. By her will, her estate was left to Hugh and the testatrix, except $50 to each of her nephews and nieces, the contestants here. Hugh died on May 8, 1947. By his will, his estate was left to the testatrix.

Mathew Jr., married Mary McGinn in 1905. They farmed one of the O'Donnell farms until they moved to Omaha in September 1922, where he died the following Christmas night. Thev had four children: Mary Elizabeth, born April 9, 1907, now Mary Elizabeth Schiltz; Mathew, born in 1908, now married and living in Arcadia, California; Cecil, born in 1910, married and living in San Francisco, California; and Gladys, born in 1915, living with her mother in Omaha and employed in an Omaha store, who are the contestants.

The attorney who drafted the will of the testatrix testified that he became acquainted with the O'Donnell family in 1909, when he was a classmate of Josephine while attending Fremont normal college. Throughout the years he acted as attorney for different members of the family. He participated in the probate of Katherine O'Donnell's estate. This was when he first met the testatrix. He drafted a will for Mathew O'Donnell, Sr., in 1923 and a codicil thereto in 1926. He drafted Josephine's will in July 1930. He handled legal work in

the Hugh O'Donnell estate. The testatrix was the executrix of Hugh's will. He participated in the contest of the codicil of the will of Mathew O'Donnell, Sr., by these contestants in 1929. During the progress of this contest he instituted a partition action on behalf of Hugh and the testatrix of the home property and land they had an interest in and also in which the mother of these contestants had an interest. There was a complete settlement of this litigation.

He further testified that the testatrix came to his office for the purpose of changing her will after her brother Hugh passed away. She did not say what her intention was at that time, but she believed that she would give some of her estate to charity. He told her to think it over and then they would make a will in accordance with her wishes. She returned to his office on July 1, 1947, and at that time she had a statement in her own handwriting and signed by her dated June 25, 1947. This statement described the real estate she owned, and designated her beneficiaries. In addition, it contained a paragraph to the effect that she did not want the mother of these contestants, nor the contestants, to have any part of her estate. Clara M. Topp was nominated as executrix of her will. When questioned about the residue of her estate, she indicated that her church could use it. The attorney then called in his secretary and certain questions were propounded to the testatrix and answers given thereto which were recorded. The answers in effect were as follows: That since her brother Hugh had passed away she did not know of anyone to whom she wanted to leave her estate; that the Topps had been her neighbors for 20 years, had done many things for her, and she got along well with them; that she had not discussed the making of a will with them; and that on one occasion she told them she would have to change her will as she did not like it as it was. She mentioned the Topps' son, and that he was in the service and had a hard time. She stated that she owned

320 acres of land in Saunders County which she had inherited from her father, her sister Josephine, and her brother Hugh. She wanted to give St. Patrick's Church $200, St. James Orphanage in Omaha $200, and $200 to Boys Town near Omaha. The will was drawn and witnessed by the attorney, his secretary, and Dr. A. J. Merrick. In this will, the testatrix gave the residue of her estate to St. Patrick's Church of Fremont, Nebraska.

On July 2, 1947, the testatrix went to the office of her attorney again and they engaged in a conversation. She had a statement in her own handwriting as of that date to the effect that she desired to give the residue of her estate to Clara M. Topp. She also wanted to raise the bequest to the church from $200 to $300. The other bequests were to stand as they were in the former will. A new will was drafted, executed at Dr. Merrick's office, and attested to by the same witnesses. The attorney was quite sure the will was read to the testatrix and that she was asked if it was her last will and testament, and she replied that it was.

There is other testimony on the part of this witness to the effect that he had known the testatrix 25 or 30 years; and that he had transacted business for her in making her income tax returns since 1947, drawing a couple of farm leases for her, and sending notices to two tenants to vacate.

Both wills heretofore mentioned contain this provision: "I have made no provision herein for the widow, children or grandchildren of my deceased brother, Mathew O'Donnell. I have not overlooked them, but for reasons known not only to myself, but others, I am eliminating them entirely from participating in any part of my estate."

The will gave to Clarence S. Topp, son of the proponents, 160 acres of land in Saunders County; to Mabel J. Waters, daughter of the proponents, 160 acres of land in Saunders County; to the proponents the home property of the testatrix; to St. Patrick's Roman Catholic

Church of Fremont $300; to St. James Orphanage of Omaha $200; to Boys Town near Omaha $200; and to Clara M. Topp the residue of the estate. The will nominated Clara M. Topp as executrix and Adolph J. Topp as executor of the will.

The witnesses to the will, under proper questions with reference to the competency of a person making a will, testified that the testatrix was competent to make a will on the date on which it was made. While the doctor indicated on cross-examination that he had not had ample opportunity to judge the competency of the testatrix to make a will, it is apparent on his re-direct examination that he would not have witnessed a will if he believed the person incompetent to make it.

The contestants predicated error on the trial court rejecting the testimony of the witness Ed Murphy as to his opinion of the testamentary capacity of the testatrix. Without reviewing this evidence, it is apparent that this witness, although well acquainted with the O'Donnell family and relating many instances that occurred in Saunders County, had not seen or visited the testatrix for a number of years at or before the time the will was made; and that he had not talked to her about her relatives nor discussed her property with her. He visited with her occasionally on the streets of Fremont and saw her at funerals many years prior to the time the will was made.

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. See, In re Estate of Witte, 145 Neb. 295,

16 N. W. 2d 203; In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421.

We conclude that this witness failed to meet the requirements as a nonexpert witness testifying to the competency of a person making a will, and the trial court did not err in rejecting his testimony.

The question of testamentary capacity relates exclusively to the time when the will was made, and although competent evidence of the 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. Whether or not a testator was justified in making the provisions of a will is of no concern to the courts, provided the testator had the mental capacity to make a valid will. See In re Estate of Fehrenkamp, *supra.*

We find no evidence in the record to sustain the contestants' objection with reference to testamentary capacity, and the trial court did not err in not submitting this issue to the jury.

The next question to determine is whether or not the trial court erred in not submitting the issue of undue influence alleged to have been practiced on the testatrix by Clara M. Topp and Adolph J. Topp, neighbors of the deceased, to the jury.

"The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence." In re Estate of Inda, *supra.* See, also, In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284; In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625; In re Estate of Thompson, 153 Neb. 375, 44 N. W. 2d 814; In re Estate of Benson, *supra.*

The burden is on contestants to produce evidence tending to prove each of the four elements stated above,

as a prerequisite of their right to have the issue submitted to a jury for determination. See, In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80; In re Estate of Benson, *supra*. If any one of the essential elements enumerated is not supported by evidence or reasonable inference drawn from a fact or facts otherwise established, the contention of undue influence must be rejected. The evidence must tend to show undue influence directly in reference to the will in question, and be of such a nature as to control the will of the testator and cause him to do something that he did not intend. Suspicion or supposition of undue influence is not sufficient to require the submission of the question to a jury or to sustain a verdict. See, In re Estate of Bayer, 119 Neb. 191, 227 N. W. 928; In re Estate of George, *supra;* In re Estate of Bainbridge, *supra;* In re Estate of Benson, *supra*.

It should be stated here that it is not the function of this court to determine the question whether or not undue influence has been established, but only the question whether or not there was sufficient evidence to justify submission of that question to a jury. See, In re Estate of Kerr, 117 Neb. 630, 222 N. W. 63; In re Estate of Noren, 119 Neb. 653, 230 N. W. 495.

In addition, there are other propositions of law applicable to a determination of this appeal as it relates to undue influence, as follows: 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 obstacle 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 Benson, *supra*.

Undue influence cannot be inferred alone from motive or opportunity. There must be evidence, direct or cir-

cumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed. Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence. See, In re Estate of Fehrenkamp, *supra*; In re Estate of Witte, *supra*.

We recognize in the case of In re Estate of Bainbridge, *supra,* that in evaluating the testimony and proper inferences therefrom, it is not always possible to apply the evidence tending to establish improper influence which is referable to the will solely to one of the essential elements. It is permissible therefore not to strive to separate each fact supported by evidence offered as proof of undue influence and allocate it under one or more of the four essential elements required to establish the exercise of undue influence, but to view the entire evidence offered by the contestants as proof of this issue and rest the decision upon whether or not the evidence as a whole is of such a substantial nature as to contain some proof of each of the essential elements, and to require that the issue of undue influence be submitted to and determined by a jury.

The testimony adduced in behalf of the contestants on the issue of undue influence was given by distant relatives, old-time friends and acquaintances of the O'Donnell family when they lived in Saunders County and in Fremont, the mother of the contestants, the contestants, tenants of the testatrix and prospective renters of her land, neighbors who lived across the street from her in Fremont, a clergyman of her church, and her doctor. A great part of this evidence is to the same effect, therefore, we summarize that part deemed pertinent to the elements constituting undue influence.

It appears from the record that the testatrix, during her childhood, school, and Sunday school periods in Saunders County, was described as slow to learn, back-

ward, and having had much difficulty in comprehending her lessons. One witness described her in later years as "simple minded," and another witness described her as not possessed of normal understanding or intelligence. When she attended functions, social or otherwise, she was accompanied by a member of the family to and from the same, while her brothers and sisters were not restricted in this respect. She attended country school until she was 17 or 18 years of age and then attended a boarding school in Lincoln for a year. Her brothers and sisters attended Fremont normal college and later taught school or engaged in gainful occupations, while the testatrix stayed at home and did house work described as "menial" work. She had no outside friends as did the other members of the family. Her condition in such respect did not improve, at least, as shown by the testimony, up to the time of her father's death in 1929, when she was 50 or 51 years of age. Beyond this period there is little evidence of this character.

One witness testified that he had been acquainted with the O'Donnell family for a period of 40 years, and visited them on an average of once a month when they lived in Fremont, at least up to the time of the death of Mathew O'Donnell, Sr. He and his wife would take the testatrix riding and to church on many occasions. She would often bring up the subject that someone was after her money and property. He endeavored to comfort her in this respect. At the time of the funeral of his wife, in January 1950, the testatrix brought up this subject again. He suggested that she forget about her property, and leave it to the O'Donnells as her father wanted her to do. She said she believed she would. The granddaughter of this witness testified that she knew the testatrix, especially during the last years of her life, and she would bring up the subject of someone wanting to get her money and property, but would not say who it was.

The testatrix's clergyman, who called on her either

late in 1947 or early in 1948, testified that the testatrix told him that he was after her money. He tried to get her in a better mood by giving her a few pleasantries, and then left.

The mother of the contestants testified that after her husband's death she took in roomers and boarders, was busy raising her family who were attending school, and had difficulty in getting away to visit the testatrix for this reason. She had very little contact with the testatrix after 1930, but talked to her between 1935 and 1938, when she noticed the attitude of the testatrix had changed toward her. With reference to the contest of the codicil involving the will of Mathew O'Donnell, Sr., this witness testified that she informed her attorneys to leave the testatrix out of the matter as she had nothing to do with it and did not understand it. However, it appears in the objections to the codicil to the will of Mathew O'Donnell, Sr., that Josephine and the testatrix were charged with undue influence upon the testator. At that time two of the contestants were adults and two were minors.

There is no evidence to show that the proponents had anything to do, directly or indirectly, with the testatrix's affairs relative to the members of her family. Nor is there any evidence to connect the proponents with the resentment felt by the testatrix against these contestants and their mother. Neither is there evidence to show that the proponents brought about this condition or contributed to it. Also in this connection, the attorney for the testatrix testified that Mrs. Topp called him to tell him the testatrix wanted to see him. She had been hospitalized by her doctor in October 1952. He went to the hospital and had a conversation with the testatrix wherein she requested that the information that she was in the hospital be kept from the newspapers. He explained the difficulty in this respect. Her reason for making the request was that she did not want her nephews or nieces or their mother to know where she

was for fear they would bother her. She did not want to see them. She also inquired about her will and wanted to know if everything was all right, and told him if her nephews or nieces or their mother came to him for the key to her house, not to let them in. She told him where the will was kept. He and Mrs. Topp went into the house and unlocked the box in which the will was kept. Mrs. Topp had a key to this box. He took the will, retained it for awhile, and then deposited it with the county judge.

His secretary testified that when the testatrix was in the office after Hugh's death, she stated that she had given a key to the house to Mrs. Topp so that she could come in and check on her and see that she was all right. With reference to the contestants and their mother, the testatrix said that they had nothing to do with her, and she did not want to see them as they never came to see her. That seemed to be her main complaint and one which she made on more than one occasion. This witness remembered Mrs. Topp being in the office with the testatrix on just one occasion, at a time just before or after Hugh's death, but she took no part in the matters being discussed. She further testified that there was no one with the testatrix when she made the wills on July 1st and 2nd, 1947.

There is also evidence on the part of Mathew O'Donnell and his sister Gladys that when they called to attend Hugh's wake, the testatrix told them: "Why don't you people stay away and quit bothering me." The record shows that Mathew and his brother Cecil only saw the testatrix a few times between 1931 and 1939. Thereafter they had very little contact with her and paid little attention to her. The two nieces did not see her from 1930 to 1947. The O'Donnell family in Omaha received knowledge of Hugh's death through mutual friends, but were not notified by the testatrix.

There is evidence to the effect that a long-time friend and neighbor of the testatrix often saw her in church,

and that the testatrix went down town almost every nice day. They visited back and forth until about a year or so after Hugh's death when the testatrix did not visit this witness any more. This witness endeavored to obtain admittance to the testatrix's home, but without success except on one occasion within a period of a year. Other witnesses testified to the same fact, and that they were unable to contact the testatrix at her home when they believed she was there.

Two neighbors also testified that after Hugh's death Mrs. Topp was at the testatrix's home every day and seemed to have the freedom of the premises.

A tenant of the testatrix from 1934 until the spring of 1952, testified that he met the Topps when they were at the farm in 1935, when the barn was built; that they were at the farm on three occasions with the testatrix, once in 1950; that he saw them when he went to Fremont to transact business with the testatrix; and that the business transacted was solely between the testatrix and him. A question arose involving payment for clover seed under the government program. This witness endeavored to explain the government program to the testatrix, but said that she could not comprehend it, so he gave up and let the matter drop. He received notice to vacate in 1951. He was unsuccessful in ascertaining the reason why he should vacate, and testified that he had always been on friendly terms with the testatrix.

Another tenant of the testatrix from 1931 to 1949, testified that he and his wife were friendly with the testatrix and she visited the farm quite frequently, sometimes staying for a week or more. He also visited the testatrix in her home, and on several occasions before 1946 they exchanged Thanksgiving dinners with each other. In 1947 or 1948, after Hugh's death, the testatrix did not visit the farm but once or twice. He further testified that the Topps came to the farm with the testatrix, but he did not remember how often during the 18

years he resided on the farm. He met them first before Hugh's death. He would not swear, but he thought they were there once after Hugh's death. There had been some talk before Hugh's death with reference to some building to be done on the farm. After Hugh's death he talked the matter over with the testatrix and obtained a carpenter for that purpose. The testatrix canceled the arrangements and told him Mr. Topp had people who were going to do the building on the farm. He received notice to vacate in 1949, and endeavored to ascertain the reason why, but received no response. He further testified that the testatrix was slow to grasp things, and after Hugh's death she did not want anything to do with anyone, even her friends. He had an experience with her with reference to clover seed, which she would not purchase.

From the above evidence it is apparent that the proponents had little, if anything, to do with the relations between these tenants and the testatrix.

A prospective renter, in the first part of September 1951, contacted the testatrix with reference to renting one of her farms which the tenant was vacating. While he was engaged in conversation with the testatrix Mrs. Topp came in and took part in the conversation. She asked him several questions with reference to his ability to farm and the experience he had. When he left, he asked the testatrix to let him know one way or the other. Mrs. Topp said there was no hurry about renting the farm, and that there was plenty of time and plenty of good tenants to whom to rent it.

Dr. Merrick testified that he attended Hugh O'Donnell during his last illness in May 1947, when he first met the testatrix, and met her again on July 1 and 2, 1947, when the wills were made. He attended her professionally in September 1949. He was called by Mrs. Topp to the testatrix's home on October 8, 1952. The testatrix was seriously ill, and he hospitalized her on October 18, 1952. Mrs. Topp was a constant visitor at

the hospital, and seemed to be in charge of the testatrix's affairs. Upon entering the hospital, the testatrix informed him that she desired that only Mrs. Topp enter the room. He visited the testatrix frequently. She was rational, and he would talk to her. A change in her condition occurred on November 20, 1952, when she apparently had a stroke and grew gradually weaker. He met the Topps frequently, and they inquired as to whether the nurse she had was a nurse under his direction or one proposed by her relatives. The doctor also testified that Mrs. Topp solicited his help in not permitting callers to see the testatrix for the reason that her last wishes should be respected.

Other witnesses testified to being at the hospital and being informed by Mrs. Topp that the testatrix was not seriously ill, that she would be home in a few days, and that she was not to receive callers at the hospital. The doctor placed no restrictions on her receiving callers.

The contestant Gladys O'Donnell and her sister Mrs. Schiltz, about two weeks after the testatrix was confined to the hospital, gained admittance to her room. The door was partially open and there was a sign on the door indicating that no visitors were allowed. Their aunt asked them if they had seen the sign on the door, to which they replied that they had been told at the desk that it was all right. She told them that it was not, that the doctor wanted her to rest, and that she could not do it with people running in and out. They terminated their visit. Right afterward they met Mrs. Topp and inquired of their aunt's condition. Mrs. Topp replied that she was not in a serious condition and would be sent home in a few days, but would require nursing. In addition, the statement is attributed to Mrs. Topp that she could not help it if their aunt did not like them, and not to blame her; and that they could go to the house and there was not a plate touched in the house. Mrs. Topp also told these witnesses:

"I do know that Nelle said the O'Donnells in Omaha didn't do anything for her when Hugh died."

There is testimony that the testatrix had a lease on a safe deposit box with a loan association. This lease was dated March 19, 1945, and terminated June 17, 1947. There was also a lease in the joint names of the testatrix and Mrs. Topp, dated June 5, 1947, which terminated June 15, 1950.

There is evidence that Hugh O'Donnell, due to excessive drinking, was committed to a state institution from 1935 to 1939, during which time the testatrix acted as his guardian. While the proponents complained about Hugh's conduct just prior to his commitment, there is no evidence that they were instrumental in bringing about his commitment. Whatever strained relations that might have existed between the testatrix and Hugh as a consequence of his conduct must have been forgotten. The testatrix was the sole beneficiary under his will. None of this was any of the Topps' business, and there is no evidence that they made it their business.

The record shows that on July 2, 1947, the date of the testatrix's will, she had a bank account of $1,157.57. The contestants argue that the change made with reference to the residue of the estate as it appears in the will of July 1, 1947, and the will of July 2, 1947, shows an inference of the exercise of undue influence upon the testatrix by the proponents at that time. From the evidence heretofore recited on the issue of undue influence, this evidence is insufficient to prove undue influence at the time the will was made. The fact that 5 years later, at the time of her death, her bank account had increased to $10,780.01 and she had a substantial amount of grain on her farms as her share of the rent, also that she was frugal and did not equip her home with modern conveniences, does not show evidence of the exercise of undue influence upon her by any person.

There is evidence that neither the contestants nor their mother did anything to cause the disfavor toward

them by the testatrix. They never sought to borrow money from her or in any manner to obtain her property. There is no evidence that the testatrix ever accused them of trying to get her money or property.

For the reasons given in this opinion, the judgment of the trial court in directing a verdict for the proponents should be, and is hereby, affirmed.

AFFIRMED.

IN RE APPLICATION OF PAUL CHRISTENSEN. PAUL CHRISTENSEN, APPELLANT, V. HIGHWAY MOTOR FREIGHT, INC., ET AL., APPELLEES.
64 N. W. 2d 99

Filed April 30, 1954. No. 33494.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
2. **Public Service Commissions: Carriers.** The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity and such proceedings are administrative and legislative in character.
3. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
4. **Public Service Commissions: Carriers.** The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity.
5. ———: ———. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.
6. **Public Service Commissions.** The prime object and real purpose

of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

R. E. Powell and *J. Max Harding,* for appellant.

D. A. Russell and *Shelburn & Russell,* for appellees.

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

CHAPPELL, J.

Appellant, Paul Christensen, an intrastate motor freight carrier, doing business as Christensen Truck Line at Beaver City, filed application No. M-8232, Supplement No. 2, with the Nebraska State Railway Commission, hereinafter called the commission, seeking to acquire the irregular operating authority heretofore issued to Severn A. Johnson of Oxford in application No. M-8350, and consolidate same in one certificate of convenience and necessity with his own more limited irregular route authority. Appellant had previously operated Johnson's rights for some time under lease from him with commission approval, which authorized irregular route transportation of commodities generally, except groceries and liquors, between points within a 20-mile radius of Edison and from points within said radial area on the one hand, and on the other hand to and from points within the state at large. As part of the same application appellant also sought an extension of authority to transport by regular route commodities generally, except those requiring special equipment, between Omaha, Lincoln, and Hastings, on the one hand, and Oxford, Beaver City, Edison, and Arapahoe, with the off-route point of Bertrand, on the other hand, together with irregular route authority between points and places

within a 25-mile radius of Edison, and between points and places within said radial area on the one hand, and on the other hand, points and places in Nebraska over irregular routes.

No formal objections to the application were filed, but Highway Motor Freight, Inc., Ideal Truck Lines, and Coffey's Transfer Co., appellees herein who were motor carriers serving the same area, appeared at the hearing as interveners in opposition to the proposed extension from irregular to regular route authority and the proposed extension of radial service from 20 to 25 miles from Edison. Appellees did not oppose the transfer of Johnson's irregular route authority under application No. M-8350, and no evidence was adduced by appellant in support of his proposed extension of radial service from Edison.

After an extended hearing before a commission examiner, he filed a consolidated report which recommended: (1) Granting that part of appellant's application seeking to acquire Johnson's irregular route authority with appropriate concellations, and issuance of a new consolidated certificate; and (2) that appellant's extension application should be granted in part. Thereafter appellees filed exceptions to only part 2 aforesaid of the examiner's report, and after hearing thereon before the commission, the exceptions were sustained and that part of appellant's application for an extension granting regular route authority was denied upon the ground, as shown by the record, that "the present and future public convenience and necessity does not require the regular-route Extension of service by motor vehicle in Nebraska intrastate commerce as proposed by applicant in Application No. M-8232, Supplement No. 2, * * *." The effect of their order was to authorize appellant to transport: "Commodities generally, except groceries and liquors, and those requiring special equipment. * * * Irregular Route Operations: Between points and places within a 20-mile radius of Edison, and between points

and places within said radial area, on the one hand, and, on the other hand, points and places in Nebraska, over irregular routes."

Appellant's motion for rehearing was subsequently overruled, and he appealed to this court, assigning that the denial of his application for extension as aforesaid was arbitrary, unreasonable, and contrary to law. We conclude that the assignment should not be sustained.

There are fundamental, well-established, and controlling rules in such cases. In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, this court held: "Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights."

As held in Moritz v. State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545: "The Nebraska State Railway Commission has original jurisdiction and the sole power to grant, amend, deny, revoke, or transfer common carrier certificates of convenience and necessity and such proceedings are administrative and legislative in character.

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made."

In Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496, we held: "The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future convenience and necessity."

In that connection, we have held in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, that: "In determining the issue of public convenience and necessity, controlling questions are whether the operation will

serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest."

See, also, In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603, in which we held: "The prime object and real purpose of Nebraska State Railway Commission control is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose, and in doing so primary consideration must be given to the public rather than to individuals."

In the light of such rules, we have examined the record and summarize the evidence. It discloses that appellant had been in the trucking business since 1944, first from Oxford but now from Beaver City, handling livestock and grain under irregular route authority. The precise extent of his own authority is not disclosed by the record. However, it was concededly more limited in scope than the irregular route authority of Johnson under application No. M-8350, which appellant sought herein to acquire. In any event, appellant now operates four tractors, three trailers, and one straight truck from a place of business in Beaver City consisting of an office and truck-service area facilities, with room in the center for construction of a dock. He has been making from 10 to 12 trips per week to Omaha handling livestock as a result of an increase in volume, because some other livestock truckers in the area have discontinued their service.

Several months before the hearing appellant arranged for dock facilities and pick-up services at Omaha, and commenced regular route operations with return freight to Oxford, Beaver City, Edison, and Arapahoe, out of Omaha and elsewhere, thereby obtaining enough general

freight revenue to earn within 40 to 45 percent of his livestock revenue.

In such situation, a commission inspector in Omaha required appellant to get his operations in line with his authority, so he filed this application requesting extension thereof to regular route because he wanted to hold the business which he had acquired as aforesaid, and increase the tonnage of general freight from points of origin, Omaha, Lincoln, and Hastings, to Oxford, Beaver City, Edison, Arapahoe, and off-route point Bertrand, which has a population of only 584. If his application were granted he intended to add one van-trailer to his equipment, retain his dock facilities at Omaha, establish such facilities at Lincoln and Hastings, continue regular route daily general freight service to and from the points and towns aforesaid, and advertise and solicit business therein. Under his proposed schedule, his trucks would regularly leave Omaha at 5 p. m., pick up freight in Lincoln and Hastings, arrive at Oxford about midnight, and distribute such freight to the towns by noon the next day. His competitors would be Highway Motor Freight, Inc., Ideal Truck Lines, Coffey's Transfer Co., B & B Truck Lines, Red Ball Transfer Co., Burlington Truck Line, Burlington Railroad, and other irregular carriers who also operate in the area.

Beaver City, the center of his operations, has a population of 913. It is presently served from Omaha, Lincoln and Hastings, arrive at Oxford about midnight, and Truck Lines three times a week, Coffey's Transfer Co. daily with teletype service at least until 3 p. m. daily, appellant's irregular route on call and demand, and other irregular carriers. The Ideal Truck Lines also serves it with points of origin from Kansas City and points west.

Eight witnesses from Beaver City testified for appellant, and as a matter of course the commission, as it should, considered both the direct and cross-examination, which in several instances materially weakened appel-

lant's application. One of such witnesses was appellant's wife who simply testified with regard to the office work and transmission of freight service telephone calls by her. Seven of the witnesses were shippers who generally used other facilities as well as appellant's. Five of them testified in substance that present trucking service at Beaver City with few exceptions had been satisfactory and adequate, characterizing Coffey's Transfer Co. service as good, very good, satisfactory, and very satisfactory. One remaining witness was a seed and feed dealer who said his seed inventory was delivered by the supplier. He got most of his feed by rail but the rest by appellant. The other witness and appellant were mutual customers. Such witness operated a filling station and appellant moved most of his freight, but present facilities were adequate for his purposes. None of such witnesses testified that there was any future public need or demand for additional truck-line service in Beaver City. They generally assumed that it would be beneficial as a whole to the community to have a regular-route truck-line headquarters located there giving them personal contact with the shipper for delivery of orders and settling of claims, and that in some instances the proposed service might be quicker and safer. In that connection, the evidence discloses that present carriers lawfully serving Beaver City are fully equipped and prepared to handle any and all kinds of freight there except that requiring special equipment, which is not involved.

Oxford, Edison, and Arapahoe have a combined population of 2,798. They are served by Burlington Railroad, Burlington Truck Line, Highway Motor Freight, Inc., Ideal Truck Lines, Coffey's Transfer Co., B & B Truck Line, Red Ball Transfer Co., appellant, and some other irregular carriers. Three witnesses from Oxford testified for appellant, and the testimony of another witness therefrom was stipulated. Two of such witnesses were mutual customers of appellant. One of them was a filling station operator who had just started in busi-

ness and had not "really any freight hauled." Another was an automobile dealer who received regular stock orders by truck once a month with emergency orders two or three times a week hauled by appellant. It was his opinion that movement of freight worked from a dock terminal, as done by Highway Motor Freight, Inc., at McCook, and Coffey's Transfer Co., at Holdrege and Alma, was not generally as quick or safe as when delivered directly, as proposed by appellant. The third witness, an implement dealer, and the fourth, whose evidence was stipulated to be the same, testified that he received freight from appellant, Burlington Truck Line, Red Ball Transfer Co., and Coffey's Transfer Co., with whose services he had been very well satisfied. His shipments originating at Hastings had been handled by B & B Truck Line. He uses appellant about three times a week. He testified that present freight service is satisfactory, "but as I said before it can always be better," and gave his opinion that if all shipments came by one carrier there might be a tariff freight charge advantage.

Two witnesses from Arapahoe testified for appellant. One was engaged in the feed and produce business. He testified that he received his feed, "quite a lot of it," in straight railroad cars from Lincoln, and the balance by appellant's truck when business was slack, and the service was satisfactory. Some of his feed was handled out of Sioux City, but it was handled and delivered from there by the supplier mill itself. He knew there were "a good many other services coming into Arapahoe" but he did not use them because he was "not sure that all those others haul feed." It was his opinion that if appellant were given regular route authority direct delivery would better protect the sacks of feed and he could reduce the size of his stock by daily delivery.

The other witness was an implement dealer who received most of his freight from Lincoln, Kansas City, and other points, including Omaha. He had used Cof-

fey's Transfer Co., B & B Truck Line with good service, and Highway Motor Freight, Inc., which was slow. He had also very good service with Burlington Truck Line out of Kansas City and had once used appellant to haul some machinery out of Lincoln. He testified that when he calls for an order he leaves it to the supplier to "send it the best way" and he would use appellant's service along with others if he delivered the kind of service proposed.

The owner and operator of Coffey's Transfer Co. testified for appellees that he had been in the common carrier trucking business since March 1929, and now covers the west half of the south half of Nebraska and the west half of the north half of Kansas. He has equipment of all types sufficient and capable of moving any freight at all the points involved, except those requiring special equipment, which is not involved. He has completely fulfilled the requirements of his operating authority at all times over the same area here involved; has never denied any requested service; and has received two American Trucking Association awards for efficiently and timely handling claims of shippers. He maintains complete terminal and dock facilities in Omaha, Lincoln, Hastings, Holdrege, Alma, and McCook, with general offices at Alma. Freight destined for Beaver City is picked up at Omaha, Lincoln, Hastings, and Holdrege one day and delivered the next morning on his regular daily Valley Line from Alma, which serves Orleans, Stamford, Beaver City, Hendley, Wilsonville, Lebanon, and Danbury, which have a combined population of 3,022. During 1952 his daily service on that line was cancelled 31 times for lack of tonnage, and twice because of bad weather conditions. In that connection, also, Ideal Truck Lines, one of his competitors, who formerly rendered daily service, has discontinued the same for lack of tonnage and now operates only about three times a week.

Freight destined for Oxford, Edison, and Arapahoe is

picked up in Omaha, Lincoln, Hastings, and Holdrege, and delivered the next morning from Holdrege on his regular daily main line which also serves all towns from Holdrege to McCook by way of U. S. Highway No. 6. In addition to general freight service, he also furnishes all towns aforesaid with refrigerator service, handling fresh meat, vegetables, and perishables, regardless of tonnage, which is adequate for all trade in that territory.

The 11,000-pound equipment normally used by Coffey's Transfer Co. on the Valley Line requires a tonnage of 8,000 pounds each trip in order to be profitable, but the average load carried in 1952 was only 5,822 pounds, with a loss in revenue therefrom made up by his other profitable operations. He and other carriers have already suffered a loss of general freight business since appellant began his regular run.

There is, as we view it, ample competent evidence to sustain the conclusion that appellant's customers could as well be served by irregular route and that if permission were given him to operate a regular route as requested in such small area, then the adequate frequency of carrier service given by others already in the field and serving all outlying towns involved, would be reduced and imperiled for lack of available tonnage. It would permit appellant without any justification to take the better business away from those already rendering like adequate service in a small area with limited population, which is not required by present or future public convenience and necessity, and would be contrary to the public interest.

We conclude from the record before us that the order of the commission denying appellant's application for extension of authority to regular route was not arbitrary or unreasonable or contrary to law. Therefore, it should be and hereby is affirmed.

AFFIRMED.

MYRTLE PESTEL, APPELLANT, V. BERNHARD PESTEL, APPELLEE.

64 N. W. 2d 299

Filed April 30, 1954. No. 33500.

1. **Divorce.** A decree of divorce cannot be granted solely on the declarations, confessions, or admissions of the parties. There must be corroborative evidence of the facts necessary to be established as required by section 42-335, R. R. S. 1943.
2. ———. In determining the sufficiency of the evidence in a divorce case the degree of corroboration required necessarily relates itself to the facts of the particular case. But this does not eliminate the statutory requirement of corroboration of the essential facts.

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

T. L. Grady, for appellant.

Deutsch & Jewell, for appellee.

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

MESSMORE, J.

The plaintiff, Myrtle Pestel, brought this action seeking a divorce from the defendant, Bernhard Pestel, alleging extreme cruelty and praying for an absolute divorce, an allowance of alimony, suit money, and attorney's fees. The defendant's answer, after admitting certain facts in the petition, denied generally the allegations of extreme cruelty contained therein, and prayed that the plaintiff's action be dismissed. Subsequently, on March 4, 1952, the plaintiff amended her petition, alleging other grounds of extreme cruelty. The defendant then filed an amended answer and cross-petition alleging extreme cruelty on the part of the plaintiff toward him, and praying for an absolute divorce and other equitable relief. At the time of trial, plaintiff was 54 years of age and the defendant 60 years of age. After a hearing upon the merits, the trial court entered a decree finding generally

in favor of the defendant and against the plaintiff, awarding him an absolute divorce on his cross-petition, and awarding the plaintiff permanent alimony, suit money, and costs. The plaintiff filed a motion for new trial which was overruled. From this order the plaintiff appeals.

The parties were married on February 15, 1917, at West Point, Nebraska, and moved to Stanton County in 1926, where they have since lived and farmed. Two sons were born to this union who are now of age, married, engaged in business and farming, and are not dependents.

The principal grounds for cruelty charged by the plaintiff against the defendant are that he was of a sullen disposition and would go for days without speaking to her, also that he had a violent temper. She testified to many acts of cruelty on the part of the defendant, most of which took place many years previous to the time of trial. She also testified that the last few years the defendant had not mistreated her, but would not speak to her. It is unnecessary to recite the evidence of the plaintiff's witnesses for the reason that they had very little, if any, knowledge of any acts of cruelty committed by the defendant toward the plaintiff in recent years, and such acts as they did testify to were that the parties did not get along well, that the defendant did not talk to the plaintiff, and that he did not take her places.

There is some evidence offered by the plaintiff charging the defendant with accusing her of insanity. The evidence in this respect is not corroborated to such an extent that it could be said to be extreme cruelty within the law of this state.

The defendant charged the plaintiff with extreme cruelty in that she desired to disinherit her sons; that she wanted him also to disinherit his sons; and that he could not stand the continual nagging of the plaintiff and as a consequence he left the home place on August 13, 1951. There is no corroboration of this evidence as to the plaintiff nagging the defendant over a period of

years. He did testify that he had no reason to get a divorce. Whether he left voluntarily or the plaintiff requested him to do so is not clear from the record.

The principal discussion between these parties relates to their financial arrangements and the treatment of the sons with reference to their marriages and leaving home. Each of the parties apparently managed his own business without interference from the other.

We fail to see any competent evidence in the record, however, to corroborate the allegations of the cruelty by either of the parties.

The grounds for a divorce are statutory. It is provided by section 42-335, R. R. S. 1943, that no decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose. This statute means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce. Of the other witnesses who were called and examined in the present case, not one, nor all collectively, supported the elements necessary to be established to entitle either party to a divorce. A divorce case is tried de novo in this court, under the rule that where the evidence is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court saw and heard the witnesses and accepted one version of the facts over the other. See, Wakefield v. Wakefield, 157 Neb. 611, 61 N. W. 2d 208; Schlueter v. Schlueter, *ante* p. 233, 62 N. W. 2d 871. But this rule does not operate to eliminate the necessity for evidence corroborating the facts essential to the obtaining of a divorce. See Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505.

"It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances." Schlueter v. Schlueter, *supra*. But where

there is no evidence which corroborates a statutory ground for divorce and a case is not made, then the divorce should be denied. Spray v. Spray, 156 Neb. 774, 57 N. W. 2d 926; Hines v. Hines, *supra*.

The evidence fails to disclose any evidence corroborating the allegations or testimony of either party that would entitle either to a divorce within the requirements of the controlling statute. The trial court therefore erred in granting a divorce to the defendant on his cross-petition and in entering a decree for permanent alimony.

The decree of the district court is reversed and the petition of the plaintiff and cross-petition of the defendant are dismissed.

REVERSED AND DISMISSED.

ERNST F. W. ALEXANDERSON, APPELLANT, V. FRED WESSMAN ET AL., APPELLEES.
64 N. W. 2d 306

Filed April 30, 1954. No. 33527.

1. **Bills and Notes.** A note payable on demand is due the day after it is executed and delivered and may then be the subject of an action to enforce payment of the indebtedness evidenced by it.
2. **Limitations of Actions.** The voluntary payment of part of a debt arising on contract, a written acknowledgment of it, or a promise in writing to pay it tolls the statute of limitations except as is otherwise provided by section 25-216, R. R. S. 1943.
3. ———. The execution and delivery of a real estate mortgage to secure payment of a promissory note and the indebtedness evidenced by it are within the meaning of section 25-216, R. R. S. 1943, an acknowledgment in writing of the note and debt and a promise in writing to pay it.
4. ———. A mortgage on real estate constitutes a lien thereon for only 10 years from the maturity of the debt secured by it unless the statute of limitations is tolled by some act authorized by law.
5. ———. A subsequent encumbrancer within the meaning of section 25-202, R. R. S. 1943, is one who acquires his encumbrance

for value after the statute of limitations has run against the prior encumbrance shown on the record.

6. ———. Laws 1941, Chapter 35, section 1, page 145, is applicable only to subsequent purchasers and encumbrancers for value and only affects the rights of mortgagees against such third persons.

7. ———. Sections 25-202 and 76-239, R. R. S. 1943, do not conflict and the latter does not give any right to or protect any interest of a mortgagee in addition to those given and protected by the former.

APPEAL from the district court for Dixon County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

P. F. Verzani and *Phyllis M. Verzani,* for appellant.

John E. Newton, for appellees.

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

BOSLAUGH, J.

This appeal contests the legality of the order of the district court sustaining the general demurrer of the Old Age Assistance Board of Dixon County, Nebraska, to the petition of appellant for the foreclosure of a mortgage on land in that county and the judgment of dismissal rendered by the trial court. The contesting parties are the appellant and the Old Age Assistance Board of Dixon County, Nebraska, sued as Dixon County Assistance Committee, and designated herein as appellee. The individuals named and described as defendants in the petition made no appearance in the case.

The facts alleged by appellant to be considered in the disposition of the appeal are as follows: Fred Wessman and his wife Hilda Wessman, who is deceased, on June 15, 1922, executed and delivered a promissory note, due on demand, and payable to the order of appellant for the sum of $1,200 and interest at 6 percent per annum payable semiannually. No part of the indebtedness has been paid except a part of the interest. The last payment was made in December 1934. The

makers of the note on November 26, 1937, executed and delivered to appellant a mortgage deed securing the note. It described and conveyed the land involved in this case. It was filed for record December 27, 1937, and recorded in the mortgage records. It contained the usual provision of defeasance and an obligation to pay the indebtedness as the note required. Appellee claimed an old age assistance lien on the premises dated September 1, 1944, filed for record May 5, 1948, and recorded in the public records as authorized by law on account of old age assistance furnished Fred Wessman, the mortgagor. Appellant asserted that any lien of appellee on the land was subject and inferior to the mortgage of appellant, and that there had been no action at law for the recovery of the indebtedness secured by the mortgage. The amount claimed due appellant was $3,172 and interest. He asked that the mortgage be adjudged a first lien on the premises; that it be foreclosed; that the premises be sold; and for general equitable relief.

Appellant concedes that appellee is a subsequent encumbrancer. Its capacity to contest the mortgage lien asserted by appellant is not made an issue. It has a lien for the old age assistance of which Fred Wessman has been the recipient since September 7, 1947, the effective date of the amendment to the Old Age Assistance Act, accepting as true the allegations of the petition as must be done in testing the sufficiency of the petition by demurrer. § 68-215.01, R. R. S. 1943; Arterburn v. Vandemoer, 157 Neb. 68, 58 N. W. 2d 606.

The note was payable "On demand after date * * *." It became due June 16, 1922, the day after its date and suit could then have been maintained thereon for the recovery of the indebtedness represented by it. Melville Lumber Co. v. Scott, 135 Neb. 379, 281 N. W. 803. Payments of interest were made, the last in December 1934, and an action on the note was not barred by the statute of limitations November 26, 1937, when the

mortgage was given to secure its payment. §§ 25-205, 25-216, R. R. S. 1943; Steeves v. Nispel, 132 Neb. 597, 273 N. W. 50; Hadley v. Corey, 137 Neb. 204, 288 N. W. 826.

The mortgage was an acknowledgment of the note, an existing liability and debt, and a promise to pay it. § 25-216, R. R. S. 1943. The note, and the indebtedness evidenced by it, was due when the mortgage was made, and a cause of action for the foreclosure of it then accrued. An action to enforce the lien of the mortgage could have been brought at any time thereafter during a period of 10 years or until November 26, 1947. The relevant statute, section 25-202, R. R. S. 1943, contains this: "An action for * * * the foreclosure of mortgages thereon (lands, tenements, or hereditaments), can only be brought within ten years after the cause of action shall have accrued * * *." A mortgage on real estate continues as a lien thereon for only 10 years from the maturity of the debt secured unless a payment has been made thereon or the statute of limitations has been otherwise tolled. Herbage v. McKee, 82 Neb. 354, 117 N. W. 706; Hatch v. Ely, 131 Neb. 882, 270 N. W. 480; Steeves v. Nispel, *supra;* Hadley v. Corey, *supra.*

Appellant did not plead any fact that avoided the bar of the statute. The claim that there was at the time of the commencement of the case a maintainable cause of action on the mortgage, the subject of this suit, does not depend upon that theory. The view of appellant is definite and is clearly stated. He says the only question is whether the cause of action for the foreclosure of his mortgage was barred as to appellee, a subsequent encumbrancer, by the 10-year statute of limitations which is applicable only to a mortgage which contains a maturity date of the debt secured thereby, or whether the longer period of 20 years is required to cause that result. The mortgage here involved contains no date of maturity of the note and indebtedness secured, and the date of the maturity thereof is not as-

certainable from the mortgage. Appellant concludes that suit on the mortgage "could only be barred by a twenty year lapse of time from the date of his mortgage," that is, not until November 26, 1957.

The thesis of appellant is that the cause of action for enforcement of the mortgage survives for the period of 20 years from its date because of the provisions of the statute for the benefit and protection of subsequent encumbrancers. § 25-202, R. R. S. 1943. The unsoundness of this is that appellant is a party to the mortgage in suit and is not a subsequent encumbrancer. A subsequent encumbrancer, within the statute, is one who acquires his encumbrance after the statute has run against the prior encumbrance shown on the record. In Bliss v. Redding, 121 Neb. 69, 236 N. W. 181, the court said: "It accords with standard rules of construction to say that a subsequent incumbrancer for value is one who obtains his incumbrance after the statute has run against the prior incumbrance, as shown by the public record relating to the latter; that the statute operates prospectively." See, also, Tynon v. Bliss, 121 Neb. 80, 236 N. W. 184.

The persons within the amendment of 1925 were limited to "subsequent purchasers and encumbrancers for value." Laws 1925, c. 64, § 1, p. 220. The amendment of 1941 is restricted by its language "* * * so far as relates only to the rights and interests of subsequent purchasers and encumbrancers for value * * *." Laws 1941, c. 35, § 1, p. 145; § 25-202, R. R. S. 1943. As to the rights inhering between the original parties to a mortgage the 1941 amendment has no effect. It has application only to subsequent purchasers and encumbrancers and was intended to affect only the rights of mortgagees as against such third parties. The appellant is a party to the mortgage in suit and is not protected or benefited by the statute. Franklin v. Zarmstorf, 145 Neb. 21, 15 N. W. 2d 190; Weekes v. Rumbaugh, 144 Neb. 103, 12 N. W.

2d 636, 150 A. L. R. 129; Steeves v. Nispel, *supra;* O'Connor v. Power, 124 Neb. 594, 247 N. W. 414.

There is basis for contention in reference to the character of the amendments to the statute described above. The parts of them referred to herein are identical in legal effect. Franklin v. Zarmstorf, *supra.* Neither of them is precisely, technically, nor exclusively a statute of limitations. They are more concerned with written notice of mortgages exhibited by public record than the designation of a period within which suit may be brought to enforce a mortgage on real estate. A significant provision of the 1941 amendment indispensable to what was intended, indicative of its true character, and convincing of its applicability only to subsequent purchasers and encumbrancers is this language: "At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be conclusively presumed to have been paid, and the lien thereof shall then cease absolutely as against subsequent purchasers and encumbrancers for value whose deeds, mortgages, or other instruments shall be thereafter executed and delivered * * *." In O'Connor v. Power, *supra,* the court said concerning the 1925 amendment: "We are of the opinion that the statute has more to do with record notice of mortgages than to operate as a statute of limitations. The language of the statute is that, if the mortgage is not refiled within ten years from the date the cause of action accrues, it shall cease to be notice of the mortgage as unpaid, and the lien thereof shall cease absolutely as to subsequent purchasers and incumbrancers for value." That statement is applicable to the 1941 amendment.

Appellant asserts that sections 25-202 and 76-239, R. R. S. 1943, must be construed together. This may be conceded. A careful consideration of these has not developed any conflict in them. The latter does not give any right to or protect any interest of a mortgagee in addition to those given and protected by the former.

The facts alleged and admitted in this case do not make the latter section significant.

These considerations demonstrate that the contention of appellant is untenable. The bar of the statute of limitations was complete as to any cause of action on the mortgage of appellant on November 26, 1947. This case was commenced September 5, 1953. The statute of limitations was a complete defense. It was shown by the petition and was properly taken advantage of by general demurrer. Wright v. Schram, 121 Neb. 775, 238 N. W. 658.

The judgment should be and it is affirmed.

AFFIRMED.

WENKE, J., participating on briefs.

IN RE ESTATE OF SARAH ELIZABETH COONS, DECEASED. LULU C. MOORE, ADMINISTRATRIX WITH WILL ANNEXED, AS SUCCESSOR TO EDWARD E. MOORE, NOW DECEASED, APPELLEE, V. WILLIAM BRYAN MOORE ET AL., APPELLANTS.

64 N. W. 2d 301

Filed May 7, 1954. No. 33462.

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 proponent in proceedings for the probate of a will must in the first instance produce evidence of the mental capacity of the testator sufficient to make out a prima facie case.
3. ———. A prima facie case is made when the party having the burden of proof has produced evidence sufficient to support a finding and adjudication for him on the issue in litigation.
4. ———. 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.

5. ———. The recitals of an attestation clause and the introduction in evidence of the will including the attestation clause in proceedings to probate the will do not create a presumption or establish prima facie that the testator was of sound mind when he signed the will, and do not relieve the proponent of producing testimony that at the time the will was signed the testator was of sound mind.

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

Ferneau & Kiechel and *Dwight Griffiths,* for appellants.

John P. McKnight and *John C. Mullen,* for appellee.

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

BOSLAUGH, J.

This is an appeal in proceedings involving the validity of an instrument purporting to be the will of Sarah Elizabeth Coons, deceased. The result of the trial in the district court was the admission of the instrument to probate as the will of the deceased. The contestants appeal.

The petition for the probate of the will of the deceased stated that she died testate January 19, 1950, a resident of Nemaha County, the owner of real estate and personal property; that petitioner was named in the will as executor; that the will was tendered for probate; and that the deceased left surviving her as her heirs a sister, two brothers, a nephew the son of a deceased sister, and five nephews and two nieces the children of a deceased brother. The sister, the son of the deceased sister, and the children of the deceased brother of the testatrix objected to the probate of the will for the reasons, asserted by them in their pleading, that it was not executed as required by law; that the testatrix was not of sound mind at the time she attempted to make it; and that it was the result of undue influence exerted on the testa-

trix by Edward E. Moore and others unknown to the contestants.

This is the second appeal in these proceedings to this court. In re Estate of Coons, 154 Neb. 690, 48 N. W. 2d 778. The result of the first appeal was that a judgment sustaining the validity of the will based upon an instructed verdict for the proponent was reversed and the cause remanded on the grounds that proponent produced only one of the two attesting witnesses to the will and did not show the unavailability of the other; that incompetent testimony of a privileged communication between the testatrix and her attorney was improperly received against objections of contestants; and that the district court incorrectly denied the motion of contestants for a directed verdict and should have granted their motion for judgment notwithstanding the verdict or in the alternative for a new trial.

The request of contestants at the close of the evidence of the proponent on the second trial that the court direct a verdict for them, because the evidence produced by the proponent was insufficient to constitute a prima facie case that the deceased had testamentary capacity at the time she signed the instrument claimed to be her will, was denied. It was renewed when the proof offered by contestants was concluded and again when all the proof was completed. It was each time denied.

The appellants say that the appeal is presented solely on the total absence from the record of any evidence tending to establish testamentary capacity of testatrix at the time she attempted to make the will, the subject of these proceedings. The sole problem of this appeal is whether proponent sustained the burden of establishing prima facie that the testatrix was of sound mind when she signed the instrument herein referred to as her will.

The requirement has been frequently stated and it was recently reiterated by this court that the proponent must in the first instance produce evidence of the

mental capacity of the testator to make out a prima facie case; that the burden of proof in this regard is always on the proponent; and if soundness of mind of the testator is not established prima facie by the evidence the will may not be admitted to probate. In re Estate of Hunter, 151 Neb. 704, 39 N. W. 2d 418, states the rule: "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." See, also, In re Estate of Coons, *supra*.

The testatrix fell on the evening of September 3, 1942, while in the chicken house on the farm where she lived. She was disabled to the extent she could not arise or return to the house in which she lived. She was found on the evening of September 4, 1942, where she had fallen and was taken by ambulance to and placed in a hospital. It was learned that she had been the victim of a brain hemorrhage. She was at times while in the hospital unconscious, irrational, and incoherent. She left the hospital September 27, 1942, and was taken by ambulance to her home. She was there cared for by Mrs. Lee Pyle, a woman of experience in nursing and caring for afflicted persons, but who was not educated or licensed as a nurse. She was for a time assisted in the work at the home of the testatrix by Bess M. Kay. Mrs. Pyle was employed to, was responsible for, and did attend to the needs of testatrix from the time she returned to her home from the hospital until her death.

The proponent offered the testimony of six witnesses as her case-in-chief. Three of them furnished no evidence concerning the will of Sarah Elizabeth Coons, herein referred to as the testatrix or deceased, or the validity of it. The testimony of Mrs. Lee Pyle, one of two attesting witnesses of the will, was to this effect: She first met the deceased at the hospital the day before she was taken from there to her home. She was em-

ployed by Edward E. Moore, a brother of the deceased, to care for her and she was paid by checks written by and received from Mrs. Moore, who signed them for the deceased. They were drawn against the account of the deceased. She did no business after she became ill. Her affairs were looked after by Mr. and Mrs. Moore. The deceased never signed her name after September 3, 1943, until her death, except she attached her name to the will. The deceased was bedfast in the hospital and after she was taken home for many weeks. She was helpless, had to be bathed, fed, and entirely cared for. It was "almost like taking care of a baby. You had to take care of her and change her bed, and do work, and cook and feed her. She was just cared for." There were weeks after she came home during which she was unable to recognize people with whom she had been acquainted or to carry on a conversation. This was her condition when the will was made October 8, 1942. Later she could sit up and she would talk about her mother as though she were living although she had been dead for many years and about her family concerning things that had transpired when deceased was a young girl. Before and for a considerable time after the will was made the deceased had substantially no conversation except to answer in the affirmative or negative when she was asked some question. She did not talk about her property or business of any kind or participate in any business matter from the time she became ill until about a year after the will was made except what she did about attempting to make her will. The witness did not see the testatrix sign the instrument claimed to be the will of the deceased. She did not know its character when she signed it as a witness. She did not know it was intended to be the will of the deceased. The witness was asked to state her opinion as to the mental capacity of the testatrix and she refused. She said she did not know. She would not say that the deceased, when she signed the will, was mentally competent and

of sound mind. The witness said if she had known that the paper she signed was a will she would not have signed it. She gave no testimony that the testatrix was of sound mind when she signed the will.

The other attesting witness to the will, Bess M. Kay, was examined. The substance of her testimony was she had known the testatrix for many years and was at her home assisting Mrs. Pyle from sometime after the deceased was taken there from the hospital and before the will was signed and until some days after it was made. She did not care for the deceased but she saw her each day. She noticed no change in the mental condition of testatrix while she was working there. The witness did not know of the testatrix saying anything about her property, any business matter, or any matter of a personal or general nature. She did not see the testatrix write or sign any check or do any business of any kind except she saw the deceased sign the will. The witness said that the deceased was sick and confined to bed, and she did not expect her to do any of those things. The witness was paid by Mrs. Moore. The witness had only one conversation with the deceased the substance of which she recalled and stated. It did not concern the will and was not of a character to indicate that deceased was of sound mind and had testamentary capacity. The witness saw the testatrix sign the will. As she remembered the incident she was requested to attest the will by the attorney who wrote it. This was in the presence of the testatrix, the attorney, and Mrs. Pyle. The witness did not express an opinion that the deceased was of sound mind when she signed the will. She did not testify to facts which would sustain a finding of testamentary capacity of the deceased.

The last witness produced by appellee in making her case-in-chief was the attorney who prepared the will and who was present when it was executed and attested. He testified only to its preparation, execution, and attestation. He respected the opinion of the court on the

first appeal and refrained from saying anything concerning the physical or mental condition of the testatrix.

This was the condition of the record when appellee submitted her case-in-chief by her rest. There was an absence of proof that testatrix was of sound mind when she made the will. The appellants by motion for this reason requested the court to instruct a verdict for them. The court refused. Appellee was required to show prima facie that the testatrix was of sound mind at the time of the execution of the will. A prima facie case is made when the party having the burden of proof has produced evidence sufficient to support a finding and adjudication for him of the issue in litigation. In re Estate of Hoagland, 126 Neb. 377, 253 N. W. 416; Mantell v. Jones, 150 Neb. 785, 36 N. W. 2d 115. A sound mind within the requirement of the statute on the subject of qualification of a person to make a will (§ 30-201, R. R. S. 1943) means the mental capacity to enable the testator to understand 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. The proponent to make a prima facie case that the testator was of sound mind when he made the will must produce evidence sufficient to support a finding that the testator possessed each of the elements of mental capacity stated above. In re Estate of Hunter, *supra*, states the rule: "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." The proof of proponent is not sufficient to satisfy these requirements. She did not make a prima facie case that the testatrix was of sound mind at the time she made the will. The motion of appellants for a directed verdict when proponent rested her case-in-chief should have been sustained.

The attestation clause of the will recites that it was on the date it exhibits signed, published, and declared by

Sarah Elizabeth Coons to be her will in the presence of the attesting witnesses, and they at her request subscribed their names thereto as witnesses in the presence of testatrix and in the presence of each other, and that at that time the testatrix was of sound mind and free from restraint. The appellee says that the attestation clause is full and complete and she argues because of this and by the introduction of it in evidence with the will she made a prima facie case. The essence of this is a contention that if a will has a complete attestation clause, one that substantially recites the requirements of the relevant statute as to the acts required for legal execution of a will (§ 30-204, R. R. S. 1943), and a statement that the testator was of sound mind, and if the will including the attestation clause is received in evidence, a presumption of due execution by and soundness of mind of the testator results and that a prima facie case has been made for the proponent. This has not been accepted in this jurisdiction. It is contrary to the cases above referred to and many others decided by this court. It opposes what was stated in the opinion on the first appeal of this matter. In re Estate of Coons, *supra.* It is statutory that only a person of "full age and sound mind" may make a valid will. § 30-202, R. R. S. 1943. If there is no contest of the validity of a will it may be probated on the "testimony of one of the subscribing witnesses only, if such a witness shall testify that such will was executed in all the particulars as required in section 30-204, and that the testator was of sound mind at the time of the execution thereof." § 30-218, R. R. S. 1943. A prohibition appears from this that no will may be probated without evidence outside of the will and its attestation that the testator was of sound mind when he made it. This is mandatory where the will is not opposed and it must be self-evident that the requirement is not less when the legality of the will is assailed.

If the subscribing witnesses are nonresidents of the state the court may admit proof of the "handwriting of

the testator and of the subscribing witnesses" as evidence of the execution of the will but there must be "testimony of other witnesses to prove the sanity of the testator * * *." § 30-219, R. R. S. 1943. This statute does not permit the identification of the handwriting of the testator and the subscribing witnesses to satisfy the mandate that there must be testimony that the testator was of sound mind. The legislative intent emerges that proof of sound mind can never be supplied by a presumption or by the existence and contents of an attestation clause. The exaction of testimony of sound mind of the testator is exclusive. There is no substitute. It is a condition precedent to lawful probate of a will in every instance. In Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650, it is said: "Thus it will be seen that, under the provisions of the sections above quoted, a will cannot be admitted to probate, even when no contest is entered, until it is established by the testimony that at the time of its execution the testator was of sound mind. The fact that the will is contested certainly does not change the burden * * *. It is the duty of the proponent in the first instance to offer sufficient testimony of the capacity of the testator to make out a prima facie case." That case set the pattern many years ago for proof of validity of a will: "* * * a will cannot be admitted to probate, even when no contest is entered, until it is *established by the testimony * * * the testator was of sound mind*" and "*the proponent in the first instance * * * (must) offer sufficient testimony of the capacity of the testator to make out a prima facie case.*" The doctrine of that case has not been modified or rejected. On the contrary it has been frequently approved. There is no area for argument that sound mind may be presumed from attestation recitals of a will when the statute requires, and the decisions of the court affirm and emphasize, that the proponent has the burden in all instances to produce testimony of soundness of mind of the testator.

The judgment should be and it is reversed and the

cause is remanded to the district court for Nemaha County with directions to sustain the motion of appellants for judgment notwithstanding the verdict, and to enter a judgment in the cause denying probate of the alleged will of Sarah Elizabeth Coons bearing date of October 8, 1942, shown in the record as exhibit No. 1.

REVERSED AND REMANDED WITH DIRECTIONS.

LEONA SPENCER, APPELLANT, V. WILLIAM CLAYTON SPENCER, APPELLEE.

64 N. W. 2d 348

Filed May 7, 1954. No. 33503.

1. **Appeal and Error.** In an action in equity this court is required to try the issues de novo and to reach an independent conclusion as to what findings are required under the pleadings and evidence without regard to the conclusions reached by the district court.
2. **Divorce.** Any unjustifiable conduct on the part of a husband or wife which destroys the legitimate ends and objects of matrimony may constitute extreme cruelty.
3. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

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

Miles N. Lee, for appellant.

Evans & Evans and *William C. Heelan,* for appellee.

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

YEAGER, J.

This is an action for divorce by Leona Spencer, plaintiff and appellant, against William Clayton Spencer, defendant and appellee. A trial was had to the court at the conclusion of which a decree was entered denying the divorce. A motion for new trial was filed which was overruled. From the decree and the order overruling the motion for new trial the plaintiff has appealed.

The parties were married on December 24, 1940, and lived together as man and wife until June 25, 1952, when the plaintiff left the home of defendant. Three children were born of the marriage. Their names are and their ages at the time of the separation were Sally, age 10, Betty Lou, age 9, and John, age 8.

As grounds for divorce the plaintiff charged that the defendant had been guilty of extreme cruelty toward her and that he was an habitual drunkard. The court found by its decree that the charges had not been sustained.

As grounds for reversal the plaintiff assigns numerous errors but basically the grounds for reversal are that the charges were fully and amply sustained and that the court erroneously found otherwise. This therefore calls upon this court to try the issues of fact de novo and to reach an independent conclusion as to what findings are required under the pleadings and evidence without regard to the conclusion reached by the district court. § 25-1925, R. R. S. 1943; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383; Cain v. Killian, 156 Neb. 132, 54 N. W. 2d 368; Budde v. Anderson, 156 Neb. 812, 58 N. W. 2d 204; Mason v. Mason, 157 Neb. 279, 59 N. W. 2d 365.

To review in this opinion the evidence adduced at the

hearing on the charges made could serve no useful purpose. It appears sufficient to say that it has been conclusively shown that the defendant has been an habitual and at least occasionally excessive user of intoxicating liquors for many years. The plaintiff charged and testified in substance that in the late period before the separation the excess became so great and so continuous that a continuance of the marriage relation became intolerable. Her evidence in this respect received substantial corroboration by witnesses on her behalf. At least by inference substantial corroboration flowed also from the testimony of the defendant's witnesses.

While the defendant denied that he was an habitual drunkard he did not deny that he habitually used intoxicating liquors and at times to excess. He sought to excuse his conduct on the ground that his habits were known to plaintiff before the marriage and that on account thereof she was estopped to make complaint, and also that plaintiff was addicted to the use of intoxicants and supplied them to defendant.

As to plaintiff's use of intoxicants there is no evidence of any occasion when plaintiff took more than two drinks. As to furnishing liquor to defendant the reasonable conclusion is that she did nothing more than to comply with defendant's demands.

On the strict charge of cruelty there was evidence of conduct in connection with drinking which if true ought to be regarded as too offensive to be endured. Also there was evidence of two shooting episodes. One of these took place before and one after the separation. Both were before the court under the pleadings as a basis of the charge of cruelty. As to the first the defendant denied that the shooting had any relation to plaintiff. His explanation was that he was only trying to shoot the legs off a beetle. As to the second he gave no testimony whatever. Moreover when plaintiff's attorney sought on cross-examination to inquire into the second incident objection was made on the ground that the mat-

ter had not been inquired into on direct examination, which objection was sustained.

Whether or not the evidence of plaintiff if accepted as true places the defendant within the category of habitual drunkard we think we do not need to decide. The evidence in all of its aspects taken together however is clearly sufficient to sustain plaintiff's charge of cruelty.

It is a well-established rule of law that any unjustifiable conduct on the part of a husband or wife which utterly destroys the legitimate ends and objects of matrimony may constitute extreme cruelty. See, Myers v. Myers, 88 Neb. 656, 130 N. W. 254; Green v. Green, 148 Neb. 19, 26 N. W. 2d 299; Kroger v. Kroger, 153 Neb. 265, 44 N. W. 2d 475.

The defendant substantially asserts that plaintiff has been guilty of conduct the effect of which would be to defeat any right to obtain a divorce from the defendant.

There is evidence of two slight indiscretions on her part neither of which was anything more than bare indiscretion even if the evidence be accepted as true. Neither is corroborated. Moreover when the facts and circumstances are considered it must be said that plaintiff's denials of this testimony and that of her witnesses is entitled to more weight than that of her accusers.

Taking into consideration all of the evidence and considering it as this court must, de novo, the conclusion is that the plaintiff has sufficiently proved her charge of extreme cruelty against the defendant and that the district court erred in refusing to grant her a divorce from the defendant.

There are numerous errors assigned other than the basic one considered and while it may well be said that at least some of them have merit, in the light of the conclusion reached, it does not become necessary to consider them.

The next question for consideration is that of alimony, child support, costs, and attorney's fees.

The following is the general rule to be followed in

the determination of alimony and division of property: "In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just." Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508. See, also, Kroger v. Kroger, *supra;* Prosser v. Prosser, 156 Neb. 629, 57 N. W. 2d 173.

In 1940 when the parties were married plaintiff was 24 years of age and the defendant 41. There is no evidence as to the present earning ability of the plaintiff except that before the marriage she worked in a restaurant. In view of the fact that there are three children to care for her ability in this respect must be regarded as very limited. The earning ability of defendant depends upon proper management of his business as a rancher and on future economic prospects. His ranch holdings are a one-half interest in slightly less than 13,000 acres of deeded lands, a lease on 160 acres of school lands, and a lease on 40 acres of government lands.

The total value of the ranch property is not accurately ascertainable. There is a variation in the estimates fixed by witnesses which extends from $175,000 to $440,000. We think however that it may be said that it is reasonably of at least the value of $300,000 and that

defendant's interest is reasonably of the value of $150,000.

Like the value of the ranch property the value of the cattle is in dispute. We think however that it is safe to say that at the time of trial they had at least the value of $65,000.

From the ranch property and the handling of cattle thereon flows the income of the defendant. What that will be is of course speculative. It is all the more speculative since there is no break-down of past gross income so that a reasonably accurate conclusion may be reached as to the past net income. There is evidence as to bank deposits but whether or not these deposits represent the entire gross income does not appear.

Ranching operations were carried on by defendant with his brother for a long period of years until October 1951. For the last ten years of this partnership operation the average deposits of gross income amounted to a little more than $30,000 a year. The yearly variation was from a low of a little more than $16,000 to a high of a little more than $64,000. The deposits for the year 1951 were a little more than $23,000.

What the expense of operation was cannot be even fairly ascertained. Labor and feed costs were probably at the minimum since hay probably sufficient for feeding purposes was produced on the ranch property. This appears to be true since for at least a part of the time hay was cut and handled without cash outlay, the cost of handling being paid for by a share of the hay.

The income over the years must have been considerable since the ranch property appears to be unencumbered and at the time of trial the defendant apparently had government bonds of the cost of $25,360, cash in the amount of $11,505.66, and money due him in the amount of $6,691.10. Also when plaintiff left the defendant she took from their joint account $8,000.

The record discloses that some of the present holdings came to defendant by inheritance and some by his own efforts and of course some by the appreciation of values

over the years but no reliable information has been given as to the values flowing from these respective sources. Likewise there is no reliable information as to the value added after the marriage of the parties.

It may be said however that it is reasonably inferable that since the marriage and up to the date of separation the plaintiff gave all of her efforts in furtherance of the welfare of her husband's interests. There is no evidence to the contrary.

The station and social standing of the parties was that of the sandhill rancher. What are regarded as modern conveniences were few. In separation the physical and social environment of plaintiff probably is and will be superior to what she enjoyed on the ranch. Apparently the health of plaintiff is good. The defendant appears to suffer some physical disability.

Having taken into consideration all of the facts and circumstances as disclosed by the record and having considered them in the light of the rule hereinbefore set forth for the determination of alimony and division of property we conclude that there should be an award in favor of plaintiff in the amount of $75,000, payable $15,000 within 60 days from the date of issuance of mandate herein and $6,000 annually thereafter until the full sum of $75,000 shall have been paid.

As to the minor children of the parties it is concluded that the plaintiff should have the care, custody, and control of them subject to the right of visitation by the defendant at reasonable times and that the defendant pay to plaintiff $200 a month for the support of the children. The provision as to custody and support of children shall remain in force until the children shall become of age or self-supporting or until the further order of the court.

In addition to what has been allowed by the district court the defendant shall pay to plaintiff $6,000 as fees for her attorney.

The decree of the district court is reversed and the

cause is remanded with directions to the district court to enter a decree granting a divorce to the plaintiff and to award alimony, custody of and support for children, and attorney's fees as indicated by this opinion. Costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF ADDIE R. LISCO, DECEASED. DAN J. BOMAN, APPELLANT, V. H. B. OLSON, EXECUTOR OF THE ESTATE OF ADDIE R. LISCO, DECEASED, APPELLEE.

64 N. W. 2d 310

Filed May 7, 1954. No. 33515.

1. **Money Received.** An action in the nature of one for money had and received lies wherever the defendant has obtained possession of money which in justice and fairness he ought to refund.
2. ———. Implicit in the right of recovery is a requirement that the plaintiff show that defendant actually received his money or its equivalent.

APPEAL from the district court for Garden County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Neighbors & Danielson, for appellant.

Warren E. Van Norman, Van Pelt, Marti & O'Gara, and *Warren K. Dalton,* for appellee.

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

SIMMONS, C. J.

This appeal involves a claim for $1,000 against the estate of Addie R. Lisco, deceased. It was appealed to the district court where trial was had. It resulted in a finding that the appeal should be dismissed. The judgment was that the petition be dismissed.

The claimant is Dan J. Boman, hereinafter called the plaintiff. The executor of the estate will be hereinafter called the defendant. Plaintiff filed a motion for new

trial which was overruled. Plaintiff appeals. Plaintiff assigns as error the finding and dismissal of his petition and error in not finding that he was entitled to a judgment. We affirm the judgment of the trial court.

Plaintiff filed his petition and claim in the district court. Defendant, so far as important here, filed a general denial.

The cause was submitted on a stipulation of fact which we recite in its entirety. It follows:

"It is stipulated that prior to November 30, 1949, Addie R. Lisco was the owner of school land lease No. 62384 covering the West Half of Section 16, Township 19, Range 47, Morrill County, Nebraska, which was a 25-year lease issued in 1924 and expiring on the 31st day of December, 1949, and within the time permitted by law Mrs. Lisco made application for a renewal of this lease, and the renewal was approved by the Board of Educational Lands and Funds and a new lease, No. 70015 was issued to her on the 22nd day of December, 1949. This new lease was assigned and delivered to Dan J. Boman, and thereafter the Board of Educational Lands and Funds approved the assignment. At the time said lease was delivered to Dan J. Boman he paid to Addie R. Lisco the sum of $4,000.00 for the assignment of said lease; that pursuant to an agreement between the parties $2,000.00 of said sum was in payment for improvements on the property, and the sum of $2,000.00 was a bonus for the assignment of the lease. That thereafter, as provided by law and rules and regulations of the Board of Educational Lands and Funds, Addie R. Lisco paid one-half of said bonus, or the sum of $1,000.00, to the Board of Educational Lands and Funds or to the State of Nebraska; that thereafter under a decision of the Supreme Court of Nebraska in the case of State ex rel Ebke Vs. The Board of Educational Lands and Funds, the statute under which said lease No. 70015 was written was declared unconstitutional, and thereafter the Board of Educational Lands and Funds can-

celled said lease, advertised said property for releasing and, in order to protect his investment, Dan J. Boman was required to and did bid for said lease a sum of about $3,500.00; that at the time both parties understood the lease was a 12-year lease, to run from January 1, 1950 to December 31, 1962; that the Executor of the Estate of Addie R. Lisco filed a claim with the Clerk of the Legislature for the sum of $1,000.00, which has been paid to the State of Nebraska as a part of the bonus for the assignment of the lease, and the Legislature in the 1953 Session allowed said claim and appropriated money for the purpose of paying said sum together with bonuses received by the State on account of the cancellation of other leases. The payment of this $1,000.00 has not been as yet received by the Estate of Addie R. Lisco."

Plaintiff in his petition alleged facts somewhat at variance from the stipulation. He alleged also that because the lease had been declared null and void the state "should" return the $1,000 to the defendant and defendant "should" return it to plaintiff; and that he was in equity and good conscience entitled to recover from the defendant the sum of $1,000, and prayed for an allowance and recovery of said amount from the estate.

Plaintiff clearly seeks to recover a judgment for the $1,000, which he expects the state will repay to the defendant.

Plaintiff argues that as assignee of the lease the rights of the defendant to the $1,000 have accrued to him and he is entitled to the reimbursement of the $1,000. Defendant answers that the assignment was merely a quit claim. We are unable to explore or determine this contention, as neither the lease nor the assignment are in the record. That theory of recovery is not pleaded. The rights and liabilities of the parties under those instruments cannot be determined.

Plaintiff further argues that this money was paid to the state under a mistake of fact arising as a result of a mistake of law, to wit: The unconstitutionality of the

statute under which it was paid to the state, and that he is accordingly entitled to recover it. Defendant argues that it was a payment to the state under a mistake of law and that recovery cannot be had. We need not determine that question. This is not an action to recover from the state, to whom the money was paid.

Finally plaintiff argues that in justice and equity he is entitled to the $1,000 rather than the defendant. This is obviously the theory upon which he pleaded and tried his case.

The petition was filed in the district court July 10, 1952. At the time this action was brought there were in force the provisions of sections 81-857 to 81-861, R. R. S. 1943, inclusive. This statute creates a "Sundry Claims Board" for the investigation of claims against the State of Nebraska for the payment of which no moneys have been appropriated. The Clerk of the Legislature is the secretary of the board. Claims are to be filed with the secretary. The record does not show a resort to this act. The trial was had May 20, 1953. The stipulation does show that the defendant had filed a claim with the Clerk of the Legislature for the sum of $1,000 which had been paid to the state as a part of the bonus for the assignment of the lease.

The stipulation then is that "the Legislature in the 1953 Session allowed said claim and appropriated money for the purpose of paying said sum together with bonuses received by the State on account of the cancellation of other leases."

Neither party cites the appropriating act to us. We have not found it. The Legislature did pass L. B. 579, Laws 1953, chapter 198, page 684, making appropriations for the payment of claims filed in the office of the Sundry Claims Board. That act was passed with an emergency clause and approved May 30, 1953, 10 days after the trial of this cause. We have examined it and find no appropriation in it for the payment of $1,000 to the defendant.

The Legislature did pass L. B. 188, Laws 1953, chapter

261, page 871, now sections 72-234.03 and 72-234.04, R. S. Supp., 1953, which provided for the filing of claims with the Board of Educational Lands and Funds for the refund of amounts paid for the assignment of leases. This act was approved March 28, 1953, a date before the trial of this cause. Its effective date was September 14, 1953, a date after the trial of this cause. The stipulation does not show compliance with the procedural provisions of this act. The Legislature, in the bill making appropriations for the state government, appropriated $120,000 for the purpose of making refunds as provided by L. B. 188, Laws 1953, chapter 261, page 871. See Laws 1953, c. 194, § 15, p. 636. This bill was passed with an emergency clause and was approved June 13, 1953—23 days after the above stipulation was made and trial had.

The stipulation appears to be anticipatory of enactments of the Legislature. We need not determine whether or not the trial court was required to accept a stipulation contrary to the statutes that it purported to reflect.

This fact was stipulated: "The payment of this $1,000.00 has not been as yet received by the Estate of Addie R. Lisco."

An action in the nature of one for money had and received lies wherever the defendant has obtained possession of money which in justice and fairness he ought to refund. Washington v. Beselin, 141 Neb. 638, 4 N. W. 2d 753. - The action, though falling under the common-law class of assumpsit, is really in the nature of a bill in equity and lies wherever the party should by equity and natural principles of justice refund the money. Estate of Devries v. Hawkins, 70 Neb. 656, 97 N. W. 792. Implicit in the right of recovery is a requirement that the plaintiff show that defendant actually received his money or its equivalent. 58 C. J. S., Money Received, § 9, p. 921; 4 Am. Jur., Assumpsit, § 22, p. 512.

Here it was stipulated that defendant had not received

the money. Certainly equity and good conscience do not require that plaintiff have a judgment against the defendant for $1,000 based on a hope or expectation that at some future time defendant may receive the money.

The judgment of the trial court is affirmed.

AFFIRMED.

JERRY BELZA, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLEE, V. THE VILLAGE OF EMERSON, A MUNICIPAL CORPORATION, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH GERALD B. LONGWELL, COUNTY TREASURER OF DAKOTA COUNTY, NEBRASKA, APPELLEE.

64 N. W. 2d 214

Filed May 7, 1954. No. 33519.

1. **Taxation.** In order that special assessments levied by a city or village may become a lien upon real estate it is necessary that they shall be certified to the county clerk and placed on the property tax lists to be collected in the manner provided by law for the collection of state and county taxes in the county.
2. ———. The time provided by law for certification of taxes assessed by a city or village is July 15 of the year when the tax is assessed.
3. ———. Special assessments become a lien upon real estate only if regularly assessed and levied as provided by law.
4. ———. The record of special assessments must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power, and no omission of essential fact may be supplied by presumption.

APPEAL from the district court for Dakota County: SIDNEY T. FRUM, JUDGE. *Affirmed.*

Harold T. Curtiss, for appellants.

Mark J. Ryan, for appellee.

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

YEAGER, J.

This is an action in equity by Jerry Belza on his own behalf and all others similarly situated, plaintiff and appellee, against the Village of Emerson, a municipal corporation, and the members of the board of trustees of the village, defendants and appellants, and Gerald B. Longwell, County Treasurer of Dakota County, Nebraska, defendant and appellee, to have declared null and void and not a lien upon real estate of plaintiff and others similarly situated certain sewer assessments made by the village of Emerson against the real estate in question, and for an injunction preventing the collection of the assessments.

There was a trial to the court at the conclusion of which a decree was rendered in favor of plaintiff in his own behalf. No relief was granted to others similarly situated. A motion for new trial was filed and duly overruled. From the decree and the order overruling the motion for new trial the defendants, except defendant Longwell, have appealed.

The factual history back of this litigation to the extent disclosed is substantially as follows: Purportedly on or about January 18, 1923, the defendant Village of Emerson, which will be referred to as the defendant, levied special assessments against real estate in Emerson, Dakota County, Nebraska, including Lots 6 to 12, inclusive, in Block 19, North Addition. The special assessments were for part payment of the cost of a sanitary sewer system and disposal plant in Main Sanitary Sewer District Number 1, which had been created. The complete records as to proceedings creating the district and making the levy have not been located and of course were not produced at the trial.

The record of the special assessments was never properly certified to the county clerk for the purpose of having it placed on the tax list for collection, and the assessments were never placed on the tax list by the county clerk or by anyone else. A purported list was

found in the office of the county treasurer but no record of it was ever made in connection with the tax list or otherwise. No effort was made to enforce the alleged assessments as a lien against the property involved here until 1952.

At the time the assessments were made plaintiff was not the owner of any real estate involved but in September 1948, he purchased the lots which have been described. The assessment against the lots was $55 a lot. The rate of interest was 12 percent per annum on delinquent installments. In 1952 an effort was made to collect these amounts with interest. The defendant claimed a lien against the lots in the amounts assessed and the accumulated interest.

It was because of the effort to collect the assessments and interest and to enforce a claimed lien that this action was instituted.

It is not deemed necessary nor advisable to consider the question of the validity of the special assessments as such in the first instance, since a determination upon the question of whether or not the assessments, even if they were valid when levied, are a valid lien upon the real estate involved will be fully determinative of the case.

After the assessments were levied, it was required that within the time provided by law they should be certified to the county clerk and by him placed upon the property tax lists to be collected in the manner provided by law for the collection of state and county taxes in the county. § 4369, Comp. St. 1922; § 17-702, R. S. Supp., 1953.

The time provided by law for certification of taxes assessed by a city or village is July 15 of the year when the tax is assessed. § 77-1612, R. R. S. 1943.

Special assessments become a lien upon real estate only if regularly assessed and levied as provided by law. § 77-209, R. R. S. 1943.

In regard to special assessments the record must show

affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power. The omission of essential facts may not be supplied by presumptions. Smith v. City of Omaha, 49 Neb. 883, 69 N. W. 402; City of Scottsbluff v. Kennedy, 141 Neb. 728, 4 N. W. 2d 878.

From an application of these rules to the facts as disclosed by this record it cannot be said that these special assessments ever became a lien on this real estate. Assuming but not deciding the regularity of the steps taken by the village of Emerson in assessing the special taxes for the purposes for which assessed, as to that portion attributed to the real estate involved here the required steps were not taken to cause it to become a lien. It was never properly certified and was not, within the time provided by law, placed upon the property tax lists.

It follows that the decree of the district court should be and is affirmed.

AFFIRMED.

JOSEPH SPORER ET AL., APPELLEES, V. MARTHA HERLIK, APPELLANT.

64 N. W. 2d 342

Filed May 7, 1954. No. 33531.

1. **Appeal and Error.** To obtain redress by appeal, the right to appeal must exist at the time. This right is not one at common law. The mode and manner of appeal is statutory and such jurisdiction can only be conferred in the manner provided by statute.
2. **Forcible Entry and Detainer.** The party against whom judgment is rendered in forcible entry and detainer cases may obtain a review of the case by writ of error, or by appeal, to the extent that a right of appeal is given to him by constitutional or statutory provisions.
3. ———. The forcible entry and detainer statute, sections 26-1,118 to 26-1,134, R. R. S. 1943, provides a speedy and more or

less summary remedy, quasi-criminal in its nature, and the ordinary rules of pleading and practice provided elsewhere in the code and not by inclusion made a part thereof, do not apply.

4. **Judgments.** In the strict sense, a default judgment is one taken against a defendant who, having been duly summoned in an action, fails to enter an appearance in time; but the term is also now ordinarily applied where default occurs after appearance as well as before, and may be rendered against a defendant who fails to answer or plead or take some step required within the time limited by statute or authoritative order or rule of court, or after issues joined fails to appear at the hearing or trial when the same is called or set for trial, as required by statute or authoritative rule or order of court.

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

James W. Karlovsky and *Edward J. Baburek,* for appellant.

John C. Barrett, for appellees.

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

CHAPPELL, J.

On June 10, 1953, plaintiffs Joseph Sporer, Marie Sporer, and Matous Sporer filed this forcible entry and detainer action against defendant Martha Herlik in the municipal court at Omaha seeking restitution of described premises belonging to plaintiffs. On June 11, 1953, defendant was personally served with summons therein which directed her to appear on June 17, 1953, at 9 a. m. to answer, and recited that if she failed to appear plaintiffs would take judgment for possession of the described premises and costs. On June 15, 1953, as requested by defendant, she was granted a continuance of 7 days until June 24, 1953, at 9 a. m., as provided by section 26-1,125, R. R. S. 1943. She never subsequently made any request for further continuance or gave any undertaking therefor as required thereby. Rather, on June 22, 1953, defendant filed a demurrer. Thereafter, on June 24, 1953, plaintiffs appeared but defendant did

not, and proceeding in conformity with section 25-1,126, R. R. S. 1943, the municipal court rendered and entered its order and judgment as follows: "Defendant failed to appear on this date and made default herein. On motion of plaintiff, defendant's demurrer is overruled and this cause came on for trial. Trial had. Evidence heard. On consideration of the evidence the court finds the defendant guilty as charged in the complaint.

"It is therefore considered, ordered and adjudged by the court that the plaintiffs have and recover of and from the defendant restitution of the premises described in the complaint and also his costs herein expended * * *."

Subsequently, on July 6, 1953, defendant filed an appeal undertaking with justification of sureties, as provided by section 26-1,133, R. R. S. 1943, and transcript on appeal was filed in the district court on July 14, 1953. However, on August 11, 1953, plaintiffs filed a special appearance in the district court challenging its jurisdiction upon the ground that the municipal court judgment against defendant having been "entered by default," her right of appeal was barred by section 26-1,132, R. R. S. 1943, controlling municipal court procedure in forcible entry and detainer cases. That section provides: "Any party against whom judgment has been entered by this court in an action of forcible entry and detention, or forcible detention only, of real property, may appeal therefrom to the district court, *except that the right of appeal herein granted shall not be granted from judgments entered by default.*" (Italics supplied.)

Defendant then filed objections to plaintiffs' special appearance, designating same as "Answer to Special Appearance," in which she: (1) Denied that the municipal court judgment against defendant was a default judgment within the provisions of the aforesaid statute; and (2) alleged that in any event such judgment was based upon plaintiffs' petition, which did not state a cause of action, and being thus erroneous was reversible on appeal to the district court.

After hearing thereon, plaintiffs' special appearance was sustained and defendant's appeal was dismissed at defendant's costs. Her motion for new trial, to which plaintiffs again filed a special appearance, was overruled, and defendant appealed to this court, assigning that the decision and judgment of the district court was contrary to the transcript from the municipal court and contrary to law. We conclude that the assignment should not be sustained.

At the outset it should be noted that plaintiffs' petition clearly stated a cause of action and defendant's demurrer thereto filed in municipal court was entirely without any merit. That question is so answered by Locke v. Skow, 3 Neb. (Unoff.) 299, 91 N. W. 572; Blaco v. Haller, 9 Neb. 149, 1 N. W. 978; Hitchcock v. McKinster, 21 Neb. 148, 31 N. W. 507; Blachford v. Frenzer, 44 Neb. 829, 62 N. W. 1101; and Moore v. Parker, 59 Neb. 29, 80 N. W. 43. In the last-cited case the opinion said: "The complaint is not defective in any essential particular. It accurately describes the premises, and distinctly charges an unlawful and forcible detention of the same by the defendant. The statute requires nothing more." As stated in the syllabus: "A complaint in an action of forcible entry and detainer which accurately describes the premises, and distinctly charges an unlawful and forcible detention thereof by defendant is sufficient." Plaintiffs' petition complied therewith in every respect and the overruling of defendant's demurrer thereto could not in any manner have been prejudicial to her under the circumstances presented in this case.

In such situation, that question requires no further discussion, and in the final analysis, as conceded by defendant, the primary question presented is whether or not under the circumstances and applicable law the judgment of the municipal court against defendant was a judgment "entered by default." We conclude that it was. While the question is of first impression in this

jurisdiction, there are innumerable authorities sustaining that conclusion.

In that connection, section 26-1,124, R. R. S. 1943, provides: "If the defendant does not appear in response to the summons, and it shall have been properly served, the court shall try the cause as though he were present."

Also, section 26-1,125, R. R. S. 1943, provides: "No continuance shall be granted for a longer period than seven days, unless upon cause shown to the court of the existence of extraordinary causes and then not unless the defendant applying therefor shall give an undertaking to the adverse party, with good and sufficient surety to be approved by the court, conditioned for the payment of any rents that have or may accrue, and any additional damages that may be sustained by such adverse party by reason of said continuance, if judgment be rendered against the defendant."

It will be observed that no continuance was requested by or granted to defendant thereunder beyond 7 days, and in such situation section 26-1,126, R. R. S. 1943, became operative, which, insofar as important here, provides: "If the suit is not continued * * * as in this article provided, the court shall try the cause. If, after hearing the evidence, he shall conclude that the complaint is not true, he shall enter judgment against the plaintiff for costs. If he shall find that the complaint is true he shall render a general judgment against the defendant and in favor of the plaintiff for restitution of the premises and costs of suit." It follows that the cause herein was set for hearing and trial in the municipal court on June 24, 1953, as required by statute, and upon failure of defendant to appear on that date to present her demurrer or answer and proceed with the trial, she was in default.

As held in From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441: "An appeal is not a remedy to cure or remove an error in matter of law only but is a retrial of the whole case upon the pleadings and proofs.

"To obtain redress by appeal the right to appeal must exist at the time. This right is not one at common law.

"The mode and manner of appeal is statutory and such jurisdiction can only be conferred in the manner provided by statute."

As a matter of fact, as held in Schmidt v. Henderson, 148 Neb. 343, 27 N. W. 2d 396: "The action of forcible entry and detainer is a statutory proceeding and original jurisdiction thereof is conferred on justices of the peace, county courts, and municipal courts."

As stated in 36 C. J. S., Forcible Entry and Detainer, § 77, p. 1210: "The party against whom judgment is rendered, may obtain a review of the case by writ of error, or by appeal, to the extent that a right of appeal is given to him by constitutional or statutory provision."

In Blachford v. Frenzer, *supra*, it is said: "The legislature designed by the enactment of this statute to provide a summary remedy by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof, or one who, having lawfully entered, then unlawfully and forcibly detained possession." See, also, Adkins v. Andrews, 1 Neb. (Unoff.) 810, 96 N. W. 228, wherein it is said: "The special character of proceedings in forcible entry and detainer is generally recognized. They are intended to provide a speedy and more or less summary remedy, and belong in a class apart with other special and summary proceedings."

In 2 Fisher, Courts of Limited Jurisdiction, § 393, p. 725, citing cases from this and other jurisdictions and referring to Chapter 27, article 14, R. R. S. 1943, and Chapter 26, sections 26-1,118 to 26-1,134, R. R. S. 1943, it is said: "The remedy is strictly statutory and the applicable statute must be strictly complied with. The two articles of the code are complete within themselves and the provisions of the general code of civil procedure relating to civil and criminal actions do not apply."

See, also, 2 Fisher, Courts of Limited Jurisdiction, § 401, p. 743.

In 26 C. J. S., Default, p. 665, the term default: "* * * has been defined generally as meaning failure, neglect, or omission; the failure of a party to take a step required by law in the progress of a legal action; neglect or omission of a legal requirement, and, more specifically, as meaning a failure to appear, a failure to file a required pleading within time; any omission or neglect to plead or to appear. The term when applied to a defendant is frequently used in a much wider sense, and a failure to enter a plea, answer, affidavit of defense, etc., as well as for want of appearance, is included in the definition, and has been said to signify a confession of the complaint."

Black's Law Dictionary (3d ed.), p. 539, defines the term default under the sub-head "In Practice" as: "Omission; neglect or failure of any party to take step required of him in progress of cause. When a defendant in an action at law omits to plead within the time allowed him for that purpose, or fails to appear on the trial, he is said to make default, and the judgment entered in the former case is technically called a 'judgment by default.'" Also, "Judgment by default," is defined as: "One entered upon the failure of a party to appear or plead at the time appointed." See, also, p. 1027, where it is said: "Judgment by default is a judgment rendered in consequence of the nonappearance of the defendant. * * * The term is also applied to judgments entered under statutes or rules of court, for want of affidavit of defense, plea, answer, and the like, or for failure to take some required step in the cause." See, also, Webster's New International Dictionary (2d ed.), Unabridged, p. 686.

In 11 Words and Phrases (Perm. ed.), p. 532, citing and quoting from Forgotson v. Becker, 39 Misc. 813, 81 N. Y. S. 321, it is said: "The definition of 'default' as a failure to appear and contest a point of law or fact by

presentation of counter argument or proof has been applied in many cases."

In Forgotson v. Becker, *supra,* quoting with approval from Flake v. VanWagenen, 54 N. Y. 25, it is also said: " 'In the absence of any objection he will be held to have acquiesced; and, for the same reason, if a party permits an order or judgment to be taken against him by default, when he has been notified to appear, and has thus had an opportunity to object, he will be deemed to have acquiesced; and afterward he can no more attack the same upon appeal than he could if he had expressly assented to the order of judgment.' "

In Continental Oil & Gas Production Co. v. Austin (Tex. Civ. App.), 17 S. W. 2d 1114, it is said: "The term 'judgment by default' is now generally applied to a default made after an appearance, as well as before; and may be entered where defendant fails to answer or plead within the time allowed him for that purpose, or fails to appear on the trial, or otherwise fails to take some step required by some rule of practice or some rule of court." See, also, 23 Words and Phrases (Perm. ed.), p. 219.

As stated in 31 Am. Jur., Judgments, § 506, p. 125: "A judgment by default is based upon an omission by a party to take a necessary step in the action within the proper time. Generally, the omission consists of a failure to plead or appear within the time required."

As stated in Peterson v. Kissell, 148 Iowa 516, 125 N. W. 808: "A default is the failure to take the step required in the progress of an action, and a judgment by default is a judgment against the party who has failed to take such step."

To sum it all up, in the strict sense, a default judgment is one taken against a defendant who, having been duly summoned in an action, fails to enter an appearance in time; but the term is also now ordinarily applied where default occurs after appearance as well as before, and may be rendered where defendant fails to answer or

plead or take some step required within the time limited by statute or authoritative order or rule of court, or after issues joined fails to appear at the hearing or trial when the same is called or set for trial, as required by statute or authoritative rule or order of court. 49 C. J. S., Judgments, § 187, p. 324.

Hardy v. Miller, 11 Neb. 395, 9 N. W. 475, was not a forcible entry and detainer case, but otherwise it is comparable in every material respect with that at bar. Defendants Hardy therein filed separate demurrers which were untenable, as in the case at bar. They had not appeared to present same at the time the case was set for trial. Answer day had then passed, so the demurrers were overruled, and being in default of answer, judgment was rendered against them by default under a statute comparable in material respects with section 26-1,126, R. R. S. 1943. In the opinion this court said: "The finding of the court that Hardy and wife made 'default of answer' is one of fact. No judgment can lawfully be rendered by default until the time for filing an answer has elapsed, and the authority of the court to render such judgment follows from the failure of the defendant to answer, and not from the particular manner in which the default entered. The essential fact is the failure to answer, and where this appears in a judgment it is sufficient prima facie to authorize the action of the court, and its proper action in taking the default will be presumed."

Authorities relied upon by defendant either follow the old strict minority rule that once having made an appearance there can subsequently be no judgment by default, which we do not desire to adopt, or they are distinguishable upon the basis of the statutes involved or circumstances presented. To discuss them at length here would serve no purpose.

Under the circumstances appearing in this case, the rules heretofore set forth are controlling. We conclude that the judgment of the municipal court was one ren-

dered and entered by default within the provisions of section 26-1,132, R. R. S. 1943, which barred defendant's right of appeal. To hold otherwise would give the statute no force or effect; permit litigants to toy with courts; and thus indefinitely retain possession of another's property without authority of law, thereby perpetrating an injustice which the Legislature appropriately sought to avoid.

Therefore, the judgment of the district court sustaining plaintiffs' special appearance and dismissing defendant's appeal should be and hereby is affirmed.

AFFIRMED.

GEORGE W. DEWITT ET AL., APPELLANTS, V. HENRY SAMPSON ET AL., APPELLEES.
64 N. W. 2d 352

Filed May 14, 1954. No. 33486.

1. **Courts: Executors and Administrators.** The Constitution of this state confers upon the county court original and exclusive jurisdiction to receive, examine, allow, and adjust all lawful claims and demands of every kind against the estate of a deceased person.
2. **Courts: Wills.** The county court in the exercise of its probate jurisdiction, as a distinct and independent branch of jurisdiction, has no power to construe wills.
3. ———: ———. The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but it has no jurisdiction to construe wills to determine rights of devisees or legatees or to bind heirs, legatees, or other persons claiming benefits of a will.
4. **Wills: Executors and Administrators.** The construction of a will by the county court for the information and benefit of the executor in order to advise him as to what course to pursue adjudicates only his rights and liabilities in the execution of his office.

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

McKillip, Barth & Blevens, for appellants.

Kirkpatrick & Dougherty and *Dryden, Jensen & Dier,* for appellees.

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

YEAGER, J.

This is an action in equity by 15 plaintiffs who are residuary legatees of the estate of Laura Sampson, deceased, by 12 plaintiffs who are the spouses respectively of 12 of the legatee plaintiffs, and by Robert T. Cattle, executor of the last will and testament of Laura Sampson, deceased, against Henry Sampson, individually, Susan Belle Gadeke, Homer T. Gadeke, Henry Sampson, administrator de bonis non with the will annexed of the estate of Theodore C. Sampson, deceased, and 13 other defendants. The defendants Henry Sampson, Susan Belle Gadeke, and Homer T. Gadeke will be hereinafter referred to for convenience of identification as appellees and the other defendants simply as defendants. Seven of these are children of designated legatees named in the will of Laura Sampson, deceased, and the other six are spouses respectively of six of the seven. Henry Sampson is a brother of Theodore C. Sampson, deceased, and Susan Belle Gadeke is the daughter of a deceased sister of Theodore C. Sampson. These two, according to the petition, are the remaining residuary legatees of Theodore C. Sampson. Homer T. Gadeke is the husband of Susan Belle Gadeke.

By the cause of action pleaded the plaintiffs seek to have the will of Theodore C. Sampson construed and, on the basis of the construction which they seek, to have title to what they contend to be the assets of the estate of Laura Sampson, deceased, quieted in them as legatees of the estate of Laura Sampson.

In order that confusion may be avoided it should be borne in mind that from the standpoint of succession in any capacity the plaintiffs are strangers to the estate of Theodore C. Sampson.

The pertinent facts as disclosed by the petition are that Theodore C. Sampson and Laura Sampson were husband and wife. In his lifetime Theodore C. Sampson made a will. In that will he set up what he termed two trusts both in favor of Laura Sampson, his wife. The provisions setting up the two so-called trusts are the following:

"Subject to paragraph ONE, of this my last will and testament, I give, devise, and bequeath to my beloveth wife, Laura Sampson, in trust for the following purposes, the sum of $10,000.

"1 - She shall pay to herself all of the income from this trust estate during her life time.

"2 - She shall have the right and power during the life of this trust, to sell and convey all or any part, either of the real estate or personal property; and turn the same into money. And all such money received, she shall be allowed to invest or re-invest, in any security or real estate she sees fit so to do, without the consent of any court of law, or any person or persons whatsoever.

"3 - She shall not be required to make any report or accounting of this trust to any court of law or to any person or persons whatsoever."

"Subject to paragraphs ONE and TWO of this my last will and testament, I give, devise and bequeath all of the remainder of my said estate, either real, personal or mixed to my beloveth wife, Laura Sampson, in trust for the following purposes:

"1 - She shall pay to herself all of the income from this said trust estate, to herself during her life time.

"2 - She shall have the right to pay to herself any part or all of the principal, in case she should need the same for her own comfort, during her life time.

"3 - She shall not be required to make any report or accounting of this trust estate to any court or to any person or persons whatsoever.

"4 - She shall have the right and power during the life time of this trust to sell and convey all or any part,

either of the real estate, personal property or securities and turn the same into money. And all such money received, she shall be allowed to invest or re-invest in any securities or real estate she sees fit, without the consent of any court or any person or persons whatsoever."

As to the disposition of the first trust after the death of Laura Sampson, the following appears in the will:

"After the death of my beloveth wife, Laura Sampson, I desire that the trust estate created in paragraph TWO, of this my last will and testament, shall cease, and the trust estate of $10,000 shall be divided as follows:—

"One third to my sister Florence Slonecker of Los Angeles, California.

"One third to my brother Henry Sampson of Lincoln, Nebraska.

"One third to my sister Anne Moore of Seward, Nebraska."

"It is my will and desire that in case any of the legatees mentioned in paragraph THREE, of this my last will and testament, should not survive me, and leave no living child or children, then in that event the above bequest left to that legatee shall lapse; and his or her proportional share shall be divided equally between the living legatees named. But in case the said legatee shall die before me, leaving a living child or children, then his or her proportional share shall be divided between the children share and share alike."

As to the disposition of the second trust after the death of Laura Sampson, the following appears:

"After the death of my beloveth wife, Laura Sampson, I desire that the trust estate created in paragraph FIVE, of this my last will and testament, shall cease and any and all balances, whether real, personal or mixed assets, shall be divided as follows:

"One third to my sister Florence Slonecker of Los Angeles, California.

"One third to my brother Henry Sampson of Lincoln, Nebraska.

"One third to my sister Anne Moore of Seward, Nebraska."

"It is my will and desire that in case any of the legatees mentioned in paragraph SIX of this my last will and testament, should not survive me, and leave no living child or children, then in that event the above bequest left to that legatee shall lapse; and his or her proportional share shall be divided equally between the living legatees named. But in case the said legatee shall die before me, leaving a living child or children, then his or her proportional share shall be divided between the children share and share alike."

Theodore C. Sampson died on October 15, 1937, and his estate was duly probated. At the time of the death of Theodore C. Sampson his estate consisted of lands and personal property. The lands were sold in accordance with the powers granted by the provisions of the will.

On October 17, 1952, Laura Sampson died testate and her will was probated in Seward County, Nebraska.

In her lifetime, according to the petition, Laura Sampson sold all of the real estate of which Theodore C. Sampson died seized and handled the proceeds and all of the personal property as if it had been her own.

On Laura Sampson's death, according to the petition, the defendants Henry Sampson and Susan Belle Gadeke, as residuary legatees of Theodore C. Sampson, made claim apparently in the county court against her estate for $31,950.66 which they asserted was due them as the residue under the provisions of the will of Theodore C. Sampson quoted herein.

The prayer of the petition is to have the will of Theodore C. Sampson construed.

The plaintiffs allege that by the provisions of the will Laura Sampson, instead of receiving the described estates in trust with remainder, received them absolutely under the will. By the prayer plaintiffs seek such a construction and an adjudication accordingly.

To the petition the appellees filed concurrently a plea in abatement and a demurrer.

By the plea in abatement it was alleged that the claim filed in the estate of Laura Sampson, deceased, raised the issues pleaded by the plaintiffs herein. The effect of this was to say that at the time of the commencement of this action there was already an action pending for the determination of the issues pleaded herein, hence this action should be abated.

The demurrer was both special and general. In it was pleaded misjoinder of parties plaintiff and parties defendant and also that the petition did not state sufficient facts to constitute a cause of action.

The defendants filed an answer but it requires no attention.

A trial was had to the court on the plea in abatement at the conclusion of which the court found in favor of the appellees on the plea. Accordingly the plea was sustained and the action dismissed.

The appellants filed a motion for a new trial in which they set forth that the order sustaining the plea in abatement and the dismissal of the action was erroneous.

The defendants filed a similar motion for new trial.

On the hearing on the motion for new trial the demurrer of appellees was sustained whereupon appellants elected to stand on their petition. Thereupon the court overruled the motion for a new trial based on the order sustaining the plea in abatement and entered a judgment of dismissal based upon the demurrer of appellees.

Apparently assuming that the petition of appellants stated a cause of action against the defendants which was peculiar to them and separate from the action pleaded against appellees and that this cause of action was erroneously dismissed by the order sustaining the plea in abatement, the order sustaining the plea in abatement to that extent was vacated and set aside and a new trial granted.

With this phase of the case we will have no concern at least at this time.

The appellants in the presentation of their appeal say: "The only question presented by this appeal is whether the plaintiffs' petition states a cause of action." As their only assignment of error they say: "The court erred in sustaining the demurrer to the petition." In their statement of the case they say: "The plea in abatement was overruled. The demurrer was sustained." These statements do not reflect the condition of the record.

As pointed out both the plea in abatement and the demurrer were sustained and on the basis of the orders in those connections the petition was dismissed as to appellees. There is in actuality no appeal as to the order dismissing the petition based upon the plea in abatement. However since the confusion may have arisen because of the simultaneous filing of the plea in abatement and the demurrer by the appellees the appeal will be treated as being before the court on appellees' attack upon the appellants' petition. This can do no hurt since the question actually presented is that of whether or not appellants may be allowed to maintain their pleaded cause of action.

The purport and effect of the plea in abatement and the demurrer is to say that the subject matter of appellants' pleaded cause of action is a claim by appellees against the estate of Laura Sampson, deceased, a matter over which the county court has exclusive jurisdiction.

The appellants on the other hand have proceeded on the theory that since the rights, if any, which appellees had flowed from the will of Theodore C. Sampson the rights of all parties should be determined in an action in the district court.

It was this contention which was determined adversely to appellants by the dismissals based on the plea in abatement and the demurrer.

The Constitution of this state confers upon the county court original and exclusive jurisdiction to receive, ex-

amine, allow, and adjust all lawful claims and demands of every kind against the estate of a deceased person. Article V, section 16, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; * * *." See Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711.

This constitutional provision has been interpreted by the decisions of this court which give full force and effect to the declared constitutional purpose and intent. See, Robinson v. Tower, 95 Neb. 198, 145 N. W. 348; Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856; Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344.

In Rehn v. Bingaman, *supra,* the question of necessity for filing claims in the county court against the estates of deceased persons was exhaustively considered and what was said there need not be elaborated on here. In that case it was said: "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."

If involved here were only the matter of a claim against the estate of Laura Sampson there could be no question but that the county court had original and exclusive jurisdiction but that is not the situation. The plaintiffs do not contend otherwise.

Neither is there any contention that if on construction of the will of Theodore C. Sampson, deceased, the claim of appellees is found to be valid it may not be asserted and recovery had thereon out of the estate of Laura Sampson. They claim only that "said claims are entirely false and without effect in law or equity, * * *."

More than a mere claim is involved here. The basic question involved is that of the rights of the parties to this action under the terms of the will of Theodore C. Sampson, deceased. The determination of this question cannot be made except by a construction of that will.

The only proper forum for that determination is the district court.

In In re Estate of Stieber, 139 Neb. 36, 296 N. W. 336, it was said: "A county court in Nebraska in the exercise of its probate jurisdiction, as a distinct and independent branch of jurisdiction, has no power to construe wills."

In Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551, it was said: "The construction of a will, in the probate court, for the information and benefit of the executor only in order to advise him what course to pursue adjudicates nothing beyond his rights and liabilities in the execution of his office. Controversies between adverse claimants under a devise or bequest or between the executor and persons claiming adversely to the estate will not be affected thereby."

In In re Trust Estate of Myers, 151 Neb. 255, 37 N. W. 2d 228, this question received exhaustive consideration. In the opinion by quotation from Merrill v. Pardun, 125 Neb. 701, 251 N. W. 834, it was said: " 'The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves, and where under the terms of the will an executor can assign the property without a construction of the will and does not request a construction, the court has no authority to bind the heirs or legatees by any construction.' " This statement is quoted with approval in Jones v. Shrigley, 150 Neb. 137, 33 N. W. 2d 510. See, also, Tucker v. Heirs of Myers, 151 Neb. 359, 37 N. W. 2d 585.

It must be said that the district court had jurisdiction of the cause of action pleaded, that the petition was not vulnerable to demurrer, and that therefore the action was erroneously dismissed.

The judgment of the district court is reversed and the

cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

SHIRLEY LUSK, A MINOR, BY HER FATHER AND NEXT FRIEND, CHARLES E. LUSK, APPELLANT, V. COUNTY OF YORK, NEBRASKA, ET AL., APPELLEES.

64 N. W. 2d 338

Filed May 14, 1954. No. 33504.

1. **Trial.** A motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.
3. ———. What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence.
4. ———. When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law.
5. **Automobiles: Negligence.** The burden of proof is upon a guest, riding in an automobile by invitation, to prove by a preponderance of the evidence, if he seeks to hold the owner or operator thereof liable for damages, that such owner or operator was guilty of gross negligence. Failure to so prove, or the fact that the operator of the automobile may have been guilty of ordinary negligence, is insufficient to warrant a recovery in favor of the guest.

APPEAL from the district court for York County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Keenan & Corbitt, John L. Riddell, and *Wallace W. Angle,* for appellant.

John D. Zeilinger and *Kirkpatrick & Dougherty*, for appellee.

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

CHAPPELL, J.

Charles E. Lusk, as father and next friend of his minor daughter, Shirley Lusk, brought this action in her behalf against defendants County of York and Jack Noodell to recover damages for personal injuries sustained by the daughter in an accident while she was riding as a guest in an automobile owned and driven by Jack Noodell.

At the conclusion of plaintiff's evidence the trial court sustained the County of York's motion for directed verdict and dismissed it from the case for insufficiency of the evidence to sustain a verdict and judgment. No appeal was taken therefrom so the County of York is not now a defendant before this court. Therefore, Shirley Lusk will be hereinafter called plaintiff and Jack Noodell will be called defendant.

Plaintiff alleged in her petition that on September 12, 1952, her defendant host was guilty of gross negligence which proximately caused the accident and injuries because he: (1) Drove his car at an excessive speed on a strange and unsafe road at night; (2) disregarded warnings of occupants of the car that the road was unsafe; and (3) failed to keep a proper lookout and have his car under reasonable control, all of which caused it to swerve across the highway and land in the bottom of a creek parallel with the highway a few miles northeast of York.

Defendant's answer admitted that plaintiff was his guest in a 1948 Dodge automobile owned and driven by him, and that an accident occurred at the time and place involved, but denied generally and alleged that the accident was unavoidable and not caused by any negligence on his part at a time when he was con-

fronted with a sudden emergency. Plaintiff's reply thereto denied generally and specifically denied that the accident was caused by a sudden emergency.

Upon trial to a jury, defendant's motion to direct a verdict in his favor for insufficiency of the evidence as a matter of law to establish that he was guilty of gross negligence, made at conclusion of plaintiff's evidence and renewed at conclusion of all the evidence, was overruled. Thereupon the issues were submitted to the jury, which returned a verdict for plaintiff and judgment was rendered thereon. Thereafter defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial, whereupon the trial court overruled his motion for new trial, but sustained his motion for judgment notwithstanding the verdict, set aside the verdict and judgment, rendered a judgment accordingly for defendant, and dismissed plaintiff's cause of action with prejudice. Therefrom plaintiff appealed to this court, assigning that the trial court erred in so doing. We conclude that the assignment should not be sustained.

We have recently reaffirmed well-established rules of law which have application and are controlling in this case. In that regard, we held in Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184: "A motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence.

"Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty.

"What amounts to gross negligence in any given case must depend upon the facts and circumstances. What

would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence.

"A series of acts of ordinary negligence may, under certain circumstances, operate to produce gross negligence but not necessarily so.

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

"When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law."

In Cunning v. Knott, 157 Neb. 170, 59 N. W. 2d 180, we also held that: "The burden of proof is upon a guest, riding in an automobile by invitation, to prove by a preponderance of the evidence, if he seeks to hold the owner or operator thereof liable for damages, that such owner or operator was guilty of gross negligence. Failure to so prove, or the fact that the operator of the automobile may have been guilty of ordinary negligence, is insufficient to warrant a recovery in favor of the guest."

Such case also reaffirmed that violation of the provisions of section 39-7,108, R. R. S. 1943, with regard to speed, was not negligence but simply evidence of negligence, and held: "Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered.

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

The evidence has been examined and pertinent parts thereof will be summarized in the light of such rules.

On Friday, September 12, 1952, defendant was a teacher and coach in Thayer High School. As a stranger from another city, he had only been in Thayer about 2 weeks at the time of the accident. After school on September 12, 1952, all of the high school students had a picnic at a milldam site near Thayer. After the picnic they decided to attend the movies at York. Defendant, a licensed driver, owned a 1948 Dodge club coupe in good condition, so five girl students, including plaintiff, rode with him to York as guests in his car. There they attended a show, then had ice cream refreshments, and started home. Plaintiff and another girl were to be taken home first. Defendant did not know the route to take for that purpose, and was not familiar with the highways, so plaintiff, who was familiar in every respect therewith, directed the route they should take. With his car lights on, they traveled 2 miles east of York on pavement, then turned north on a graveled highway, driving from 35 to 50 miles an hour. It was a clear night, about 10:45 p. m., and the highway, about 22 to 24 feet wide, was dry. With exceptions hereinafter discussed, the highway was in good condition. The radio in the car was on while they listened to Lombardo's orchestra. After they turned north, plaintiff warned defendant that there was a rough spot at an intersection ahead of them. Thereafter he first slowed down to 30 or 35 miles an hour, and then almost stopped because he did not know where the intersection was, so they passed over it safely. From that point, the highway went down hill for about ½ mile to a rough spot 65 to 70 feet long, having ruts and chuck holes of various sizes and depths over all the highway. There was a right-hand curve in the highway about 400 to 500 feet north of the rough spot. The accident occurred about 125 feet from the south end of that curve. Some 500 feet before they reached the rough spot, defendant was driving about 45 or 50 miles an hour. At that point, plaintiff told defendant to slow down. Whether or not she told him

why is not made clear. It is undisputed, however, that plaintiff and others in the car then told him about the curve ahead and he started to slow down. However, defendant did not see the rough spot and as the car struck the same it suddenly began to swerve and seemed to speed up, out of control, although defendant had no recollection of stepping on the accelerator. He was frightened and had no recollection whether or not he put on the brakes, but he did attempt to prevent the car from swerving by turning the steering wheel back and forth, but the car continued to swerve from one side of the highway to the other and back again, until it struck a ridge of gravel about 8 inches high and 1 foot wide on the east side of the highway, which caused the car to swerve back across to the west side, where it went off the highway, struck a tree, turned over, and landed upside down, headed south, in the bed of unguarded Lincoln Creek about 20 feet below the highway. As a result, plaintiff, who rode on the right side in the back seat, was seriously injured, and this action followed.

It should be stated that before the accident no occupant of the car had ever complained about defendant's manner or method of driving during any of the trips. Further, on September 15, 1952, after the accident, all of the occupants gave statements which in effect exonerated defendant from any negligence causing the accident. Therein they estimated defendant's speed to have been as low as 30 miles an hour, and never at any time more than 35 or 40 miles an hour. True, as witnesses they attempted in one form or another to justify their testimony which was materially different in some respects from that appearing in such statements. However, they were received in evidence, without any objections, and in any event defendant could not have been found guilty of more than ordinary negligence.

In the light of rules heretofore set forth, and their application to the evidence aforesaid, we conclude that the trial court did not err in deciding as a matter of

law that defendant was not guilty of gross negligence. In Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622, cited and quoted with approval in Paxton v. Nichols, *supra,* this court said: "Authorities relied upon by plaintiff for reversal all disclose the ever present imminence of danger visible to, known by, or made known to the driver, together with a persistence in negligence apparently heedless of the consequences thereof; evidence of negligence far in excess of any appearing in the case at bar and from which different minds might reasonably draw different conclusions as to the factual question of gross negligence." That statement is also controlling here.

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

AFFIRMED.

LESTER L. SCHEER (REVIVED IN NAME OF ALECE SCHEER ET AL.,), APPELLEE, V. KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., A CORPORATION, APPELLANT.

64 N. W. 2d 333

Filed May 14, 1954. No. 33516.

1. **Eminent Domain.** A petition for condemnation of an easement for a pipeline which specifically sets forth its course across condemnee's land and describes its extent as that which is necessary and required for the laying, relaying, maintaining, and operating of the pipeline and appurtenances thereto, is sufficient as against a collateral attack.
2. **Judgments.** A judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose.
3. **Judgments: Eminent Domain.** The rule of res judicata applies to judgments in actions and proceedings relating to the taking

or injury of property under the power of eminent domain.

4. **Easements.** If an easement, however it may have been created, is specific in its terms it is decisive of the limits of the easement. If an easement is not specifically defined, the rule is that the easement is such as is reasonably necessary and convenient for the purpose for which it was created.

5. **Eminent Domain.** An appeal in a condemnation proceeding under the provisions of section 76-717, R. S. Supp., 1953, contemplates the filing of pleadings and a framing of issues in a judicial proceeding in the district court.

6. ———. The extent and quantity of lands sought to be taken by condemnation under the power of eminent domain are legislative and not judicial questions. A determination of the question as to whether or not the requirements of the statute have been met is judicial in character and does not encroach upon the legislative power.

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

Conway & Irons and *Brogan & Brogan,* for appellant.

R. J. Shurtleff, for appellee.

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

CARTER, J.

This is a suit to quiet title to all the real estate described in the petition, except a right-of-way across said real estate 3½ inches wide and 4,046 feet long obtained for pipeline purposes in a condemnation proceeding. The trial court quieted the title to the real estate in accordance with the prayer of plaintiff's petition and enjoined the defendant from using more than the 3½ inch strip for the laying, relaying, operation, maintenance, and repair of its pipeline. The defendant appeals.

The plaintiff is the owner in fee simple of the land across which the right-of-way was obtained. On August 23, 1951, the defendant filed its petition with the county judge of Madison County to obtain a right-of-way

by condemnation for a pipeline pursuant to the provisions of section 75-601, R. S. Supp., 1953. A map was attached to the petition showing the course of the pipeline across plaintiff's land. The petition alleged that the gas pipeline will be of metal construction, 3½ inches in diameter, and will be placed at least 30 inches below normal ground level in such a manner that the ground surface above such pipeline may be farmed and worked over without inconvenience, interference, or damage to farming operations or crops. The extent of the easement is described as that which is necessary and required for the laying, relaying, maintaining, and operating of said pipeline and appurtenances thereto for the transportation of natural gas upon and through plaintiff's premises. The county judge appointed three appraisers as required by law, who made an award of damages and filed the same as required by the statute. The plaintiff Scheer appealed to the district court for Madison County. On the appeal plaintiff recovered a judgment on the same issues as were raised by the proceedings in the county court.

In the present case plaintiff alleges that defendant acquired by condemnation an easement over his land not exceeding 3½ inches wide and 4,046 feet in length as shown by the map attached to the petition for condemnation filed by this defendant with the county judge. He asserts that defendant claims the right to enter upon and use all of plaintiff's land, or a part thereof in excess of 3½ inches in width, for the purpose of laying, relaying, maintaining, and operating its gas pipeline and appurtenances thereto for the transportation of natural gas, unless the defendant be enjoined from so doing.

The defendant by answer alleges that it acquired an easement and right-of-way across plaintiff's land for so much of it as was reasonably necessary for the laying, relaying, operating, repair, and maintenance of the pipeline. It asserts further that an easement 3½ inches in width defeats one of the main purposes of the easement

and unduly restricts its extent. It also alleges that the claims of the plaintiff have or should have been adjudicated in the condemnation suit tried in the district court and that the defense of res judicata applies in the present case.

Plaintiff asserts in his reply that sections 75-601, 75-606, 75-609, and 75-610, R. S. Supp., 1953, are invalid as a taking without due process of law insofar as they authorize the defendant to condemn plaintiff's real estate without describing the extent, amount, or portion of his real estate reasonably necessary to be appropriated for condemner's purpose. It is also alleged that any attempt to have the judicial department of the state determine what is reasonably necessary for the laying, relaying, and maintaining of its pipeline constitutes an attempt to delegate to the judicial department powers which are reserved to the legislative department.

The petition for condemnation describes the extent of the easement in the language of the statute. §§ 75-601 and 75-606, R. S. Supp., 1953. It is the rule that a condemner is required to allege the portion of condemnee's land he deems necessary for his purposes, and to describe in his petition the portion sought to be taken in that proceeding. In the absence of an appeal to the district court the condemner is bound by the description set forth in his petition, and if it be indefinite or inaccurate in description it is subject to collateral attack.

In the present case an appeal was taken to the district court by plaintiff, the condemnee in the original proceeding. It was there stipulated that no new pleadings need be filed and that the case would be tried on appeal on the same issue as in the court below, namely, damages only. A jury was waived and the trial court entered a judgment for the damages sustained by the first laying of the pipeline. The judgment was fully satisfied.

It is a fundamental rule in this state that if new issues other than the assessment of damages are to be raised

on appeal in a condemnation proceeding, they must be pleaded. On appeal the proceeding is judicial as distinguished from the administrative proceeding before the county judge. A condemnee is required to raise any and all issues in the district court and, if he does not, he is bound by the rule of res judicata in a collateral attack.

We think the petition filed with the county judge was sufficient as against a collateral attack. In Fremont, E. & M. V. R. R. Co. v. Mattheis, 39 Neb. 98, 57 N. W. 987, this point was discussed in the following language: "Assuming the above description to be less specific than contemplated by law, objection on that ground comes too late when made for the first time after the damage has been assessed and the road constructed. It cannot be said there is not available to the land-owner in such cases an adequate remedy by direct proceeding. Without doubt the county judge is authorized to exercise the same control over the warrant or commission to the appraisers as over any other process issued by him. If the allegations of the petition are indefinite, an amendment may be allowed; and if there is no authority for the issuing of the writ, it may be quashed and set aside upon the motion of one adversely interested; * * *." In the foregoing opinion the following from the case of Cleveland & T. R. R. Co. v. Prentice, 13 Ohio St. 373, is quoted with approval: "The authorities will be found, I apprehend, less strict in requiring definite description of roads where the question is not made until after the road has been opened and in use, than in those cases where the question as to the locus in quo has been raised in limine, * * *."

In the case at bar the condemnee perfected an appeal to the district court in accordance with the applicable statute. There it was stipulated that no pleadings be filed and that the case be heard upon the transcript of the proceedings had in the county court. The only issue, therefore, was the amount of damages. Pierce v. Platte Valley Public Power & Irr. Dist., 143 Neb. 898, 11 N.

W. 2d 813. The doctrine of res judicata applies. The rule, as adopted in this jurisdiction, is: "The rule is well settled that a judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for such purpose." Webber v. City of Scottsbluff, 155 Neb. 60, 50 N. W. 2d 541. See, also, Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85, 106 N. W. 429.

The foregoing rule applies to judgments rendered by courts of competent jurisdiction in condemnation proceedings under the power of eminent domain. The rule is stated in 30 C. J. S., Eminent Domain, § 414, p. 142, as follows: "The general rule with respect to judgments, that a judgment rendered by a court of competent jurisdiction on the merits is a bar to any future action between the same parties or their privies with respect to the same cause of action so long as it remains in force applies to judgments in actions and proceedings relating to the taking or injury of property under the power of eminent domain, * * *." We held to this effect in Webber v. City of Scottsbluff, *supra*. See, also, A. M. Campau Realty Co. v. City of Detroit, 268 Mich. 417, 256 N. W. 357; Baird v. Hamilton County, 186 Iowa 856, 167 N. W. 590, on rehearing 186 Iowa 860, 173 N. W. 106.

The petition filed in the county court describing the easement required in the language of the statute was sufficient as against a collateral attack. On appeal to the district court the condemnee was required to raise every issue about which he complained. His only complaint at that time concerned the amount of damages which had been allowed him by the appraisers. If he was dissatisfied with the nature or extent of the easement as described in the condemner's petition, he was required to raise it by proper pleading. His failure to do so amounts to a waiver and subjects him to the rule

of res judicata. He may not sit idly by, permit a judgment to be entered, accept the proceeds thereof and, when the condemner attempts to exercise his right, assert for the first time an issue that should have been litigated in the previous action.

The decree of the district court should have quieted title to plaintiff's lands subject to the easement of the defendant for a pipeline across said lands to the extent reasonably required for the laying, relaying, maintaining, and operating the pipeline and the appurtenances thereto. Adequate remedy exists for determining the width of the easement reasonably required if it becomes controversial. Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94. In 17 Am. Jur., Easements, § 97, p. 996, it is said: "If a grant is specific in its terms, it is decisive of the limits of the easement. If an easement is not specifically defined, the rule is that the easement need only be such as is reasonably necessary and convenient for the purpose for which it was created." We think the same rule applies irrespective of the method by which the easement was created. Where an easement is not specifically defined in a condemnation proceeding under the power of eminent domain, its enjoyment is ordinarily limited only by the necessity for its use under which the easement was acquired.

The plaintiff contends that the only issue to be tried in the district court on appeal is the question of damages. He cites the change in wording of section 76-717, R. S. Supp., 1953, from what it was in the former act, section 74-314, R. R. S. 1943. In the new act the statute provides: "After docketing of the appeal, the issues shall be made up and tried in the district court in the same manner as an appeal from the county court to the district court in a civil action." In the old act it was stated: "The parties shall proceed in all respects in the trial of the cause in the same manner as though the action had been originally instituted in such appellate court."

The securing of an appraisal of damages by appraisers appointed by the county judge is an administrative act as distinguished from a judicial proceeding. The method of appeal is procedural only and contemplates a complete new trial upon pleadings to be filed as in the case of an appeal from the county court. There can be no variance in the issues because no pleading, except the petition of the condemner, is contemplated in the administrative proceeding. The present appeal statute contemplates the filing of pleadings and the framing of issues for the first time in the judicial proceeding in the district court. The issue is not limited to the question of damages only unless the pleadings limit the trial to that issue. We appear to have so held under the same statute here involved in Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213, wherein we said: "The procedure in the county court contemplates an informal hearing by the appraisers, a view of the lands, no record of the testimony, and a report of damages assessed to be filed subject only to the right of appeal, not to confirmation by the appointing court. It is obvious that the appellant could only raise the proposition here being discussed for the first time in his petition on appeal to the district court. * * * On appeal to the district court from the appraisement of damages, if other issues than the question of damages are involved, they must be presented by proper pleadings."

The plaintiff raises certain constitutional questions. He contends that the extent and quantity of lands sought to be taken by condemnation proceedings under the power of eminent domain are legislative and not judicial questions. With this statement we are in accord. In the instant case, however, the petition sufficiently described the extent of the taking. Any dispute growing out of it as to the specific meaning of the language of the grant of the easement is a judicial question. It cannot well be argued that a determination as to whether

or not the requirements of the statute have been met is anything other than a judicial question. There has been no invasion of the legislative power by the judiciary in the present proceeding.

We conclude that the trial court was in error in limiting as it did the width of the easement obtained by the condemnation proceeding. The judgment is reversed and the cause is remanded with directions to the trial court to enter a decree in accordance with the holdings of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., participating on briefs.

RAY PEAKE, APPELLEE, V. OMAHA COLD STORAGE COMPANY, A CORPORATION, APPELLANT.

64 N. W. 2d 470

Filed May 21, 1954. No. 33451.

1. **Trial.** A motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Depositions: Evidence.** An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible in evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled.
3. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
4. **Automobiles: Negligence.** Ordinarily where it appears from the evidence of a witness that, although he saw the car in movement immediately before the accident, but he had no reasonable length of time, movement in distance, or other means to use

as a basis upon which to formulate an opinion as to the speed thereof, he should not be allowed to testify in regard thereto.

5. ———: ———. Where one driving an automobile is suddenly confronted by an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.

6. **Negligence.** A litigant injured in an accident who has placed himself in a position of peril is not entitled to an instruction under the last clear chance doctrine where it appears that he had the means at hand up to the time of the accident to have avoided injury. Such a situation involves questions of negligence and contributory negligence and not the last clear chance doctrine.

7. ———. The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying reasonable inferences one way or another upon the subject; when such evidence is produced the presumption disappears and is not entitled to be considered.

8. **Trial: Appeal and Error.** The refusal of the trial court to permit the jury to view the premises involved in the litigation is not reversible error in the absence of an abuse of discretion.

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

Smith & Smith and *Pilcher & Haney,* for appellant.

Wear & Boland, W. O. Baldwin, and *John E. North,* for appellee.

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

MESSMORE, J.

This is an action at law brought by Ray Peake, as plaintiff, in the district court for Douglas County, against the defendant, Omaha Cold Storage Company, a corporation, to recover property damage resulting from a collision between a truck owned by the plaintiff and a truck owned by the defendant. The defendant denied any negligence on its part, and filed a counterclaim alleging negligence on the part of the driver of the plain-

tiff's truck which caused the collision and property damage to the defendant. The case was tried to a jury resulting in a verdict in favor of the plaintiff. Motion for judgment notwithstanding the verdict and for a new trial filed by the defendant was overruled. The defendant appeals.

The pleadings of the respective parties, insofar as necessary to consider in this appeal, are in substance as follows: The plaintiff's petition alleges that the damages occasioned to the plaintiff were the direct and proximate result of the negligence of the defendant corporation acting through its employee Winfield S. Boaz in the following particulars, as summarized in the trial court's instructions: (1) In the defendant's driver failing to accord to the plaintiff's transport the right-of-way; (2) in the defendant's driver failing to keep a proper lookout for traffic upon the highway; (3) in the driver of the defendant's truck and trailer driving directly into the path of the transport owned by the plaintiff when the plaintiff's transport was in such close proximity that a collision could not be avoided; (4) in the defendant's driver failing to heed the sounding of the horn given by the driver of the plaintiff's transport; and (5) in the driver of the defendant's truck suddenly making a turn from the west, or left side of the highway to the right side thereof without giving a proper and legal signal.

The defendant's answer and counterclaim charged that the collision and the property damage resulting to the defendant's truck were caused solely by the negligence of John D. Newell, the driver of the plaintiff's transport, in the following particulars, as summarized in the trial court's instructions: (1) That the driver of the plaintiff's transport drove the same at a rate of speed greater than was reasonable and prudent under the conditions then existing, considering the load carried by the transport, and at a rate of speed in excess of 20 miles an hour; (2) that the driver of the plaintiff's transport

attempted to pass the tractor and trailer of the defendant on the wrong side thereof; (3) that the driver of the plaintiff's transport drove the same more closely to the tractor and trailer of the defendant than was reasonable and prudent under the circumstances; (4) that the driver of the plaintiff's transport failed to accord the right-of-way to the defendant's tractor and trailer; (5) that the driver of the plaintiff's transport failed to stop the same in time to avoid striking the trailer and tractor of the defendant; and (6) that the driver of the plaintiff's transport failed to keep a proper lookout for vehicles traveling upon the highway.

At the time of the accident, the plaintiff was engaged in the business, as sole owner, of transporting gasoline, kerosene, and tractor fuel. He owned a 1948 International tractor and gasoline-tank trailer approximately 28 feet long, composed of four compartments which would contain 5,100 gallons. The trailer was pulled by a tractor, the overall length of the tractor and trailer being from 33 to 36 feet in length and approximately 8 feet in width at the widest point. The unit was loaded at the time of the accident and weighed 51,600 pounds.

The defendant's unit was an International tractor with a semi-trailer attached, of an overall length of 43½ to 44 feet, its greatest width being 8 feet. Its weight was approximately 9,500 pounds. This trailer carried a trade name of "Ocoma." It was loaded with 50 pounds of cargo at the time of the accident, and was driven by Winfield S. Boaz, an employee of the defendant, who was killed in the collision.

For convenience we will refer to Ray Peake as plaintiff, and the Omaha Cold Storage Company, a corporation, as defendant, as the same are designated in the district court; to the plaintiff's International tractor and trailer as the Peake truck; to the driver of the same, John D. Newell, as Newell; to the defendant's International truck and semi-trailer as the Ocoma truck; and to its driver, Winfield S. Boaz, as Boaz.

The collision occurred about noon on July 20, 1951, on a highway a short distance north of an intersection where Madison Avenue intersects State Highway No. 31 in Elkhorn, Nebraska. Highway No. 31 runs north and south, has a concrete surface, and is 20 feet in width at the point of collision. Madison Avenue, which intersects Highway No. 31 on the west side thereof, consists of black-top paving and is 20 feet in width. Where it enters Highway No. 31 it spreads out, or expands, to a width of 63 feet. There is also involved in this collision a graveled road which intersects Highway No. 31 on the east, and which is north of where Madison Avenue intersects Highway No. 31. This road is 14 feet wide and runs east of the highway a distance of 15 feet and then makes a sharp curve to the south to the property of the defendant located under and just east of the viaduct. This graveled road is about 105 feet north of the center point of Madison Avenue, and it is 60 feet from where the north edge of Madison Avenue meets the highway to where the south edge of the graveled road meets the highway. The collision occurred approximately at the point where the graveled road enters Highway No. 31 from the east, within the limits of the village of Elkhorn where the speed is fixed by ordinance at 20 miles an hour. There is a stop sign approximately 25 feet west of where Madison Avenue intersects Highway No. 31 to require traffic proceeding east on Madison Avenue to stop before entering the intersection. There is also a graveled road extending to the northeast of Madison Avenue and entering Highway No. 31 which is protected by a stop sign. Highway No. 31 is also protected by a stop sign on the graveled road intersecting it from the east heretofore mentioned. On the east side of Highway No. 31 is a house occupied by one Daily, and a tree which will be designated as where the vehicles laid immediately after the collision.

The viaduct, or overpass, consists of an earthen elevation of the highway on the north and south sides of the

railroad tracks which run generally in an east-west direction. The highway coming from the south slopes artificially upward toward a point adjacent to and 25 feet above the level of the railroad tracks; and the highway coming from the north does likewise. These two points in the roadbed, which have been artificially elevated by earthen structures, are joined together by a steel and concrete bridge that spans the railroad tracks and the valley wherein they lie. Highway No. 31 is 24 feet wide on the bridge portion of the viaduct but narrows as it goes down the earthen incline on the north so that from a point 53 feet from the north end of the bridge portion of the viaduct up to and beyond the point of collision the highway is 20 feet in width. There are guardrails on the east and west sides of the viaduct.

The record shows that the Peake truck was loaded at McPherson, Kansas, on July 19, 1951, with gasoline and other oil products. It was driven to Chester, Nebraska, where the plaintiff Peake is engaged in the transportation of such products. At about 6 a. m., July 20, 1951, Newell, an employee of Peake, proceeded to drive the truck to Omaha to deliver the cargo. He entered Highway No. 31, and proceeded north thereon to the village of Elkhorn at a rate of speed of 35 miles an hour until he came to the viaduct just south of the point of impact. As he approached the viaduct there were speed signs limiting the speed to 25 miles an hour. In compliance therewith, he reduced his speed to between 20 and 25 miles an hour and proceeded to cross the viaduct with his vehicle on the east, or right side of Highway No. 31. His vision was unobscured. The day was clear and the pavement dry. There were no vehicles ahead of him as he proceeded north over the viaduct starting down toward the scene of the accident.

Newell further testified that when he first saw the Ocoma truck its front wheels were just starting onto the west edge of Highway No. 31. It had been proceeding

east on Madison Avenue which ends at the west side of Highway No. 31. The Ocoma truck proceeded in a northeasterly direction on the west, or left side of Highway No. 31, at a rate of speed of 10 to 15 miles an hour. The front end of the Peake truck was 35 or 40 feet from the Ocoma truck. Newell blew the horn of the Peake truck. The Ocoma truck proceeded out into Highway No. 31, swung part way across the highway with one wheel across the middle line of the highway, then swung back to the left or west side of the highway, proceeded a short distance, and then swung sharply to the east or right. Newell removed his foot from the accelerator and applied his brakes, at just what moment he did not remember. He did not see the driver of the Ocoma truck give a signal to indicate a turn to the right, or east. He had watched the Ocoma truck at all times. Newell turned the front wheels of the Peake truck to the right and started off to the east but was unable to miss hitting the Ocoma truck. The left front part of the tractor of the Peake truck struck the right side of the tractor of the Ocoma truck. At that time the Peake truck was headed northeast. The left front wheel was 2 to 2½ feet west of the east edge of the concrete at the time of the impact. The vehicles came together at the east edge of the highway. The Peake truck was then traveling at a rate of speed of 15, 16, or 17 miles an hour. Newell testified that he was not passing the Ocoma truck. It was in front of him at all times, and kept in front of him until the time of the impact. At the time the Ocoma truck turned to the right, the Peake truck was practically upon it. Newell remembered nothing further about the accident.

On cross-examination, Newell testified that when he first saw the Ocoma truck he was 20 to 25 feet south of the north end of the viaduct. At that point he could see down to the place where the accident happened, which was an estimated distance of 85 to 90 feet.

The Ocoma truck tractor was disengaged from the

trailer during the collision. The trailer remained on the left or west lane of the highway headed north after the collision, while the tractor rolled over in a northeasterly direction down an embankment on the east side of the highway and came to rest against a tree located about 63 feet northeast of the point of impact. The Peake truck came to rest in an upright position headed northeast down the embankment with the tractor portion of the unit against and upon the Ocoma tractor.

A trooper of the Nebraska Safety Patrol testified that he received a call at 12:04 p. m., and proceeded to the scene of the accident. He observed the Peake truck in the ditch on the east side of Highway No. 31, with the tractor of the Peake truck on top of the tractor of the Ocoma truck which was upside down in the ditch. The trailer of the Ocoma truck was sitting on the left, or west lane of Highway No. 31. The Ocoma truck was up against the third tree north of the intersecting road on the east side of the highway, 80 to 85 feet north and east of the center of the graveled road that leads to the east and south to the defendant's mills. From the stop sign on the east side of Highway No. 31 to the back end of the Peake truck was 22 feet. The tractor of this truck was headed in a northeast direction. The distance from the front end of the Ocoma trailer to the back end of the Peake trailer was 12 feet, that would be the right front corner of the Ocoma truck to the left and rear corner of the Peake truck. From an examination of the highway, there were no skid marks of any kind, and there was no showing of black marks made by the Peake truck, or evidence of the brakes having been applied. There did appear to be a mark the size of a billfold, which indicated it was a tire mark, 18 inches west of the east side of the pavement on Highway No. 31 adjacent to the end of the guardrail.

A safety engineer testified that the reaction time of an average motor vehicle driver is three-fourths of a second, while that of a professional driver is five-eighths

of a second. He further testified that a vehicle moving 25 miles an hour would move 37½ feet a second, and a vehicle moving 20 miles an hour would move 30 feet a second. In the event you considered the reaction time of five-eighths of a second, it would mean five-eighths of 30 feet, which would be in the neighborhood of 16, 17, or 18 feet for a vehicle moving 20 miles an hour, which indicates that, moving down the highway at 20 miles an hour and moving your foot from the accelerator to the brake pedal on a basis of five-eighths of a second reaction time, the vehicle would move 18 feet by the time you completed the movement. He further testified that in the course traveled by the Peake truck there was a slope of about 5 feet in approximately 400 feet, slightly under one percent grade. The reaction distance at 25 miles an hour would be about 22½ feet. The stopping distance would be 63.8 feet. In other words, from the time the driver gets an impulse or sees a danger and decides to stop his vehicle at 25 miles an hour, he can stop that vehicle, including the reaction time, in a distance of 63.8 feet.

A witness, by deposition, testified that he was proceeding east on Madison Avenue on a motorcycle and saw the Ocoma truck, the trailer of which was on the west side of Highway No. 31, headed north. The trailer was standing still. He saw a lot of dust, but did not see the impact. He was 50 yards from the Ocoma truck when he first saw it. He saw the trailer of the Peake truck, but there was so much dust that he could not see the tractor. He thought it was at a standstill. He went to the scene of the accident and, in this connection, corroborated the position of the vehicles as testified to by other witnesses.

An employee of the defendant testified that he was coming out of the door of the mill office which is located east of and below the viaduct on Highway No 31; that it was a distance of 25 to 30 feet from where the mill stands to the floor of the viaduct; and that the office

door was 10 or 15 feet east of the viaduct, facing straight north. He was going to lunch when he saw the Ocoma truck right over the top of the viaduct, facing north and proceeding north. He watched this truck for a little while then turned to eat his lunch, assuming that the driver of the truck, whom he knew, was coming to the mill. At that time it was 5 or 10 minutes before noon. There is evidence on the part of the plaintiff to the effect that it would be impossible to see the defendant's truck from the point where this witness testified that he could see it on the viaduct.

There is testimony of two boys to the effect that they were walking on Madison Avenue at about noon up the hill to the highway; that at the top of the hill there is a street which runs south to the village of Elkhorn; and that they noticed Paul Tyson on a motorcycle as he went by them. There was no other vehicle on Madison Avenue and no truck went by them while they were walking up Madison Avenue toward the top of the hill. They saw just the motorcycle. They heard the crash, but did not see the accident. Another boy testified that he lived on the street about a block west of Highway No. 31, in a house facing onto the railroad tracks which run east and west. At about noon he was riding his bicycle in front of his house. The street which runs in front of his house is about even with the north end of the viaduct, and from that point he could see the viaduct. He saw the Ocoma truck going north on the viaduct and it continued going in that direction. He did not know that an accident had happened. This testimony is to the effect that the Ocoma truck did not enter the highway from Madison Avenue, but crossed the viaduct on the highway traveling north, the viaduct being south of Madison Avenue.

The defendant contends that the trial court erred in overruling the defendant's motion for directed verdict, in overruling the defendant's motion for directed verdict on its counterclaim, and in overruling the defendant's

motion for judgment notwithstanding the verdict.

A motion for directed verdict or its equivalent, or for judgment notwithstanding the verdict, must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and have the benefit of every inference that can reasonably be deduced from the evidence. See Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

The defendant makes reference to the position of the Peake truck and the Ocoma truck and the evidence with reference to the speed of the trucks as heretofore recited. In addition, that Newell, in his deposition before trial, computed his distance from the defendant's unit as 15 or 20 feet from the north end of the viaduct while at the trial he computed his distance from the defendant's unit at 35 to 40 feet. Also, in Newell's deposition he estimated his speed at the time of the collision at 10 miles an hour while at the trial he estimated it from 15 to 17 miles an hour. The defendant asserts that the evidence discloses that it is 150 feet from where Newell said he was when he first saw the defendant's unit to the point of collision. The computation is made as follows: It is 111 feet from 12 feet north of the south line of Madison Avenue to the point of collision, and adding the 35 or 40 feet as testified to by Newell that he was south of defendant's unit when he first saw it, he would proceed an approximate 150 feet to the point of collision. Therefore, considering the testimony that Newell slackened his speed, that he did not remember when he applied his brakes, and that he could have stopped the truck in 63.8 feet, in failing to do so he was negligent as a matter of law. We believe there is evidence by which the jury could determine that the driver of the defendant's truck was negligent in driving north on the west or left side of Highway No. 31 and turning, without signaling, across the path of the Peake truck which was

only a few feet distant and moving at a rate of speed of 15 to 17 miles an hour and signaling his position of peril by blowing the horn.

"No person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only * * * after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement." § 39-7,115, R. R. S. 1943. Violation of such statute constitutes evidence of negligence. See, Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355; Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232.

We conclude that there was sufficient testimony to warrant the submission of plaintiff's case to the jury.

With reference to the testimony referred to by defendant in the deposition of Newell, and his testimony at the time of trial being different, the following is applicable: "An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him, but it may be competent and admissible as evidence in contradiction and impeachment of his present claim and his other evidence given at the trial, to be given such weight as the trier of fact deems it entitled." Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244.

The defendant contends that the trial court erred in submitting the issue of negligence on the part of the driver of the defendant's truck in failing to stop at the stop sign on Madison Avenue when there is no evidence that the driver of the defendant's truck failed to stop at such stop sign. In this connection, the trial court submitted to the jury certain instructions relating to the statutes of this state and ordinances of the village of Elkhorn setting forth the duty of a driver of a motor vehicle in crossing a state highway on which a stop sign is located, the speed that drivers using highways and streets are permitted to drive, and the care to be used commensurate with the circumstances relating to traf-

fic, speed, and conditions; and that the violation of such statutes or ordinances is not in itself negligence as a matter of law but shall be considered together with all other facts and circumstances in evidence in determining whether the one so violating the same was negligent.

In addition, the trial court submitted to the jury the duty of a driver of a motor vehicle about to enter a highway protected by stop signs. This instruction was in keeping with the decisions of this court on the subject. Then, in the same instruction, the trial court stated: "On the other hand, where the driver of a car approaches a highway protected by stop signs stops, looks and sees an approaching vehicle on the highway but erroneously judges its speed or distance and assumes that he can proceed with safety, whether or not he is negligent in proceeding depends upon what in the exercise of ordinary care a reasonably prudent man would determine about the distance, speed and safety in proceeding."

In addition, the trial court instructed the jury to the effect that the defendant presented evidence for the purpose of establishing that the defendant's unit was driving over the viaduct and proceeding northward intending to make a right turn onto the road leading to the mill, and then stated that if the jury found these facts to be true and that a preponderance of the evidence disclosed that the defendant's unit did not come from Madison Avenue, then the statutes and ordinances relative to the stop sign on Madison Avenue and the duty of the driver of the defendant's truck and the plaintiff's driver relative to such intersection need not be considered. In the same instruction the court stated that if, on the other hand, a preponderance of the evidence established that the defendant's driver came out of Madison Avenue and the jury found he was negligent in doing so, such negligence would not be the proximate cause of the accident. His later acts should be considered, where and how he drove and how and where the plaintiff's unit was driven after the defendant's driver had made the turn

into Highway No. 31, the speed of the vehicles, and their position at such times, and all other facts and circumstances in evidence in order to determine the proximate cause of the collision.

The trial court in instruction No. 1 set forth the elements of negligence charged to the driver of the defendant's truck which are set forth previously in the opinion and need not be repeated, and in instruction No. 5, the trial court instructed the jury that the burden of proof was on the plaintiff to prove by a preponderance of the evidence any one of the acts of negligence charged.

The trial court did not submit the issue of negligence on the part of the driver of the defendant's truck in failing to stop at the stop sign. The instructions with reference to the duty of the driver of a motor vehicle to stop at stop signs was given for the reason that there is evidence that the defendant's driver approached Highway No. 31 from the west on Madison Avenue. We conclude there was no prejudicial error on the part of the trial court in giving these instructions.

Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. See, Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635; Gallagher v. Law, 135 Neb. 381, 281 N. W. 806; Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

The defendant contends the trial court erred in refusing to permit the witness Merle Daily to give an estimate of the speed of the Peake truck just prior to the time of the collision. The defendant attempted to lay a foundation for the admission of this testimony by showing that the witness had driven vehicles for a number of years and had paid attention to speedometers; that he lived adjacent to the scene of the collision; that immediately before the collision he was in his yard 60 or 70 feet south of his house, about the same distance

east of the highway, and about 100 to 300 feet from the Peake truck when he first saw it; that he was walking north; and that the blast of the horn of the Peake truck caused him to look over his shoulder and see the front end of the Peake truck at the north edge of the viaduct. He testified that he paid no particular attention to the movement of Peake's truck. He did not have the speed of the truck in mind, and at most gave it merely a glance.

"Ordinarily where it appears from the evidence of a witness that, although he saw the car in movement immediately before the accident, but he had no reasonable length of time, movement in distance, or other means to use as a basis upon which to formulate an opinion as to the speed thereof, he should not be allowed to testify in regard thereto." Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576.

It is true, the strict enforcement of this rule has been modified to some extent. See, Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893; Kraft v. Wert, 150 Neb. 719, 35 N. W. 2d 786, which cases are clearly distinguishable from the case at bar. In the instant case it is apparent that the witness had no basis for estimating the speed of the Peake truck just prior to the time of the collision. The trial court did not err as contended for by the defendant.

The defendant contends that the trial court erred in assuming that there was evidence of imminent danger confronting Newell and instructing the jury on the sudden emergency rule. The evidence heretofore recited is sufficient to warrant the submission of such an instruction. See, Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689; Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. We find no error in the trial court giving such instruction.

The defendant contends the trial court erred in failing to instruct the jury on the doctrine of the last clear chance. In this connection the following authority is

applicable: A litigant injured in an accident who has placed himself in a position of peril is not entitled to an instruction under the last clear chance doctrine where it appears that he had the means at hand up to the time of the accident to have avoided injury. Such a situation involves questions of negligence and contributory negligence and not the last clear chance doctrine. See, Pope v. Tapelt, 155 Neb. 10, 50 N. W. 2d 352; Kubo v. Fish, 152 Neb. 74, 40 N. W. 2d 270; Carter v. Zdan, 151 Neb. 185, 36 N. W. 2d 781. The issues of negligence and contributory negligence were properly submitted to the jury. There is no merit to the defendant's contention.

The defendant contends the trial court erred in failing to instruct the jury that there was no evidence that the driver of the defendant's truck failed to stop at the stop sign as required by law, and the following authority is applicable: "Where there is no eyewitness, no direct evidence of the accident causing the injury, the facts and circumstances may be proved by circumstantial evidence, and the presumption is raised by the instinct of self-preservation on behalf of the deceased that he was not guilty of contributory negligence, but was in the exercise of due care and caution for his own safety, unless the contrary is shown." Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523. The presumption also applies to charges of negligence as well as contributory negligence. See Schroeder v. Sharp, 153 Neb. 73, 43 N. W. 2d 572.

We have heretofore set forth a considerable part of the evidence which contains both direct and circumstantial evidence by which a jury could determine whether or not the driver of the defendant's truck did or did not stop at the stop sign and whether he was negligent in such respect. The following authority is applicable: "The presumption of due care arising out of the natural instinct of self-preservation is not evidence, but a mere rule of law, and obtains only in the absence of direct or circumstantial evidence justifying

reasonable inferences one way or another upon the subject; when such evidence is produced the presumption disappears and is not entitled to be considered." O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123. We conclude that the defendant's contention cannot be sustained.

The defendant contends that the trial court erred in not permitting the wife and daughter of the driver of the defendant's truck to testify to his general, normal, and usual habits, that is, to stop at stop signs and comply with the law in such respect.

In Annotation, 15 A. L. R. 138, it is stated: "Although the cases are not in accord, and decisions from the same state do not always apply a uniform general rule, the numerical weight of authority is to the effect that, if a person is killed in an accident of which there are no eyewitnesses, evidence of his habits is admissible as tending to throw light upon his probable conduct at the time of the injury."

Defendant also cites Noonan v. Maus, 197 Ill. App. 103, as follows: "While the general rule is that where there are eyewitnesses to an accident, testimony as to the habits of the person injured is not admissible for the purpose of proving due care on his part, yet where eyewitnesses are lacking to some part of an accident, it is proper to admit evidence of the careful habits of the party injured for his own safety and of his skill and experience in driving." See, also, Tyrrell v. Boston & Maine Railroad, 77 N. H. 320, 91 A. 179. Other cases are cited from foreign jurisdictions to the same effect, and reference is also made to Engel v. Chicago, B. & Q. R. R. Co., *supra*; Schroeder v. Sharp, *supra;* Cotten v. Stolley, 124 Neb. 855, 248 N. W. 384; 5 Am. Jur., Automobiles, § 618, p. 845; and Holberg v. McDonald, 137 Neb. 405, 289 N. W. 542.

However, the authorities agree that if there are witnesses to an accident in which a person is killed, evidence of his habits is not admissible to show either care or

negligence on his part. See, Annotation, 15 A. L. R. 135; 5 Am. Jur., Automobiles, § 618, p. 845.

The issue of the negligence of the driver of the defendant's truck in failing to stop at the stop sign was eliminated by the trial court from the charges of negligence pleaded by the plaintiff against the driver of the defendant's truck, therefore, the habit of the driver of the defendant's truck of stopping at a stop sign on previous occasions is not material to any issue submitted to the jury and in considering the necessary inferences to be drawn from Newell's testimony, it does relate to the conduct of the driver of the defendant's truck at the stop sign. Newell testified that he did see the driver of the defendant's truck entering the highway from Madison Avenue on which the stop sign was located. We conclude that the rejection of the testimony of these two witnesses did not constitute prejudicial error.

The defendant contends the trial court erred in not permitting the jury to visit the scene of the collision upon the request of the defendant during the progress of the trial and at the conclusion of the trial when the request was renewed and joined in by the plaintiff.

The jury had the benefit of the evidence, numerous exhibits consisting of maps and pictures which pointed out the location of all the places, objects, and distances involved in this case. The refusal of the trial court to permit the jury to view the premises involved in the litigation is not reversible error in the absence of an abuse of discretion. Whelan v. City of Plattsmouth, 87 Neb. 824, 128 N. W. 520; Large v. Johnson, 124 Neb. 821, 248 N. W. 400. We conclude that the trial court did not err as contended by the defendant.

Other assignments of error are without merit and need not be discussed.

For the reasons given herein, the verdict of the jury and the judgment entered thereon are affirmed.

AFFIRMED.

LAWRENCE B. FRYE, PLAINTIFF IN ERROR, V. LUCY M. FRYE, DEFENDANT IN ERROR.

64 N. W. 2d 468

Filed May 21, 1954. No. 33497.

1. **Appeal and Error.** Affidavits not included in a bill of exceptions will not be considered as evidence by the Supreme Court.
2. **Divorce: Contempt.** Before a person may be said to be in contempt of court for failure to pay amounts fixed in a decree of divorce for the support of children the evidence must disclose not only failure to comply with the decree but also that the failure was willful.
3. **Contempt.** Contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction.
4. ———. In a contempt proceeding before a conviction will lie, guilt must be established beyond a reasonable doubt.

ERROR to the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and dismissed.*

Edward E. Carr, for plaintiff in error.

V. H. Halligan, for defendant in error.

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

YEAGER, J.

This is a proceeding for contempt against Lawrence B. Frye instituted by the filing of an affidavit by Lucy M. Frye in this case which at its inception was a divorce action wherein Lucy M. Frye was plaintiff and Lawrence B. Frye was defendant. Lucy M. Frye will be hereinafter referred to for convenience as plaintiff and Lawrence B. Frye as defendant.

The affidavit sets forth that a decree of divorce was granted to plaintiff on March 15, 1952; that plaintiff was awarded the custody and control of the two minor children of the parties; that the defendant was ordered to pay $60 a month for the support of the children beginning March 15, 1952; and though being able to do so he has since December 1952 failed to make the payments. The affidavit further sets forth that by the decree the

defendant was permanently enjoined from in any manner annoying, tantalizing, or harassing the plaintiff which injunction has been violated by the defendant.

A citation was issued to which the defendant responded by filing an affidavit in which he declared his inability to pay the amounts required of him by the decree. He also filed an objection to the jurisdiction of the court in which he charged that the court was without jurisdiction for the reason that there was a criminal action pending based on the same charge of nonpayment as is contained in the affidavit for contempt. The objection was overruled. The propriety of this ruling may not be reviewed on appeal since the record contains no evidentiary information as to whether or not there was pending such a criminal charge.

On the affidavit for contempt and the affidavit in response thereto a trial was had to the court. At the conclusion of the trial the court found the defendant guilty of contempt of court for failure to make the payments and sentenced him to imprisonment in the county jail for 30 days and taxed the costs of the proceeding against him. No finding or adjudication was made on the charge that the defendant had violated the injunction.

On the question of whether or not the defendant was able out of property or ability to work and out of earnings to make the payments the plaintiff adduced no evidence whatever. The charges in this respect in the affidavit for contempt are not supported by evidence.

The defendant testified in his own behalf. The substance of his testimony is that he has no money or property and that he is physically incapable of engaging in any gainful occupation; that he has a disability income the amount of which is not authentically disclosed but it appears to be slightly in excess of $60 a month since it appears that at the time of trial he was paying $30 a month for a place to live and in response to a question by plaintiff's attorney he said this amount was almost half of what he received; and that out of this income he

had nothing which could be applied to the payments fixed by the decree.

It is true that the affidavit for contempt contains statements the effect of which are to say that the defendant is capable of making the payments but this affidavit has not been preserved in evidence and does not appear in the bill of exceptions. It may not therefore be considered here on appeal. It is the rule that affidavits not included in a bill of exceptions will not be considered by the Supreme Court. Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704; State ex rel. Sorensen v. State Bank of Ravenna, 127 Neb. 338, 255 N. W. 549; Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44, 102 A. L. R. 1124; De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540.

In a proceeding such as this, before a person may be said to be guilty of contempt of court, the evidence must disclose not only failure to comply with the order of the court but also that the failure was willful. In Hawthorne v. State, 45 Neb. 871, 64 N. W. 359, it was said: "Unless the disobedience of an order of court is willful there is no contempt."

In Whipple v. Nelson, 138 Neb. 514, 293 N. W. 382, it was said: "It follows that the disobedience of the injunction must be *wilful* before the breach thereof may be punished as a contempt."

In Gross v. Garfield County, 145 Neb. 414, 16 N. W. 2d 850, it was said: "It is also required that the disobedience of the injunction must be willful before a breach thereof may be punished as a contempt."

Also in Gross v. Garfield County, *supra,* it was said: "This court has held that contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction; also, that it is necessary to establish guilt beyond a reasonable doubt." See, also, Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N. W. 574; State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N. W. 282.

On the record here and the controlling legal principles

it becomes clear that the district court was in error in finding the defendant guilty of contempt of court.

The judgment of the district court is reversed and the proceeding for contempt dismissed.

REVERSED AND DISMISSED.

HOMER J. HENKE, APPELLEE, V. PAUL ZIMMER ET AL., APPELLANTS.

64 N. W. 2d 458

Filed May 21, 1954. No. 33526.

Municipal Corporations. Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning.

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

Joseph C. Reavis, for appellants.

Archibald J. Weaver, for appellee.

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

SIMMONS, C. J.

This matter originated in an application by Homer J. Henke for permission to build a "Double garage" on land situated in the area of Falls City which is zoned as a residential district. The city denied the permit. Mr. Henke appealed to the district court. He will hereinafter be called plaintiff. The appellees in the district court were the members of the board of adjustment of the city and the city in its corporate capacity. They will hereinafter be called defendants. Issues were made and trial had. The trial court found generally in favor

of plaintiff; that defendants' action was unjust, unreasonable, and an abuse of discretion; and that the zoning ordinance involved did not prohibit the granting of the permit. The court ordered that the building permit issue.

Defendants appeal. We reverse the judgment of the trial court.

Plaintiff is engaged in the business of grinding feed for customers on their farms. In that business he uses feed grinders mounted on motor trucks. He proposed to build a building 22 feet wide by 36 feet long for the purpose of storing, servicing, and repairing the motor trucks and grinders. He proposed to have on the premises a storage tank of 1,000 gallon capacity for gasoline and a storage tank of 500 gallon capacity for butane which he uses for fuel for the trucks and grinders. He proposed to have a telephone in the building for the purpose of taking orders for grinding from his customers.

The ordinance provides: "No business building shall be erected in the residence district for store or other business purposes, * * *."

The ordinance does not define the words used.

The question presented here is whether or not the defendants were justified in refusing to issue the permit in view of the provisions of the ordinance. That plaintiff proposed to erect a building is obvious. That he proposed to build it in a residence district as set out by the ordinance is stipulated. The fact question remained to be determined. Is the building a "business building" to be erected "for store or other business purposes?"

"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, 151 Neb. 555, 38 N. W. 2d 435.

Where the provisions of a zoning ordinance, as to the uses of property which are permitted or which are prohibited in certain districts, are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. 62 C. J. S., Municipal Corporations, § 226(18), p. 486; 58 Am. Jur., Zoning, § 11, p. 945.

So construing the ordinance we think it patent that plaintiff proposed to build a business building in a residence district for business purposes contrary to the provisions of the ordinance. We know of no rule of construction that would permit a different conclusion.

It follows that the defendants' action in denying the permit was in compliance with the ordinance. The district court erred in its decree.

The judgment of the district court is reversed and the cause is remanded with directions to enter a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CARL ABELS ET AL., APPELLEES, V. C. R. BENNETT ET AL., APPELLANTS.

64 N. W. 2d 481

Filed May 21, 1954. No. 33542.

1. **Fraud: Limitation of Actions.** An action for relief on the ground of fraud must be commenced within 4 years of the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which if pursued would lead to such discovery.
2. ———: ———. In an action for relief on the ground of fraud commenced more than 4 years after the perpetration of the fraud the plaintiff must show by pleading and proof that he is entitled to additional time because of lack of knowledge of the fraud.

3. ———: ———. The recording of a fraudulent deed in the public deed records of the proper county is not generally sufficient to charge the defrauded party with notice or knowledge of the fraud as of the date the deed is filed for record.
4. ———: ———. The statute of limitations begins to run from the recording of a fraudulent deed if it is accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which if pursued would result in discovery of the fraud.
5. ———: ———. A defrauded party must be diligent and prudent in his effort to detect the fraud and means of knowledge thereof are equivalent to knowledge.

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

Dryden, Jensen & Dier, for appellants.

Hamer, Tye & Worlock, for appellees.

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

BOSLAUGH, J.

The subject of this action is a deed alleged to have been executed and delivered for a valuable consideration by appellees in which C. R. Bennett is named as grantee and which by its terms conveyed to him an undivided one-half of the oil, gas, and other minerals in and under described land in Buffalo County owned by appellees. The object of the suit was to obtain an adjudication of invalidity of the deed and to quiet title of the land in appellees against all claims of appellants on the ground that the purported deed was secured by fraud and misrepresentation of L. R. Graham, undisclosed agent of C. R. Bennett, who conducted the transaction for the grantee. The findings of the district court were for appellees and a judgment was entered granting them the relief they sought.

Any interest of Laura O. Bennett in the subject matter of the case is limited to that which results from her

marital relationship with C. R. Bennett. It subsists or disappears according to the fate of her husband in the litigation. C. R. Bennett is designated herein as appellant, and L. R. Graham as Graham.

The claim of appellees, the owners of the land involved, is that about May 22, 1941, they gave an oil and gas lease thereon to Graham, and he filed and had it recorded in the office of the register of deeds of the county. He at the same time filed and had recorded in that office an instrument in writing purporting to be a mineral deed allegedly executed by appellees which by its terms conveyed to appellant one-half of the minerals in the land. This document is designated herein as the deed. The lease and deed each had attached a certificate of acknowledgment.

The appellees say the negotiations between them and Graham related only to an oil and gas lease and they did not at any time have any transaction with appellant or any person known to be acting for him. Appellees had no intention to sign a deed and knowingly only signed an oil and gas lease as the result of their negotiations and contact with Graham. If the deed had subscribed thereon the signatures of appellees they were obtained by Graham, the undisclosed agent of appellant, by fraud and misrepresentation. Appellees or either of them did not sign the deed knowingly and were not asked to acknowledge its execution and did not do so. They had no notice or knowledge of it or the recording of it until October 1952. The deed is a cloud on the title of appellees to the land. It damages them in their ownership and enjoyment of it. They have no adequate remedy at law.

Appellant denies the allegations of appellees except their ownership of the land subject to the rights of appellant as the owner of one-half of the minerals in the land by virtue of the deed; alleges the cause of action stated by appellees is barred by the statute of limitations, and they have been guilty of laches and are

estopped to deny the title of appellant by virtue of the deed; and asserts that appellant had no knowledge of the transaction concerning the execution of the deed and that he is an innocent purchaser for value of the interest in the land conveyed by the deed of appellees to him. Appellees deny the new matters alleged by appellant.

The proof conduces to show that: Carl Abels is a native of Germany. He came to the United States when he was about 10 years of age and attended school with considerable irregularity and repeated interruptions until he was about 19 years old. He learned the English language sufficiently to read and write it with some proficiency. He is a farmer and at the time important to the transaction under investigation lived on a quarter section of land owned by appellees since about 1920, 3 miles northwest of the village of Amherst. Emma Abels, his wife, is obviously limited in education and general experience. She attended school for some periods. Her comment was that they did not have schools when she was a young person like they have today "and I had to make my own way as far as I got." The school she attended was a small country school that had no grades, "it was just the first, second, third, and fourth readers." She can read and write to a limited extent.

Graham was a resident of Effingham, Illinois. He had been for about 15 years engaged in buying oil and gas leases and deeds representing mineral rights. Appellant resided in Tulsa, Oklahoma. He had been engaged in purchasing mineral rights. He would assemble small drilling blocks for the purpose of drilling. He did not desire mineral rights in a large compact acreage. He desired the tracts in which he acquired mineral rights to be separated. He had known Graham for about 15 years and had done business with him. In 1941 Graham heard "of an oil play going on in Nebraska." He contacted appellant in Tulsa, Oklahoma, concerning

his interest in acquiring minerals in Nebraska. Appellant was interested and it was arranged that Graham would go to Nebraska, investigate the situation, ascertain the price being paid in the area for minerals, and when this was done he would communicate the result to appellant. This he did. Appellant then told Graham he would like 2,000 or 3,000 acres in the areas in Nebraska where other companies were operating. It was understood that the mineral deeds would be in the name of appellant as grantee and Graham would file them for record. He thereafter on several occasions conferred with appellant by telephone while he was procuring deeds in Nebraska. It was a part of the method of operation that Graham would and he did take oil and gas leases on land in which he was named as lessee and a deed to appellant for a part of the minerals in the land.

Graham and an elderly man by the name of Clint Hamilton, a notary public employed by Graham to accompany him, strangers to appellees, on May 22, 1941, came to their farm home. Graham introduced himself to Carl Abels in the farmyard, stated his business as a purchaser of oil and gas leases, and solicited Carl Abels for such a lease on his land. Graham said the lease would be for 10 years if the yearly rental was paid and that any time the rental was not paid the lease would terminate. The three of them went into the house where Mrs. Abels was. She was introduced to Graham. He repeated in her presence what he had told her husband. He did not say anything, according to appellees, about purchasing a deed of any part of the minerals in the land. The conversation concerned only an oil and gas lease for not to exceed 10 years and to terminate at any time the payment of rental according to the lease was in default. Appellees decided to give that kind of a lease to Graham. This was the first experience appellees had with a transaction of this character. There were things stated by Graham they did not understand. He did some

writing on a typewrier he had with him and when he finished he had papers he directed appellees to sign. They were laid on a table with the place of signature of only one of them exposed and when it was signed it was turned back and the next one was signed. This process was repeated until the signatures were attached to all of them. How many instruments appellees signed they did not know. They were not offered the privilege of examining or reading the papers before they signed them or while Graham was there. He took them, gave appellees copies of some papers which they thought were an oil and gas lease, and matters incident to it, and two checks. Appellees were not asked to and did not acknowledge their execution of anything they had signed. Hamilton was not introduced to them. He said nothing and had no part in the transaction. Carl Abels thought he was probably the father of Graham. There was written on one of the checks "for - ½ royalty," and the check was deposited in the bank about 4 days later. Appellees did not see this and would not have understood its meaning if they had. A receipt they signed contained this: "for ½ royalty sold to C. R. Bennett." They did not read the receipt or know its contents. The copies of documents left with appellees were folded or rolled up, were not examined or read, and were placed in a box in the house and retained for more than a year. Their contents were not known to appellees. Some time after the next installment of rental became due and had not been paid the copies were destroyed because of the belief that the oil and gas lease had terminated.

Appellees had no transaction involving the title to the land described in the deed and did not make or have made any examination of the record title of the land from the date of the deed until about October 15, 1952. They received information about the date last stated that the record title of the land in the office of the register of deeds exhibited the deed in question. This developed from the fact that they at that time made

a second oil and gas lease on the land and the party who received it examined the records in the office of the register of deeds and there found the record of the deed. He informed appellees what he had learned from the record and they claimed that it was the first information they had that Graham had secured their signatures to a deed.

Appellant produced the testimony of Graham. He said that before the deed was executed he gave to each of the appellees a form of oil and gas lease and a form of mineral deed for their examination, and that he explained to them in detail the contents and meaning of each and what he desired to purchase from them. Appellees discussed the matter between themselves and decided to give a lease and mineral deed. A lease and a deed were prepared in duplicate and when completed were given to appellees to examine before either of them was signed. Two checks and two receipts were written and examined by appellees. The lease, the deed, and the receipts were then signed and the execution of the lease and deed was formally acknowledged. Copies of the lease and the deed were given to and left with them and the checks were delivered to them.

The period of limitation within which an action for relief on the ground of fraud may be brought is 4 years. The time of the accrual of such a cause of action is fixed by statute as the time of the discovery of the fraud. § 25-207, R. R. S. 1943. This court said concerning this subject in Rucker v. Ward, 131 Neb. 25, 267 N. W. 191: "'An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.'" See, also, Burchmore v. Byllesby & Co., 140 Neb. 603, 1 N. W. 2d 327. This case requires a determination of the time appellees discovered the fraud relied upon by them as the basis of the relief they seek. The deed

was made May 22, 1941. This case was commenced May 28, 1953. The requirement is that if more than 4 years have elapsed since the alleged fraud the victim of it must allege and prove facts as to the failure to discover it which entitles him to maintain an action by virtue of the fraud, notwithstanding the lapse of time, and he must allege and establish diligence in this regard. Baxter v. National Mtg. Loan Co., 128 Neb. 537, 259 N. W. 630; Coad v Dorsey, 96 Neb. 612, 148 N. W. 155; State Bank of Pender v. Frey, 3 Neb. (Unoff.) 83, 91 N. W. 239. The deed was filed for record in the office of the register of deeds June 2, 1941. It was said many years ago that fraud is discovered when the fraudulent deed is recorded. Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302. That case in this respect was repudiated and disproved. Jones v. Danforth, 71 Neb. 722, 99 N. W. 495. The placing of a fraudulent deed upon the public deed records is a fact to be considered in deciding when the fraud was discovered and if the deed is accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which if pursued would lead to the discovery of the fraud, the statute begins to run from the recording of the deed. Sweley v. Fox, 135 Neb. 780, 284 N. W. 318; Jones v. Danforth, *supra;* Forsyth v. Easterday, 63 Neb. 887, 89 N. W. 407; Annotations, 76 A. L. R. 869, 137 A. L. R. 283.

Appellees had in their exclusive possession and control from the completion of the transaction with Graham on May 22, 1941, for more than a year a copy of the lease and a copy of the deed. The deed plainly stated that appellees had sold, conveyed, and delivered to C. R. Bennett "an undivided One Half (½) - - - interest in and to all of the oil, gas and other minerals in and under" the land owned by appellees. The receipt for the amount paid to appellees for the deed recited "Sixteen Dollars in full for ½ royalty sold to C. R. Bennett this day on my farm of 160 acres." The check for the royalty was payable to appellees. There was written on its face

near the lower left-hand corner "for - ½ royalty." Appellees had it for at least 4 days. They each endorsed it and it was deposited and cleared. Appellees could both read and they each stated they knew what a deed was and what a lease was, and that they each knew that any writing should not be signed without reading it or otherwise knowing its contents.

If a fraud ought to and would have been discovered if reasonable diligence had been exercised by the alleged victim of it the statute runs from the time such discovery ought to have been made. A litigant cannot excuse delay in instituting a suit on his cause of action if his failure to discover the fraud is attributable to his neglect. A party defrauded must be diligent and prudent in making inquiry and investigation. Means of knowledge in the possession and control of the injured party are equivalent to knowledge. In Coad v. Dorsey, *supra,* it is said: "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and, if he had the means of discovery in his power, he will be held to have known it. Wood v. Carpenter, 101 U. S. 135." See, also, Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330; Gillespie v. Cooper, *supra;* 34 Am. Jur., Limitation of Actions, § 167, p. 134; 54 C. J. S., Limitations of Actions, § 189, p. 188.

In granting relief on the ground of fraud the foundation principle of courts of equity was that the party defrauded was not affected by lapse of time so long as he remained, without any fault of his own, in ignorance of fraud that had been committed. However, equity aided the diligent and not the negligent. It disliked stale claims and would not permit a party to prolong by his laches the time during which he might apply for relief. Hence the doctrine was that the means of knowledge were equivalent to actual knowledge. The statute and the decisions of this court are consistent with the doctrine of the courts of equity. Appellees by the exercise of the

least diligence and prudence on or after May 22, 1941, for more than a year, could have had from documents in their possession all the information they secured in October 1952, concerning the result of the transaction they had with Graham and the deed involved herein. They had the means in their possession of actual knowledge and they were not entitled to an extended time within which to bring their action. The statute of limitations is a complete defense in this case.

The judgment should be and it is reversed and the cause is remanded to the district court for Buffalo County with directions to dismiss this case.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. JOSEPH D. MARTIN, APPELLANT, v. O. E. CUNNINGHAM, PRESIDENT OF THE GRAND ISLAND CITY COUNCIL, ET AL., APPELLEES.

64 N. W. 2d 465

Filed May 21, 1954. No. 33555.

1. **Municipal Corporations: Taxation.** The paving of streets by a municipality to improve the locality, as distinguished from the public generally, is a matter of local concern.
2. ———: ———. The levy and assessment of benefits to pay for such improvements, including the manner of payment and the interest rates thereon, are controlled by the charter in a home rule city and not by the state statute.

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

Joseph D. Martin, pro se.

Harold A. Prince, for appellees.

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

CARTER, J.

This is an action for a writ of mandamus against the city of Grand Island and its officers to compel the city

to accept interest at the rate of 6 percent on delinquent paving assessments. The trial court held against the relator, and he appeals.

The issue can be summarized as follows: The city of Grand Island is a home rule city. Under its charter the cost of paving may be assessed against the property benefited, to be paid in 10 annual installments bearing interest not in excess of 7 percent per annum, and, after such installments become delinquent, at a rate of 10 percent per annum. The ordinance assessing the benefits on the property here involved provided that the installments should bear interest at 7 percent per annum until they became delinquent, after which they were to draw interest at 9 percent per annum. It is the contention of the relator that the installment payments should draw interest at the rate of 4 percent per annum until delinquent, and 6 percent per annum thereafter, pursuant to section 16-622, R. S. Supp., 1953. The specific question for determination is whether the rate of interest to be charged on special assessments for paving in a city operating under a home rule charter is governed by provisions of the charter and ordinances enacted pursuant thereto, or by the provisions of the general statute (section 16-622, R. S. Supp., 1953).

It is not questioned that the city council of the city of Grand Island did on September 19, 1953, enact an ordinance levying a special assessment against the property of relator to pay the cost of paving in the amount of $368.21. The first installment on the special assessment became delinquent on November 9, 1953. On November 12, 1953, relator tendered payment for the amount of the installment with interest at 6 percent per annum from the date it became delinquent. Payment was refused on the ground that the interest was insufficient in that interest at the rate of 9 percent per annum from the date the installment became delinquent was not tendered. This action was thereupon commenced to compel the

acceptance of the installment due with interest at 6 percent from the date it became delinquent.

Under our Constitution a home rule charter must be consistent with and subject to the Constitution and laws of this state. This has been construed to mean that a provision of a city home rule charter takes precedence over a conflicting state statute in instances of local municipal concern. The purpose of the home rule charter provision is to render cities independent of state legislation as to all subjects of strictly municipal concern. When the Legislature has enacted a law affecting municipal affairs which is of state-wide concern, the law takes precedence over any municipal action taken under the home rule charter. Nagle v. City of Grand Island, 144 Neb. 67, 12 N. W. 2d 540. On the other hand, if the legislative act deals with a strictly local municipal concern, it has no application to a city which has adopted a home rule charter. Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894.

The power to adopt a home rule charter is derived from the Constitution. Its very purpose was to delegate all municipal powers formerly prescribed by the Legislature to the municipality itself except where matters of state-wide concern are involved. Except as to matters of state-wide concern, a home rule charter is to be construed according to the same rules as a legislative act containing the same provisions in determining the authority possessed by the municipality. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643. The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state simply means that on matters of such general state-wide concern to the people of the state as involve a general public need or policy, the charter must yield to state legislation. State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N. W. 499.

It appears clear to us that the assessment of special benefits to pay for paving improvements within a city

is strictly a municipal matter. It is not only municipal in character but it is local as well, although there may be exceptions. Hinman v. Temple, 133 Neb. 268, 274 N. W. 605, 111 A. L. R. 1217. The power to make paving improvements and to levy assessments to pay for the same is derived from the charter and not from the statute. In other words, the charter provisions are derived directly from the Constitution and are superior to any statute except where a matter of state-wide concern is involved.

We fail to see where the state is generally concerned in the making of purely local paving improvements or the levying of assessments for special benefits therefor, including the rates of interest to be collected either before or after such special assessments become delinquent. It is a matter of local municipal concern which involves no matter of safety, health, policy, or other protection of the citizens of the state which must be deemed to generally concern all the people of the state.

In Sandell v. City of Omaha, 115 Neb. 861, 215 N. W. 135, the court had under consideration a case in a home rule city involving the levy and assessment of taxes for the cost of paving. The court said: "Other questions are raised and discussed at some length, but, upon a review of the facts and the law applicable thereto, it clearly appears to us that both the amendment and the assessment of the taxes complained of constituted a valid exercise of councilmanic power, and they do not therefore offend against the fundamental law."

In Salsbury v. City of Lincoln, 117 Neb. 465, 220 N. W. 827, the court held: "The matter of improving the streets, alleys and highways within the corporate limits of a municipality is one strictly of municipal concern and the municipal authorities in regard to such improvement are only required to act in conformity with the provisions of the charter under which such city has its legal existence, and under the charter of the city of Lincoln its municipal officers are authorized to pave

and improve connecting streets as well as intersecting streets." In the foregoing case a charter provision authorized the paving of two or more connecting or intersecting streets while the general statutes of the state required city councils to include only intersecting streets. The charter was held to be controlling.

In Pester v. City of Lincoln, 127 Neb. 440, 255 N. W. 923, the contention was advanced that assessments for a municipal water main were erroneous because they were at variance with the general statute. The court held that the home rule charter controlled, saying: "In the present instance the procedure, assessments and equalization conformed to the home rule charter. The extension of the water main through the alley from Forty-fourth street to Forty-eighth street between Greenwood street and Adams street in water district number 141 and the assessment of real estate therein for benefits were matters of local and municipal concern. Consequently the home rule charter prevails over the statute applying to cities and villages generally."

The foregoing cases clearly indicate that, in matters relating exclusively to local municipal concern, a home rule charter provision prevails over conflicting provisions in a state statute containing legislation on the same subject applicable to cities generally. State ex rel. City of Lincoln v. Johnson, 117 Neb. 301, 220 N. W. 273. In such matters the home rule charter city has the same power to legislate that the Legislature had. The power to so legislate is derived from the Constitution and not the Legislature. If a matter of local concern is involved, a state statute applicable to nonhome rule cities has no application whatsoever. If the home rule charter be deficient, the general statute may not be relied on to supply the defect. If the home rule charter conforms to the constitutional grant which created it, attempted limitations upon its power by the Legislature are to no avail.

The appellant appears to contend that the right to

pave the streets of a home rule city and to levy assessments therefor is derived from the general statutes of the state. Such is not the fact. As to matters purely local in character the Legislature is powerless to act. In the present case, the city of Grand Island did adopt the general statutory provisions then in existence when it adopted its charter. This is merely a coincidence and does not change the fact that the origin of its powers was the Constitution and not the statute applicable to other than home rule cities.

We hold that the levy and assessment of special benefits for the cost of paving, including the manner of their payment and the interest rates to be paid thereon, under the facts of this case, are a matter of local municipal concern controlled exclusively by the home rule charter.

AFFIRMED.

SCOTT CHILES, APPELLANT, V. CUDAHY PACKING COMPANY, A CORPORATION, APPELLEE.
64 N. W. 2d 459

Filed May 21, 1954. No. 33558.

1. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case, the cause will be here considered de novo upon the record, bearing in mind that where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses, gave credence to the testimony of some rather than to the contradictory testimony of others.
2. **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.
3. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dis-

pense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking.

4. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or conjectural or speculative evidence.

5. **Trial: Courts.** A court is not required to permit a litigant to trifle with the processes of the court by asserting therein under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself.

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

Paul I. Manhart, for appellant.

Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem,* for appellee.

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

CHAPPELL, J.

Plaintiff Scott Chiles filed his petition in the Nebraska Workmen's Compensation Court on April 13, 1950, seeking compensation for injuries and disability allegedly caused by an accident arising out of and in the course of his employment by defendant Cudahy Packing Company on March 23, 1950. Defendant for answer thereto denied generally and prayed for dismissal of plaintiff's petition with prejudice. On June 23, 1950, after hearing before one judge of the compensation court, plaintiff's petition was dismissed upon the ground that his alleged disability was not caused by an accident arising out of and in the course of his employment by defendant but was due to natural causes, thus not compensable. On July 6, 1950, plaintiff waived rehearing and appealed directly to the district court for Douglas County. His petition on appeal was filed July 6, 1950. On July 10, 1950, defendant filed its answer, admitting that on and prior to March 23, 1950, plaintiff was in

the employ of defendant but denying generally and specifically denying that plaintiff sustained any accident arising out of and in the course of his employment. It alleged that he had been ill and off work immediately prior to March 23, 1950, when he returned to work still suffering from such illness, and subsequently fainted on the job. It was alleged that the order of dismissal by the compensation court was correct, therefore it should be affirmed. The prayer was for dismissal with prejudice. Plaintiff's reply was a general denial.

On June 8, 1951, there was a trial de novo on the issues thus presented, whereat evidence was adduced, at conclusion of which the parties were each allowed time for filing briefs. Subsequently, on September 10, 1951, the trial court rendered judgment, finding generally in favor of defendant and against plaintiff on the ground that plaintiff had failed to carry the burden and prove by a preponderance of evidence that his alleged disabilities were caused by any accident arising out of and in the course of his employment by defendant. Therefore it was adjudged that plaintiff's action should be and was forever dismissed at plaintiff's costs.

On September 11, 1951, plaintiff filed a motion for new trial which was not argued and submitted by him until December 4, 1953. Thereafter on January 15, 1954, plaintiff's motion for new trial was overruled and he appealed to this court, assigning that the trial court erred in making its findings aforesaid and dismissing plaintiff's action. We conclude that the assignment should not be sustained.

Section 48-151, R. R. S. 1943, provides, insofar as important here: "(2) The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."

As recently as Dietz v. State, 157 Neb. 324, 59 N. W.

2d 587, this court held: "On any appeal to this court in a workmen's compensation case, the cause will be here considered de novo upon the record, bearing in mind that where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses, gave credence to the testimony of some rather than to the contradictory testimony of others.

"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.

"The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking."

See, also, Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261, wherein we reaffirmed also that: "An award of compensation under the Nebraska Workmen's Compensation Act may not be based on possibilities, probabilities, or conjectural or speculative evidence.

"A court is not required to permit a litigant to trifle with the processes of the court by asserting therein under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself."

In the light of such rules we have examined the evidence and summarize the pertinent parts thereof. In doing so, we bear in mind not only that the evidence is directly conflicting and irreconcilable in most material respects but also that the trial court saw plaintiff and his witnesses, heard them testify, and saw and

heard plaintiff impeached upon material matters about which he previously testified contrarily in the compensation court.

The record fairly discloses that: Plaintiff worked for defendant about 1½ years. Just previous to March 23, 1950, he had been off duty 3 days. The first day was his off-duty day, but the next two he had not reported for work. He testified it was because he had a cold for which he had taken cold tablets and cough syrup purchased by him at a drug store. There is competent evidence, however, including admissions by plaintiff, that he had intestinal flu for which he had taken some pills and was treated by a physician. He brought some medical tablets with him to the job that night. On March 23, 1950, when he reported for work prior to the 11:30 p. m. shift in the fertilizer tank department, plaintiff told the night foreman who inquired about his previous absences: " 'I almost died.' " He then said: " 'I am sick, but I am going to try and make it tonight, but I don't know whether I can or not.' * * * 'Yes, I told him I had a cold and was not feeling good.' * * * 'I told him I had not been feeling well for two days, and he said if I had not been feeling good, I could not come to work.' "

Nevertheless, plaintiff, claiming that he felt all right, reported for work making block feed. About 11:45 p. m., just as he went to pick up a loaded two-wheel truck by the handles upon it, he felt an awful pain in his back, was not feeling good, and thereafter as he went to pull it up a little slant his foot slipped. Thereupon he dropped the truck, fell forward to the concrete floor flat on his face or on his right shoulder, and then went over, spread out flat on his face, and was unable to get up. Two fellow employees picked him up and laid him out straight on some sacks. Plaintiff did not remember what took place or hear anything that was said while they were picking him up. Concededly he had the pain before he claims to have slipped, and there was nothing on the floor which caused him to slip. One of such

employees reported to the foreman that plaintiff "had passed out." Both fellow employees were witnesses for plaintiff. One of them testified: "Well, I saw him there lifting the truck up, and he fell, and that is all. * * * Well, he was pulling this load of bone meal on the truck, and he slipped and went down. * * * Straight down, with his face down." He was conscious, but kept right on lying on his face and said "he wanted to call for his wife, and he wanted to go to the hospital." The other fellow employee testified: "I was standing looking at him when he picked up the truck, he started over to that about five or six steps, and then he pitched over." When asked if he saw any slipping or anything like that, the witness replied: "No, I did not know. I don't think there was no slipping or nothing."

The foreman first called the guards, telling them to bring a stretcher down to pick plaintiff up and take him to the plant physician's office, and then went down where plaintiff was lying on some sacks moving his head backwards and forward, saying: " 'I want to go home, or take me to the hospital.' " Plaintiff was removed to the examining room on a stretcher, but said nothing during that period about an accident. The plant physician was called. When he arrived plaintiff was conscious and said that "he had fainted as he stooped over to wheel a truck * * * he was leaning over to pick up the truck and he fainted and fell forward." He complained of "abdominal pain." He also gave a past history of "being sick for the previous three or four days" for which he had been "treated professionally by a doctor at Peoples Hospital" who "had given him some pills."

The plant physician then examined plaintiff, who had a low-grade temperature, dehydration, dry mucous membranes, rapid pulse, hyperactive abdominal bowel sounds, and general diffuse abdominal tenderness on palpation, all typical only of intestinal flu. Plaintiff neither then nor previously made any complaint of pain in his back

or that he had any accident or slipped and hurt his back. The plant physician then gave plaintiff a capsule containing an intestinal antispasmodic, which made him feel better. Plaintiff seemed nervous and excited as people often are after fainting, and requested confinement in a hospital. However, the physician told him that he did not need it, so plaintiff got up and walked around a little while, after which the physician, using his own car, took plaintiff home. On the way there plaintiff told the physician that he had a rupture. Upon arrival at his home plaintiff got out of the car and walked into the house without assistance. About a week previously, while plaintiff was having something removed from one of his eyes, he told the plant physician he "had some back trouble." In that connection, also, on March 28, 1950, after the accident, plaintiff gave a history to a physician at People's Hospital in which he recited: "was hurt in back 1949 April. Was hit tub—Cudahy Pk. Co. 1 mo later was back at work." Also, subsequently, on March 26, 1951, plaintiff told an orthopedic surgeon who examined him that about 1 year before March 23, 1950, he was struck by a tub on the lower part of his back while working for defendant. X-rays were taken at hospital, he was treated by a physician, and was off work about 2 months at that time.

On March 24, 1950, plaintiff's wife called the plant physician at his office several times, wanting him to come over to plaintiff's home, but he suggested that they come to his office, claiming that from his examination plaintiff was not injured, and his disability was not compensable.

At about 1 o'clock the next morning, March 25, 1950, the plant physician was called by County Hospital where plaintiff had been taken in a taxi by his wife. Plaintiff stayed in the County Hospital until the afternoon of March 27, 1950, where he claimed a back injury and pain from "loading 100# sacks and experienced

sudden severe pain in upper lumbar area not referred to legs." X-ray examination there disclosed: "lumbar spine is negative." Neurological examination was negative. "Compression fracture unlikely." Plaintiff then had a temperature of 99 degrees and physical examination was made questioning whether or not he had a "retro peritoneal hemmorrhage, or retro cecal appendix—acute appendicitis." However, after examination, it was tentatively decided that plaintiff possibly had either a "lumbo sacral strain" or "neuralgia" or "psychoneurosis." He was given sedatives mostly and when he was "fairly well up and about" he was "dismissed walking" and told that he "should report to the University Clinic." In the afternoon of March 27, 1950, plaintiff's wife took him home in a taxi and that night she called his own physician who operated People's Hospital. He gave plaintiff some pills and in 2 or 3 days plaintiff went over to that hospital where he stayed 12 or 14 days. The fragmentary hospital record kept by that institution is of little help. On April 25, 1950, and again on June 5, 1950, his physician reported in writing to plaintiff's attorney: "From the history of the case, my diagnosis is a displaced intervertebral disc. His condition is considerably improved and the symptoms have lessened markingly." Plaintiff gave his physician a history "that he had fallen, he lifted a truck with some sacks * * * and that he had excruciating pain at the time and this apparently knocked him out." His physician's tentative diagnosis was "trouble with intervertebral disc." The physician testified that he was not a spine specialist and that plaintiff's "case was rather obscure in some respects, and I was not too sure that the difficulty was in the intervertebral disc," so he called in another physician who was also "in doubt because it was not a typical case." However, after continued observation plaintiff's physician concluded that since plaintiff had general pains and a tender spot be-

tween the fourth and fifth lumbar vertebrae, it was a herniated intervertebral disc.

Another physician who was called by plaintiff's attorney testified for plaintiff. He saw plaintiff first about May 31, 1950. The history given him by plaintiff was that he "was pulling some such truck loaded with meal sacks that weighed approximately one thousand pounds. He felt a pain in his back along the left and in the middle of his hips. He pulled the truck about ten or fifteen feet, and he pulled it to where there was a drop-off, and said truck required extra effort to pull. He fell down and was unable to raise up under his own power." His examination disclosed certain pains and clinical signs present in the immediate area of the fourth and fifth lumbar vertebrae in plaintiff's back, with apparent loss of sensation on the right side extending down to his toes. Plaintiff said he had never previously had such complaints in that region, and, as stated by the physician, "there was some trouble there but just what difficulty it was we could not give it a name," so he sent plaintiff to an orthopedic surgeon. The physician testified that it was fair to assume that "this lifting and pulling" had to be considered as a "possible entity" in causing plaintiff's disability. He saw plaintiff upon several occasions and discovered that plaintiff got alternately better and then worse again, but that he would eventually approach normal and at time of trial was disabled only about 15 percent.

In August 1950 plaintiff was examined by the orthopedic surgeon aforesaid. He testified in plaintiff's behalf. The history given him by plaintiff was of "having sustained a fall while at work, he was pulling a cart and he slipped and fell, and following that he had severe pain in his low back which radiated down to his right leg and down to the foot. He complained of being without the use of the leg for a while, he said his leg was paralyzed and he had trouble with the leg going to sleep, and it slipped on him." Spinograms taken were nega-

tive, but such fact does not in all cases absolutely rule out a diagnosis of disc syndrome. Upon finding that plaintiff's dermatone picture was "not the normal thing we usually see," but was a "little bit bizarre * * * wider than the nerve irritation that we usually see in a disc syndrome" the orthopedist, being in doubt whether plaintiff had a herniated disc or arthritis, did not recommend surgery but put a brace on plaintiff's back and he began to improve. The orthopedist admitted that there were many causes for back pains including abdominal spasms, but here there "would be a strong indication it was a result of the accident." At the time of trial he estimated that plaintiff had a disability of only about 10 percent.

Another orthopedic surgeon who examined plaintiff on March 26 and 27, 1951, at request of defendant, made a written report received in evidence by stipulation. The pertinent history given him by plaintiff was that "he was pulling a heavily loaded truck up a slight incline when he slipped and fell forward." X-rays taken disclosed "no evidence of bone injury, either fracture or displacement, involving any part. * * * Spinograms made after injection of pantopaque do not reveal any definite disc pathology or alteration in the outline of the pantopaque column. * * * The fact that the patient's reactions to examination were so much more pronounced the first day I saw him than at the time of the second examination on the following day leaves no doubt in my mind that the patient very grossly exaggerates." In the light thereof, and physical examination, such surgeon said: "I find no convincing, positive, physical objective signs of injury or disability in this patient. * * * The patient has not sustained any permanent bodily damage." In that connection, on May 7, 1951, plaintiff went to work for an electric company digging ditches and putting down tile. Thereafter he became a carpenter's helper and was so employed at the time of trial in district court. He testified that he has some pain difficulty

at the beginning and end of the day, but during the day he works very well and sleeps fine after he takes a hot bath.

In the light of such evidence we conclude, as the trial court did, that plaintiff failed entirely to prove by a preponderance of the evidence that he had an accident arising out of and in the course of his employment which caused any disability of which he complained. To conclude otherwise would be purely possibility, speculation, and conjecture. Therefore, the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

IN RE ESTATE OF MARIE MARUSKA, DECEASED.
MILDRED HORTON ET AL., APPELLANTS, V. JERRY MARUSKA ET AL., APPELLEES.

64 N. W. 2d 734

Filed May 28, 1954. No. 33502.

1. **Wills.** Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.
2. ———. The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3 that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence.
3. ———. The burden of proof to establish undue influence is on the party so alleging.
4. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

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

Blackledge & Sidner, for appellants.

Clifford H. Phillips, for appellees.

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

WENKE, J.

This action arose as a result of Bessie Sperry and Jerry Maruska objecting to the allowance for probate of the last will of Marie Maruska, deceased, when offered for that purpose by Mildred and Melvin Horton, the latter being named executor therein.

The district court for Buffalo County submitted to a jury the issue of whether or not the will was the result of undue influence exercised over deceased by Mildred and Melvin Horton. The jury found that it had been so obtained and was not the true and valid will of the deceased. The proponents then filed a motion asking the court to set aside the verdict and grant them either a judgment notwithstanding the verdict or a new trial. This motion the court overruled and from its ruling this appeal was taken.

Appellants state the sole issue involved on appeal is, is the evidence sufficient to support a verdict of undue influence?

"Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.

"The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence." In re Estate of Johnston, 147 Neb. 886, 25 N. W. 2d 526.

"The burden of proof to establish undue influence is on the party so alleging. In re Estate of Hagan, 143

Neb. 459, 9 N. W. 2d 794; In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80." In re Estate of Johnston, *supra.*

In considering the evidence adduced at the trial as to a certain issue, when proper motion is made for that purpose, the trial court should, in determining whether or not that issue should be withdrawn from the jury, apply thereto the following principle: If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the plaintiff, that is, every controverted fact must be resolved in his favor and he should be given the benefit of every inference that can reasonably be deduced therefrom. See Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751.

In In re Estate of Thompson, 153 Neb. 375, 44 N. W. 2d 814, where the same issue was involved as here, we said: "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."

After so considering the evidence it is the duty of the trial court to determine the issue or issues upon which there is competent evidence and submit them, and only them, to the jury.

In a will contest on the ground of undue influence, if the evidence is insufficient to sustain a verdict upon such issue in favor of the contestants, then the trial court should withdraw that issue from the jury and, if that is the only issue, either direct a verdict or discharge the jury and render judgment for proponents.

See Nebraska Methodist Hospital v. McCloud, 155 Neb. 500, 52 N. W. 2d 325.

On the other hand, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude the will was not the free and voluntary act of testatrix, but the result of undue influence exercised upon her. See In re Estate of Strelow, 120 Neb. 242, 233 N. W. 889.

The same principles apply on appeal and, in applying them, we consider the evidence adduced in light of the following:

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

In considering this issue we have, in regard thereto, stated:

"Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed." In re Estate of Thompson, *supra.*

"There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but, so long as not coercive, they are not undue. Circumstances often arise where such conduct is wholly justifiable." In re Estate of Thompson, *supra.*

"Mere suspicion, surmise, or conjecture is not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence." In re Estate of

Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421.

"Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, mental condition, as shown by the evidence, and opportunity afforded designing persons for the exercise of improper control." In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80.

"In making proof of undue influence a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to all inferences that may be legitimately derived from established facts." In re Estate of George, *supra.*

"In evaluating the testimony and proper inferences therefrom, it is not always possible to apply the evidence tending to establish improper influence which is referable to the will solely to one of the essential elements. It is permissible therefore not to strive to separate each fact supported by evidence offered as proof of undue influence and allocate it under one or more of the four essential elements requisite to establish the exercise of undue influence, but to view the entire evidence offered by the contestants as proof of this issue and rest the decision upon whether or not the evidence as a whole is of such a substantial nature as to contain some proof of each of the essential elements, and to require that the issue of undue influence be submitted to and determined by a jury." In re Estate of Fehrenkamp, *supra.*

Marie Maruska died on June 24, 1951. She had come to this country in 1921 from Czechoslovakia. She spoke and understood only the Bohemian language, never having learned to read, write, speak, or understand the English language. Shortly after she arrived in this country she married Mr. Vencil Maruska who lived on a 160-acre farm he owned in Webster County located five miles north and one-half mile east of Red Cloud, Nebraska.

Mr. Maruska had previously been married. His first wife had died. Eight children were born to this first marriage. Three children were born to the second marriage. They are Bessie, a daughter, now Bessie Sperry; Mildred, a daughter, now Mildred Horton; and Jerry, a son. At the time of the trial, which was held on March 30 and 31, 1953, Bessie was 31 years of age, Mildred 29, and Jerry 26. Mildred is one of the proponents of her mother's will and an appellant. Bessie and Jerry are the contestants of their mother's will and appellees. The other proponent is Mildred's husband, Melvin.

The Maruskas lived on this farm from the time of their marriage in 1921 until the father died on February 1, 1948. When the father died this farm, which he then owned, passed to his wife, Marie, his son Jerry, and to Anton Maruska, a son of his first marriage. At the time of the father's death Jerry and Anton were both single and living at home. Shortly thereafter Anton married and moved out. Jerry, however, continued to live on the farm with his mother and during the year 1948 rented it from her on a crop-share basis, she having the life use thereof. In February 1949, Jerry married Donice Martinson and she came to live with him on the farm. Jerry made the same arrangements with his mother in regard to farming the land for 1949 as he had for 1948. The three of them lived in the farm home. By agreement Jerry's wife did the housework and his mother worked outside in the garden and took care of her chickens. The mother owned the chickens on the farm and also some of the cows. The evidence shows the mother enjoyed being outdoors and would rather work in a garden or take care of chickens than do housework.

Jerry again rented the farm for 1950. However, the mother did not stay on the farm during that year but left it on the last Sunday in February 1950, and went to live with her daughter Bessie Sperry and her husband Thad. The Sperrys lived in Superior, Nebraska. She

only stayed with the Sperrys until June 18, 1950, although she had put in a garden and had planned to stay there at least a year. When she left the Hortons came and got her and took her to their home in Kearney. On this occasion she stayed with the Hortons only a short time. It was while she was staying with the Hortons on this occasion that the will being contested was drafted and executed. Sometime shortly thereafter the Hortons took her to Holbrook, Nebraska. She stayed at Holbrook the balance of the summer, living with her stepdaughter Mary Sgro. The mother apparently wanted to go there because she could live in a cabin or shack by herself and have plenty of land on which to raise a garden.

The mother returned to the Horton home about October 1, 1950, and lived with the Hortons through the winter. In April 1951, she again returned to Holbrook, the Hortons taking her, and it was there she died.

When her husband died he left a will but Mrs. Maruska elected not to take thereunder but elected to take under the statute. As a result she obtained the life use of the farm plus a one-fourth interest therein. Apparently Anton and Jerry were, under the terms of the father's will, each to receive a one-half interest in the farm. However, when the mother elected to take under the statute of descent, each became vested with a one-half interest in the remaining three-fourths. When Anton left the farm the mother purchased his interest therein so thereafter she owned a life estate therein plus five-eighths of the remainder.

On November 7, 1949, Jerry and his mother entered into a written lease on the farm for the crop year of 1950. This lease contained an option whereby Jerry could, at any time during the term of the lease, or up to March 1, 1951, buy his mother's interest in the farm for $6,000. This option he exercised on January 29, 1951.

Although there was evidence adduced which would support a contrary finding, there was evidence adduced

from which a jury could find as hereinafter set out:

When the father died the family relations were friendly and they continued that way after his death until sometime shortly after Jerry married. When Jerry married and his wife came to live on the home place at first that friendly relationship continued. The working relationship, already referred to, between Jerry's wife and his mother was satisfactory. The three of them all lived on the first floor of the house and ate their meals together.

In May 1949, the home was wired for electricity and an electric washing machine purchased. In addition thereto an icebox was acquired. All this seemed to please the mother. She enjoyed these conveniences and expressed herself to that effect.

The Hortons frequently visited the mother at the farm. Commencing about May 1949 they, particularly Mildred, commenced a course of conduct that had for its evident purpose the destruction of this friendly relationship between Jerry, his wife, and the mother. Mildred commenced advising her mother about what she should do with the eggs her chickens laid, about the milk and cream her cows produced, that she was not getting her fair share of rent, and about other matters. All these matters, prior thereto, were being handled by Jerry, his wife, and mother on an agreed to and satisfactory basis.

Mildred also advised her mother electricity was too expensive; that they had always gotten along before without it; that they did not need an electric washing machine as the old hand-operated washing machine was good enough; that they did not need the icebox but could still use the water barrel down at the windmill, as they had always done.

The mother seems to have been a very nervous and sensitive person, was given to strong feelings, could be easily influenced, and was prone to follow the advice of her daughter Mildred. That she did so is evidenced

by what happened in regard to what has already been referred to. The satisfactory and agreed to arrangements between Jerry, his wife, and the mother in regard to the use of, and proceeds from, the eggs and cream were broken off, difficulties arose in regard to division of rents, and other matters caused misunderstandings. Apparently, because of Mildred's advice, the mother discontinued using the electric washing machine, going back to the hand washer. The barrel at the windmill was used in place of the icebox and she used electricity for lighting sparingly.

It also appears the mother could be easily influenced against people, including her children. All that has been herein set forth ultimately had that effect on the mother's relationship with Jerry and Donice. As a result Jerry and Donice fixed up the upstairs and moved up there to live, the mother no longer eating her meals with them. Finally, on the last Sunday in February 1950, the mother moved out.

When the mother moved out she went to live with the Sperrys at Superior. Again the Hortons entered the picture. Although, as already stated, the mother intended to stay with the Sperrys at least a year, she left them on Sunday, June 18, 1950, in company with the Hortons. It was only 3 days thereafter, on June 21, 1950, that the Hortons and the mother went to a lawyer's office in Kearney and had the will drafted and executed which is here being contested. This will bequeaths to Jerry the sum of $1, to Bessie the sum of $1, and to Mildred and her husband each a one-half interest in all the rest of her property. Thus, in effect, the will, if allowed to probate, would give Mildred and Melvin everything the mother possessed.

At first the mother's finances were handled by Jerry and his wife. However, sometime in June or July 1949, they were taken over by the Hortons. On July 26, 1949, the Hortons opened a savings account for the mother in The Ravenna Bank. That was the bank with

which the Hortons transacted their banking business. Subsequently, on February 1, 1951, they opened a checking account for her in the same bank. At the time of the mother's death the savings account had a balance of $1,882.91 and the checking account $305.05. Although the mother was never actually in the bank, on February 3, 1951, a card, signed by her and Mildred authorizing the bank to pay out such money to either or the survivor, was filed with the bank. On the basis thereof, after the mother's death, the Hortons drew out these balances. They drew out the balance of the savings account on July 13, 1951, and the balance of the checking account on July 14, 1951.

The record shows the Hortons were very anxious to have the mother sell her interest in the farm and were active in bringing about that result. When the mother gave Jerry an opportunity to buy it, by putting an option to that effect in a lease dated November 7, 1949, they were very much dissatisfied by the delay.

It should here be mentioned that on the same day this lease was signed the mother had drafted and caused to be executed a will giving her three children each a one-third interest in whatever property of which she might die seized or possessed.

When Jerry, on January 29, 1951, exercised the option, the mother endorsed the check given in payment thereof and gave it to Melvin. The Hortons, immediately thereafter, began building a home and used the $6,000 to help finance the building thereof. This home, located at 3220 Fourth Avenue in Kearney, Nebraska, they now occupy. The Hortons did not give the mother anything to evidence the $6,000 they received except as it is evidenced by Melvin's signature on the check which was given to the mother in payment of her interest in the farm.

Thus, in regard to the elements necessary to establish undue influence, it appears from the evidence adduced that the testatrix was subject to such influence, especially

by the Hortons; that the opportunity to exercise it existed seems beyond the slightest question; that there was a disposition to exercise it is evidenced by the Hortons' course of conduct that brought about the estrangement between the mother and her other children and their families; and that the result appears to be the effect of such influence is fully evidenced by the fact that prior to her death the Hortons had either obtained or had arranged it so they would obtain, whenever her will was admitted and allowed to probate, everything the mother had when only a short time before, on November 7, 1949, she, by will, had clearly indicated her desire in this respect to the effect that she wanted to treat all of her children alike.

The evidence, if believed, and the jury had a right to believe it, shows a planned scheme or course of conduct on the part of the Hortons which caused the mother to dislike her children Jerry and Bessie and thus enable them, the Hortons, to induce the mother to either transfer to them what little of this world's goods she possessed or give it to them by will. That they would have accomplished this result, except for the jury's verdict, is fully evidenced by the record.

Having come to the foregoing conclusion we affirm the action of the trial court.

AFFIRMED.

JAMES ROLAND PERIGO ET AL., APPELLANTS, V. CHRISTENA MARY PERIGO, APPELLEE.

64 N. W. 2d 789

Filed June 4, 1954. No. 33489.

1. **Wills.** Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent.

2. ———. A patent ambiguity is one which appears upon the face of the instrument, which must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself.
3. ———. In searching for the intention of the testator the court must examine the entire will, consider all its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
4. ———. The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.
5. ———. The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Bertrand V. Tibbels, for appellants.

Townsend & Youmans, for appellee.

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

CHAPPELL, J.

Plaintiffs James Roland Perigo and Lucille Broshears, assignees of Earl Perigo, Alice Lowell, Lucy Houghland, Mary Smith, and Homer Perigo, having the alleged rights of remaindermen, brought this declaratory judgment action against defendant Christena Mary Perigo, testator's surviving widow, seeking construction of the will of Eugene Perigo who died testate on March 12, 1952, in Scotts Bluff County, and to obtain injunctive together with general equitable relief.

The following is conceded: On April 19, 1952, the will executed on December 19, 1951, was duly admitted to probate and defendant was appointed and qualified as executrix in conformity therewith, without objection; as such, she took possession of all the real and personal estate of testator and in that capacity has attempted

to and negotiated a sale of part of such property; and that Earl Perigo, Alice Lowell, Lucy Houghland, Mary Smith, and Homer Perigo are the only heirs at law of testator.

Plaintiffs in their petition alleged that the personal property and income from the realty of the estate was more than sufficient to supply defendant with the usual luxuries and customary necessaries, and sale of the property or any part of it or the use of the principal of the estate was wholly unnecessary for defendant's support and maintenance or preservation of the estate, and unless defendant was enjoined from doing so, the estate would be unnecessarily sold, conveyed, or wasted. Defendant's answer denied those allegations and alleged that sale of a portion of the realty was necessary in order to pay claims against the estate together with costs and expenses of administration, and other necessary charges.

Plaintiffs also alleged that it was the intention of testator in his will: (1) To confer upon defendant only the use of so much of the income from the property during her lifetime as should be necessary for defendant's comfort, support, and maintenance in accord with standards established by testator during his lifetime; (2) that he gave defendant the power of sale only for the purpose of preserving the estate, or if the income should be insufficient to maintain her as aforesaid; and (3) that the proceeds of any property sold by defendant should descend to plaintiffs and no part of the estate ever descend to the heirs of defendant, but that all property which was not necessary for her maintenance as aforesaid should descend to plaintiffs, his heirs, the remaindermen named in the second paragraph of his will. The answer of defendant denied those allegations, alleged that terms of the will were clear and unambiguous, requiring no construction, and prayed for dismissal of plaintiff's petition.

After hearing, whereat evidence was adduced in the

form of admissions and stipulations together with certain related exhibits, the trial court rendered its judgment construing the will in some material respects contrary to plaintiffs' contentions, denying any injunctive relief, and taxing costs to plaintiffs. Therefrom plaintiffs appealed to this court, separately assigning that the trial court erred in making certain findings and construing the will in several respects hereinafter discussed, and erred in denying injunctive relief. We conclude that the assignments should not be sustained. In that connection also, it should be noted that defendant did not cross-appeal.

Insofar as important here, testator's will provided: "FIRST, I direct that all my just debts, including the expenses of my last illness and burial and the expenses of administering my estate, shall be paid by my executrix as soon after my death as may be practicable.

"SECOND, All the rest and residue of my property of every kind and nature wherever situate and of which I may die seized or possessed or of which I may have the power of disposal at the time of my death, I give, devise, and bequeath unto my beloved wife, Christena Mary Perigo, for her use during her natural life, hereby giving unto my said wife the power of sale of any and all of said property of every kind and nature and wherever situate, and the use, disposition, expenditure, application, and investment, of the proceeds of any such sale as her own separate property; provided, however, that upon the death of my said wife, if any of said property shall not have been sold by her during her lifetime, then after the payment of the expenses of her last illness, her funeral charges, the expense of administration of her estate, and the payment of all debts which she may have contracted, all from the part of said property which she may not have sold during her lifetime, I give, devise, and bequeath the rest and residue thereof as follows, to-wit;

"A. One-third thereof to my sister, Alice Lowells, of

Boonville, Indiana, if she be living at the time of the death of my said wife, otherwise to the heirs at law of my said sister, Alice Lowells, share and share alike, who may be living at the time of the death of my said wife.

"B. One-third thereof to my brother, Earl Perigo, of Marion, Kentucky," in like manner as aforesaid.

"C. One-third thereof as follows, to-wit:

"1. One-third of said one third to my niece, Lucy Houghland, of Evansville, Indiana," also in like manner.

"2. One-third of said one-third to my niece, Mary Smith, of Boonville, Indiana," also in like manner.

"3. One-third of said one-third to my nephew, Homer Perigo, of Boonville, Indiana," also in like manner.

"THIRD, I hereby nominate and appoint my beloved wife, Christina Mary Perigo, as and for executrix of this my last will and testament, hereby giving unto my said executrix full power of sale of any and all property, of every kind and nature, whereever (sic) situate without leave or license of any court."

As we view it, there is no controverted material issue of fact, and no latent ambiguity appears in the will. The ambiguity, if any, is entirely patent, and extrinsic evidence was not admissible or controlling in a determination of the intention of testator.

In Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917, 33 A. L. R. 2d 543, this court held: "Extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent.

"A patent ambiguity is one which appears upon the face of the instrument, which must be removed by construction according to settled legal principles and not by evidence, and the intention of the testator is to be determined from the four corners of the will itself."

As recently as Kramer v. Larson, *ante* p. 404, 63 N. W.

2d 349, this court held: "A patent ambiguity in a will must be removed by interpretation according to legal principles and the intention of the testator must be found within the four corners of the will.

"In searching for the intention of the testator the court must examine the entire will, consider all its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.

"The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.

"The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention."

Also, as early as Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. N. S. 198, this court held: "It is the duty of the courts in construing a will to carry into effect the true intent of the testator, so far as that intent can be collected from the whole instrument, if not inconsistent with the rules of law; but the law imputes to the testator a knowledge of those rules, and he will be presumed to have executed his will with an understanding that the objects of his bounty may demand their portions in accordance therewith."

Part "SECOND" of the will here involved is that portion which must be construed in the light of language used therein and that appearing in related parts "FIRST" and "THIRD" heretofore set forth. Preliminary to a discussion thereof and determination of plaintiffs' contentions with regard to injunctive relief, there are certain basic facts which we summarize for clarity and convenience. Defendant was the second wife of testator. They were married March 27, 1932, following the death of testator's first wife in 1930, without children surviving. Also, there were no children the issue of testator's marriage to defendant. At the time of their marriage defendant owned an almost new Chevrolet auto-

mobile which was thereafter used by the parties, some household goods of no great consequence, and a savings account of about $100. Since that time defendant has not inherited or acquired any property except that acquired from and accumulated with testator during the 20 years of their marriage.

Prior to testator's death on March 12, 1952, he had been ill for a period of about 1½ years. At the time of his death he was 79 years of age, and at the time of this trial defendant was 69 years of age. As disclosed by the inventory of his estate, testator at the time of his death owned two described farms in Scotts Bluff County worth $46,200, together with money and personal property worth $4,529.67, making a total estate of $50,729.67. Concededly, there was also an oil and gas lease upon which annual delay rentals of $298.50 were being paid, which was not, for some reason unimportant here, included in the inventory. As executrix and not in her individual capacity, defendant had on December 24, 1952, entered into a written agreement to sell part of the land for $14,000, of which $1,000 was paid in cash, with $13,000 due and payable on or before March 1, 1953, dependent upon prescribed conditions which are unimportant here. In such agreement defendant reserved to herself an undivided one-half of the oil, gas, and mineral rights in such land during her lifetime, but the purchaser was to receive oil and gas lease delay rentals due after March 1, 1953. With regard to such sale agreement it will be observed that part "THIRD" of testator's will nominated and appointed defendant as executrix of his estate, giving her as such "full power of sale of any and all property, of every kind and nature, wherever situate without leave or license of any court." The sale agreement was thus entered into by defendant not in her individual capacity but as executrix under and by virtue of such power which is not here an issue or challenged by plaintiffs. Further, in any event it may be said that

plaintiffs failed to establish any fraud or lack of necessity for such sale.

On December 20, 1951, the day after execution of his will, testator appointed defendant his attorney in fact giving her wide and general authority. Prior to his death, testator also gave defendant a bill of sale to all his farming equipment which defendant sold for $7,000, of which $2,700 has been paid, with the balance of $4,300 evidenced by a promissory note. On January 10, 1952, defendant and testator sold one of his farms for $21,100 out of which $17,500 was paid for a home in Scottsbluff, with title taken only in defendant's name. There they lived until testator's death.

Exhibits appearing in the record disclose an accounting by defendant for all money deposited in the bank by her, giving the source thereof and all checks paid out by her, reciting to whom and for what purpose they were paid, from March 12, 1952, to June 30, 1953; all money received by defendant as executrix, giving the source thereof, from March 21, 1952, to November 3, 1952; all money received in defendant's individual capacity as devisee, giving the source thereof, from September 23, 1952, to June 27, 1953; all money expended by defendant upon real property of the estate, reciting to whom paid and for what purpose, from March 12, 1952, to June 26, 1953, in addition to estate payments theretofore listed; and all money paid by defendant from funds belonging to the estate and out of her own personal funds for expenses of administration, claims filed against the estate, debts owing by testator at the time of his death which were legitimate claims against the estate, and expenses incurred in handling the estate from March 12, 1952, to December 22, 1952, reciting to whom paid, and for what purpose, for a total of $4,780.07, and listing debts and obligations still due and unpaid, aggregating $5,343.26, in addition to administrative costs yet unpaid, and executrix fees not yet ascertained or paid.

The trial court specifically found in its decree: "* * *

that the defendant, Christena Mary Perigo, has attempted to sell and has negotiated for the sale of a part of the real estate comprising a part of said estate, and that such a sale was and is necessary, and that the defendant has not sold or conveyed any of said estate, and has not wasted any of said estate, nor been guilty of any fraud in connection therewith." The evidence clearly sustained such finding. There is no evidence which could sustain any contrary conclusion or support injunctive relief with relation thereto.

Further, in the trial court's finding, it is said: "The court further finds that it was not the intention of the testator that Christena Mary Perigo should have the power to dispose of the corpus of the estate, *or any substantial part of it,* by gifts inter vivos, nor that she should have the power of disposing of any of the corpus of the estate by will." (Italics supplied.) Plaintiffs argued in their first assignment that the italicized words aforesaid were erroneously included in such finding. The answer is that even if erroneously included, it was without prejudice to plaintiffs, since such language does not appear in paragraph V of the judgment itself, hereinafter set forth and discussed, which is controlling. Therefore, plaintiffs' contention has no merit, and requires no further discussion.

Plaintiffs' second assignment argued that such finding was also erroneous in failing to find that it was the intention of testator that defendant should not have the power to dispose of *the income of the estate* as well as the *corpus* thereof by gift inter vivos or by will. We find no merit in such contention, and the reasons therefor will be found in the discussion of plaintiffs' third related assignment.

The judgment of the trial court which construed the will and adjudicated testator's intent is divided into five separate Roman numeral paragraphs. They will be separately set forth and disposed of in the light of

plaintiffs' several separate contentions with reference thereto.

Paragraph I of such judgment construed the will: "As giving the corpus of the estate of Eugene Perigo, Deceased, to Christena Mary Perigo, for her use during her life time, without any limitation whatever upon her use and disposition of the rents, profits, and income, from said corpus." Plaintiffs' third assignment argued that such paragraph erred in not holding that the will implied "a limitation upon" defendant's "use and disposition of the rents, profits, and income from said corpus to her own use, comfortable support and maintenance, in accord with standards established by testator during his lifetime, with remainder, if any, on her death to" plaintiffs. We conclude that the assignment has no merit.

In Bramell v. Cole, 136 Mo. 201, 37 S. W. 924, 58 Am. S. R. 619, relied upon by plaintiffs, it is said: "The general rule undoubtedly is that one holding the life estate is entitled to the income of the property held, but if a different intention clearly appears from the will the rule of law must give way to the intention." A different intention does not clearly appear in the will at bar.

As said in Restatement, Property, § 119, p. 371: "The owner of a possessory estate for life, during the continuance of such estate has the privilege of taking and receiving all issues and profits derived from the land." The obligations with respect thereto imposed by subsequent sections are not an issue in this case.

In Abbott v. Wagner, 108 Neb. 359, 188 N. W. 113, relied upon by plaintiffs who contend that the will therein is materially comparable with that at bar, it is said: "She had the right to the use and income of the property for life, and this she could rightfully assign or transfer to another, and the court will be under the necessity of protecting the assignee in such use and income under such restrictions and safeguards as will, at

the same time, protect the interests of the remaindermen; but the right to dispose of the corpus of the property was a limited right, as we shall hereafter show, and could be exercised only by her for her own legitimate and reasonable personal purposes, consistent with the objects for which the life estate was created, and supplemental thereto, and could not be assigned and transferred to another, except by transfers made in good faith for such fair considerations and for such objects as must have been in the contemplation of testator when making his will."

In Estate of Larson, 261 Wis. 206, 52 N. W. 2d 141, which involved a will comparable in relevant material respects with that at bar, the court said: "It was not necessary for the court to apply any rules of construction to paragraph Third of the will since the language there used was clear and unambiguous. The widow was given a life estate. When the 'use' of property is given to a donee under the will, the word 'use' is synonymous with giving a 'life estate.' 66 C. J., Use, p. 69. Thus, the accumulations of income became her separate property. See Allen v. Boomer (1892), 82 Wis. 364, 372, 52 N. W. 426; Evans v. Kemp (1899), 104 Wis. 87, 80 N. W. 98. The fact that the testator specifically provided that she should have 'the right to use and enjoy the principal, as well as the interest, if she shall have need thereof for her care, comfort, or enjoyment' makes it clear that it was his intent to grant her an absolute life estate. Appellants' argument that the clause, 'if she shall have need thereof for her care, comfort, or enjoyment,' limits the gift to a life support estate is not sound, regardless of the punctuation employed in that paragraph of the will. Such a limitation would be hostile to the nature of the gift.

" 'An absolute gift of income is not cut down or reduced by a subsequent gift of power to make use of the principal if necessary . . .' 3 Page, Wills, (lifetime ed.), p. 435, sec. 1156.

" 'It is a general rule that "where there is a gift to a person indefinitely, with a superadded power of disposal, the donee takes an absolute estate." ' Will of Zweifel (1927), 194 Wis. 428, 435, 216 N. W. 840, and cases cited." See, also, 33 Am. Jur., Life Estates, Remainders, etc., § 285, p. 789.

In 31 C. J. S., Estates, § 41, p. 47, it is said: "In general a life tenant is entitled to everything in the nature of income or profits accruing during the continuance of the life estate.

"In the absence of any limitation or restriction thereof, everything in the nature of income or profits accruing during the continuance of the life estate belongs to the life tenant, and at his death, if not otherwise disposed of by him, passes to his representative; but any appreciation in the principal of the estate belongs to the remainderman unless it is otherwise provided by the grantor." In the case at bar, we find no limitation or restriction upon the rents, profits, or income during the continuance of defendant's life estate.

Medlin v. Medlin (Tex. Civ. App.), 203 S. W. 2d 635, a recent case, involved a will more verbose with respect to intent, but comparable in all relevant material respects with that at bar. In fact, the opinion is as nearly in point upon the issues here involved as any cited or found by us. In the opinion it is said: "The contention under the first point of error it that the surviving wife, Minnie Medlin, received under the will a limited, rather than a general life estate. Appellants assert that the estate bequeathed to her was fashioned simply to provide and safeguard a comfortable living and support during her lifetime. * * * They contend that the use of the quoted words indicates that the testator's plan and purpose was to limit the life estate bequeathed to his wife only to such use as might be necessary for her reasonable and comfortable maintenance and support. We are unable to agree with the appellants in this contention. We find nothing in the

will which indicates a purpose on the part of the testator to limit in respect to her welfare and support the life estate bequeathed to his surviving wife. The adjectives, 'reasonable' and 'comfortable', are not used in the will and, to ingraft their implications of limitation upon the bequest to her would be to change completely a material portion of the will and the benefits which obviously the testator intended to confer upon her. It bequeaths to her, during her lifetime, all of the testator's property with remainder to the children, share and share alike, and then goes further and confers upon the wife the power and authority to sell, transfer, mortgage and convey part or all of the property during her lifetime. * * *

"The use of the phrases 'use and enjoyment' and 'use and benefit' in other portions of the will was not a limitation of the estate bequeathed. If it had any effect, it made more positive the absolute life estate bequeathed to her. The use and benefit of the property bequeathed constitutes the essential features of a life estate and, in fact, themselves constitute such an estate. No particular form of words is necessary for the creation of a life estate. Where a will bequeathes the use of rents or revenues or use and benefit during a life in being, its effect is to bequeath a life estate whether the technical term is used or not. Neely v. Brogden, Tex. Civ. App., 214 S. W. 614; Morris v. Eddins, 18 Tex. Civ. App. 38, 44 S. W. 203; Sexton v. Cronkhite, 74 Ind. App. 245, 127 N. E. 829; Bryson v. Hicks, 78 Ind. App. 111, 134 N. E. 874; Rutland v. Emmanuel, 202 Ala. 269, 80 So. 107.

"In support of their contention, appellants cite us to the cases of Johnson v. Goldstein, Tex. Com. App., 215 S. W. 840, and Hair v. Farrell, 21 Tenn. App. 12, 103 S. W. 2d 918, the latter a Tennessee case, in which the question of limitations in such bequests were involved. There is no doubt that a limitation, such as that contended for by appellants, and those contained in the wills involved in those cases, may be placed upon an

estate by a testator but, before it can be said that the estate bequeathed is burdened with such a limitation, the will must contain language clearly indicating such to be the purpose of the testator. In the Johnson case, it was held that not even a life estate passed to the devisee. The provision of the will was that he should have the homestead place 'to be used and enjoyed by him as a home to live at for and during his natural life'. The court held that this provision extended to the devisee only a right of occupancy of the premises as a home during his lifetime, and that it did not amount to a life estate. In the Hair case the testator specifically provided that the property was bequeathed subject to limitations and conditions as thereafter specified. The will then proceeded to limit the estate to be used by her for her own support and maintenance and 'so long as she does not waste and squander the same' (21 Tenn. App. 12, 103 S. W. 2d 921). * * *

"By the second point of error appellants contend the court erred in holding that, under the provisions of the will, the devisee, Minnie Medlin, is entitled to the rents and revenues derived from the property during her lifetime. They say that, under the provisions of the will, the rents and revenues, over and above that which is necessary for her reasonable and comfortable maintenance and support, pass to and become a part of the corpus of the estate. It is a general rule, well established in this and other jurisdictions of this country, that in the absence of restrictions or limitations in the instrument creating a life estate, a life-tenant is entitled to everything in the nature of revenue or income produced by the property during his tenancy. Wagnon v. Wagnon, Tex. Civ. App., 16 S. W. 2d 366, and authorities there cited. Appellants contend that Section VI of the will places restrictions upon the estate and limits the rents and revenues to such as might be necessary for the comfortable support of the life-tenant, Minnie Medlin, during her lifetime. They assert that the same section

specifically provides that the rents and revenues not necessary for the payment of debts and the comfortable support of the surviving wife pass to the corpus of the estate and become the property of the remaindermen. Section VI expresses the intention which the testator had in mind when he executed the will. It provides that his wife shall have the full and complete management, use and enjoyment of all of his property during her lifetime, including all rents and revenues to be derived therefrom. It expresses the purpose of extending to her power to sell and convey the property or any portion thereof for the purpose of paying debts or to be used by her during her lifetime. It then provides that any of such properties remaining on hand at the time of her death, including other properties which she may acquire by exchange or reinvestment of the proceeds of properties which she might sell, shall become portions of the remainder, but we find no such provision as to the rents and revenues. In our opinion, the first portion of Section VI clearly vests in the surviving wife the title and ownership of the rents and revenues in keeping with the general rule concerning life estates and are not included in that portion of the section which refers to the payment of the debts and the use which she is permitted to make of the property. Rents and revenues are not there mentioned and the word 'proceeds' has reference only to the money or other consideration she might receive from the sale of any of the corpus of the estate."

As we view it, the language used in the will at bar gave defendant an absolute possessory life estate in the corpus of the estate without any limitation upon her use and disposition of the rents, profits, and income therefrom, as her own and not as any part of the corpus of the estate. In that connection, it will be noted that the words: "I give, devise, and bequeath the rest and residue thereof" to plaintiffs, refers and relates solely to and gives them, subject to the conditions aforesaid

first to be performed, only any of said property which "shall not have been sold" by defendant "during her lifetime," together with "the proceeds of the sale of any such property which she may have sold and converted into other property and not disposed of during her lifetime," as held by the trial court in paragraph IV of its judgment hereinafter discussed, from which no cross-appeal was taken. Rents, profits, and income are not mentioned in testator's will, and the word "proceeds" therein refers only to money or other consideration which defendant might receive from the sale of any of the corpus of the estate. The wills involved in authorities relied upon by plaintiffs did not any of them contain the all-inclusive power of sale and disposition together with uses of the proceeds thereof or the limited remainder provisions found in the will here involved.

In its decree the trial court found that the will was "not ambiguous; that the testator understood the meaning of the words which he used in his will, and that his intent was to make ample provision for the support, care, comfort and enjoyment of Christena Mary Perigo in the event she survived him, and that he did not intend to limit her merely to the use, nor to the bare income of his property in which he gave her a life use; that the testator gave her the broad power of disposal recited in his will so as to enable her freely to dispose of any or all of the property, and to convert it into other forms by exchange or reinvestment, as her judgment might dictate, and to use the principal, or so much of it as she might reasonably need or desire, for her own maintenance, pleasure, enjoyment, and comfort, and that the testator intended to make Christena Mary Perigo the sole judge of the necessity and wisdom of any transfers, and as to the extent to which it should be desirable or necessary for her to encroach upon the corpus of the property." Thereafter the judgment construed the will: "II. As giving to Christena Mary Perigo the power of sale of the corpus of said estate or any part thereof as

the said Christena Mary Perigo may deem necessary or wise.

"III. As giving to Christena Mary Perigo the right of use, disposition, expenditure, application, and investment of the proceeds of any sale of the corpus of said estate as to her may seem necessary or desirable for her own maintenance, pleasure, enjoyment and comfort."

In that connection, plaintiffs' assignments Nos. 4, 5, and 6 argued that such findings and paragraphs of the judgment were erroneous because they did not limit the exercise of the power of sale of the corpus by defendant as she "may reasonably deem necessary or wise, for the furtherance of the testator's intent to provide for her comfortable support and maintenance *in accord with standards established by him (the testator) during his lifetime,* and to preserve the estate for the benefit of the remaindermen named," (italics supplied), and likewise erroneously failed to so limit defendant's right "to the use, disposition, and expenditure, application and investment of the proceeds of any sale of the corpus of the said estate, * * *."

Plaintiffs relied primarily upon Abbott v. Wagner, *supra,* and In re Estate of Meldrum, 149 Minn. 342, 183 N. W. 835, cited and quoted from with approval therein. However, in the latter case the court finally said: "The state has moved for a reargument. We adhere to the original decision but some inaccuracies should be corrected.

"It is the opinion of the court that, under the terms of the will, the widow took only a life estate with the power to change the form of the corpus, but without any right, for her own benefit, to exhaust any portion of the principal. Statements in the opinion suggesting a power in the widow to sell for her support should be considered as inadvertently made." Thus, the authority is entirely distinguishable in the light of limited provisions of the will involved and does not support plaintiffs' contentions.

In Abbott v. Wagner, *supra,* this court said: "It is evident that the purpose of the testator was to make ample provision for the support, care, comfort and enjoyment of his wife, in case she survived him. He did not intend to limit her merely to the use, nor to the bare income of the property in which the life estate was created. It is obvious that the added power of disposal was bestowed upon her to enable her freely to dispose of any or all of the property, and to convert it into other forms, by exchange or reinvestment, as her judgment might dictate, and to use the principal, or so much of it as she might reasonably need or desire, for her own maintenance, pleasure, enjoyment and comfort, and she was made the sole judge of the necessity and wisdom of any such transfers, and as to the extent to which it should be necessary or desirable for her to encroach upon the corpus of the property, for the objects and purposes for which the power was bestowed. In all these matters it is obvious that testator intended to bestow upon his wife wide latitude and a large degree of discretion, but we cannot hold that testator intended to place it in her power to dispose of the corpus of the estate, or any substantial part of it, by gifts inter vivos, unless we are also prepared to hold that she can dispose of it by will, to whomsoever she pleases, which would imply a fee simple estate. Having construed the will to create in the wife but a life estate with power of disposal, we feel impelled to hold that any disposal made by her must be consistent with the objects and purposes testator had in mind in creating the life estate."

In that respect it is interesting to note that the judgment of the trial court in the case at bar is materially in conformity therewith, and we find no language in the will and none can be implied limiting defendant's power of sale or the use, disposition, expenditure, application, and investment of the proceeds therefrom as her own separate property *"in accord with standards established by him (meaning testator) during his lifetime."*

(Italics supplied.) Plaintiffs' contention in that regard has no merit.

Concededly, defendant must exercise the power of sale in good faith for a valuable consideration in the exercise of reasonable judgment, and must not intentionally waste or squander the corpus for the purpose of preventing the estate or any part thereof from ultimately descending to plaintiffs, but testator's primary concern here was defendant's maintenance, pleasure, enjoyment, and comfort throughout her old age without any regimentation or unlawful interference by plaintiffs or anyone else of secondary concern. We conclude that plaintiffs' fourth, fifth, and sixth assignments have no merit.

Paragraph IV of the trial court's judgment read: "That upon the death of Christena Mary Perigo, any of the property comprising the corpus of the estate of Eugene Perigo, deceased, which Christena Mary Perigo may not have sold during her lifetime, and the proceeds of the sale of any such property which she may have sold and converted into other property *and not disposed of during her lifetime,* shall first be applied to the payment of the expenses of her last illness, her funeral charges, the expenses of the administration of her estate and the payment of all debts which she may have contracted, with remainder over as follows, to-wit:" to plaintiffs, as aforesaid. (Italics supplied.) Paragraph V also reads: "That during her lifetime the defendant, Christena Mary Perigo, has no right, power, or authority to make any gift of, nor to devise any of, the property comprising the corpus of the estate of Eugene Perigo, deceased, nor the proceeds of the sale of any such property which she may have sold and converted into other property *and not disposed of during her lifetime.*" (Italics supplied.)

Plaintiffs' assignments Nos. 7 and 8 argued that use of the italicized words "and not disposed of during her lifetime" respectively appearing in each of such para-

graphs of the judgment were erroneous because such broad ambiguous language is not synonymous with "and not used by her during her lifetime" and might be employed by defendant to ultimately subvert the intent of the testator. As a matter of course, when the words "and not disposed of during her lifetime" are employed, as they must be, in the light of testator's will and the trial court's findings and judgment aforesaid construing the same, they mean "and not disposed of during her lifetime for the purpose of her own maintenance, pleasure, enjoyment and comfort." We so construe the language "and not disposed of during her lifetime" which respectively appears in paragraphs IV and V of the judgment. Thus plaintiffs' assignments Nos. 7 and 8 should not be sustained.

Plaintiffs' ninth and last assignment contends that the trial court erred in refusing injunctive relief. Such assignment has been heretofore disposed of contrary to that contention, and requires no further discussion.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

LESTER E. SHAMBLEN ET AL., APPELLEES, V. GREAT LAKES PIPE LINE COMPANY, A CORPORATION, APPELLANT.
64 N. W. 2d 728

Filed June 4, 1954. No. 33496.

1. **Evidence: Trial.** Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom.
2. ———: ———. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover.

3. **Witnesses: Evidence.** The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated.
4. **Contracts: Damages.** The damages recoverable under a contract for the payment of damages depend on the terms of the contract.
5. ———: ———. Where a party contracts to pay certain specified damages he impliedly excludes all damages not so expressed unless a contrary intent is plainly indicated.

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

Smith & Smith, for appellant.

George M. Tunison, Thomas P. Leary, and Leary & Leary, for appellees.

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

SIMMONS, C. J.

This is an action for damages based on a contract. Issues were made and trial had. The jury allowed specific amounts as damages to plaintiff on each of five items claimed.

This appeal questions the allowance of two of the five items of damages.

Defendant, by separate motions as to each item, presented the question of sufficiency of the evidence to sustain findings for the plaintiff. This was done by motions to strike the allegations from the petition and for dismissal of the claim or for a directed verdict made at the close of plaintiff's case in chief and at the close of the case. Defendant, after judgment was entered on the verdict, moved to set aside the rulings on the motions made at the close of all the evidence, and for an order sustaining the motions. In the alternative defendant moved for a new trial. The motions were overruled. Defendant appeals. One item of damages in the sum of $125, which the jury allowed, was deducted

from the amount of the verdict by the trial court. There is no error assigned as to that item. Two items in the sums of $160 and $375 are not challenged here. We reverse the judgment of the trial court and remand the cause with directions.

Plaintiffs are husband and wife and are the owners of farm land. For convenience we will refer to the plaintiff, meaning the husband, as he is the one testifying to the things herein recited. The defendant is the holder of a right-of-way agreement for pipelines across this land. One pipeline had been laid. Defendant in 1950 laid a second line across this land. This action arises out of that operation.

The agreement provides: "All damages to crops, surfaces, fences, or other improvements on said premises for and because of the laying of each line of pipe * * * shall be paid for as soon as said line or lines are completed." The contract further provided that the plaintiffs "* * * are to fully use and enjoy the said premises except the easement * * *."

For the purpose of these motions we state the evidence subject to the rule that plaintiff 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.

Plaintiff's home buildings are located in the northeast part of the farm. He had a barn and feed lot in the southwest part of the farm. There was a private road leading from one set of improvements to the other. There was a privately owned power line running across the farm lands to these buildings in the southwest part of the farm and across the right-of-way of defendant. Plaintiff alleged that this line was torn down and completely destroyed by a truck operated by defendant's contractor. The jury allowed $1,200 damages for the loss of that power line.

The line was of insulated wire carried on poles. Plaintiff's evidence is that on April 9, 1950, employees

of the defendant came upon his property and staked out the route of the pipeline. On April 14 about 9 a. m. he went into the field across which this line runs and set corn stalks on fire. The stalks were dry and a nice breeze was blowing. He returned to his house. Probably about 12 noon or 1 p. m. he heard the noise of a truck down in that vicinity and "just figured it was somebody" from the pipeline company. He went down into the field about 2 p. m. and found the poles on each side of the road "where they would drive under the wire," "leaning," and "pulled to the south." The wire had been dragged to the south "just like they hooked it on the truck, or whatever the vehicle was," and "was just laying down in the field and the insulation was burned off." He further testified that he found dual-wheel truck tracks where "somebody had evidently come in from F Street" (to the north), "driven down this hill and evidently had hooked the two wires on something, I don't know what it was, and drug the wire down the hill * * * which tore about 1200 feet of that wire loose," and that the "truck" had gone further south, "turned around and come back out of the property" following the stakes for the pipeline. "* * * that might have been somebody else looking for their fence crew, I don't know who it was."

Prior to that time the only truck which defendant had had on plaintiff's land was a "pickup truck" that had been stopped, turned around, and driven out before it reached the point involved.

Plaintiff relies on the rule last stated in Koutsky v. Bowman, 157 Neb. 919, 62 N. W. 2d 114, which is: "Circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."

The rule also is: "Where several inferences are de-

ducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover." Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624.

It is patent that this evidence is clearly insufficient to sustain a finding that a truck for which defendant was responsible entered plaintiff's property, struck the power line, and tore it down. Plaintiff's evidence is solely one of suspicion and conjecture. The trial court erred in not sustaining the several motions directed at this claim.

The next item of damages which the trial court submitted to the jury and upon which it allowed damages in the sum of $2,800 is referred to as the corn claim. In essence it is that because of defendant's operations on plaintiff's land, he was unable to plant corn on a part of his land until some time in June; that he then planted "90-day corn"; and that the production was less than corn normally planted and of poor quality. His claim is based on the allegation that "it was impossible to plant the field on the west side of the pipeline until June 13, 1950 because there was no way to move a tractor or machinery across the pipeline."

The plaintiff's evidence is that the normal time for starting to plant corn is May 15; that on May 16, 1950, he started planting corn on the south end of the farm; and that during that morning the defendant entered from the south and began placing pipe on the ground across his land, and completed laying the pipe across his land on May 17. The pipes were 13 to 14 inches in diameter and 30 feet long by plaintiff's evidence, and 40 feet long by defendant's evidence, and weighed approximately 1,680 pounds. They were strung out on top of the ground so as to form an unbroken line across his land. Defendant's evidence is that an opening was left at the field road and that the trench was filled in

at that point after the ditcher had gone across it. On May 26 the defendant entered and dug the trench across plaintiff's land, placing the backfill dirt to the west. This work was completed on May 28. On June 3, defendant made a crossing on the field road so that plaintiff could enter his west field. This was available for 2 hours and then was dug out. The trench was filled and he was able to cross to his west field for planting on June 13.

Plaintiff's buildings and machinery were on the east side of this line of pipe. The field where he claims he was unable to plant was on the west side. Plaintiff alleged that the line of pipe continuously blocked the road and blocked the moving of trucks, tractors, or other machinery into the fields west of the pipeline and that it was impossible to plant the field on the west side of the pipeline until June 13, 1950, because there was no way to move a tractor or machinery across the pipeline. The trial court submitted to the jury the issue of the inaccessibility of the land for seasonable planting of corn and also whether or not plaintiff could with "reasonable diligence" have had access to his field.

The established rule is: "Where two parties have made a contract which one of them has broken, the other must make reasonable exertions to render his injury as light as possible, and he cannot recover from the party breaking the contract damages which would have been avoided had he performed such duty." Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749. See, also, Marcell v. Midland Title Guarantee & Abstract Co., 112 Neb. 420, 199 N. W. 731.

The questions are—did the plaintiff prove inaccessibility, and if so, did he make reasonable exertions to render his injury as light as possible?

Plaintiff's testimony is that the average planting time would have been from 2 to 3 days but that normally 4 or 5 days might be required allowing for breakdowns and interference, and that if he had started on May 16,

1950, he could easily have finished planting by May 21. Plaintiff's testimony is that he asked defendant to move its pieces out of the way and give him access to the west field "for the first time" on May 28.

It appears from this testimony that plaintiff's access to his west field across his own land was not fully interfered with by the line of loose pipe until May 17, 1950. Thereafter it was not fully interfered with by the trench until May 28. During this period at least 10 days of normal planting season passed. It was not until "past the 1st of June" that it was too late to plant regular-type corn. Plaintiff did not undertake the reasonable exertion of pulling a length of pipe out of the way or building a dirt grade over a 14-inch diameter pipe. It was not until May 28 that he asked the defendant about a crossing to his west field. It was not until that time that the trench fully interfered with access to the west field.

A graveled highway runs along the north side of plaintiff's land. It is adjacent to the west field. It connects with a driveway into plaintiff's home buildings. Defendant cut an opening in plaintiff's fence along the north side of between 40 and 50 feet. This was the opening used by defendant to enter plaintiff's property from the north. According to plaintiff's testimony a ditch ran all the way down along the south side of this road. Plaintiff describes it as a "big ditch." The only evidence we find as to the depth of the ditch at this opening is that of the defendant that it was about 3 feet lower than the center line of the highway. Defendant used this entrance as a "highway" for constant traffic for small trucks, large trucks, and heavy equipment. Plaintiff's evidence is that defendant at all times entered to the east of the line of pipe. We find no evidence that defendant made any fill of the ditch at that point. Defendant's evidence is that it did not. This gate opened directly into plaintiff's west field.

Defendant, coming from the south, laid pipe toward

that gate and toward the approximate center of it. At that point there were three lengths of pipe laid side by side to be used under the F Street road. There is a dispute in the construction of the evidence as to whether these reached the fence line or were back from it a distance of 20 or 25 feet. In any event the pipe did not prevent access to the field so far as travel from F Street into the field on either side of the pipe is concerned. Plaintiff testified that up to the time the trench was dug there on May 28, 1950, "there was no ditching and no obstruction so far as this 40 or 50-foot gate was concerned." After the trench was dug the backfill dirt was west of the trench. It would interfere with passage, and require the removal of a bit more of fence. Plaintiff testified that the fence could have been cut along there anywhere as easily as defendant did it, and that there being a fence along there rather than a gate was immaterial. Plaintiff testified that he never made any attempt to make a crossing or to enter his west field from the F Street road. There is evidence that would sustain a finding of inaccessibility at the northwest corner of his land some distance to the west of the opening here discussed.

It is quite apparent that plaintiff could have entered and planted his west field from the F Street road, at any time, so far as defendant's operations are concerned, in part without any interference, and in part by the use of reasonable exertion. He did nothing in that regard.

In reaching this conclusion we have not overlooked the testimony of plaintiff's witness on rebuttal, Martin Bock, a neighbor to the west. This witness, as to F Street west from the pipeline to the corner, testified that "during the spring and summer of 1950" he could not have driven a tractor across there. He testified that he was the owner of and had driven a tractor. The question was asked as to what he, the witness, could do. An examination of the foundation questions asked shows that he had in mind an area further to the west where

there was a bank, a swampy place, and trees growing. We find no evidence of any witness that puts these obstructions in the area immediately to the west of the pipeline at F Street. He is not shown to have any knowledge of the condition of the road at the time here involved except as above stated. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. Williams v. Watson Bros. Transportation Co., 145 Neb. 466, 16 N. W. 2d 199.

Finally it developed in the evidence that there was a physical way of access to the west field by going west along the F Street road, then along a private driveway on the Bock land, and across a cultivated field where oats were growing. There had formerly been a road across the field at that point. There is a dispute in the evidence as to whether or not permission could have been had to enter by that way. However, plaintiff made no effort to secure permission or enter across the Bock land.

Resolving the controverted facts in plaintiff's favor, and giving him the benefit of every inference that can reasonably be deduced from the evidence, we find that plaintiff has not sustained his burden of proof that his west field was inaccessible for planting corn during the normal planting period. The evidence, so viewed, shows unimpeded access to this field through the F Street entrance at all times up to May 28, 1950. Likewise the evidence shows no effort to render his injury as light as possible. The trial court erred in not sustaining the motion made at the close of all the evidence in the case and that made after judgment.

In his original petition plaintiff alleged that he had ordered 80 head of cattle for delivery on or about April 15, 1950; and that he planned on feeding and selling them in July 1950. He further alleged that by reason of the destruction of the power line and the construction of the pipeline he had no practical access to his

feed lot for transportation of the cattle, or for watering, feeding, and caring for them. He sought the recovery of damages for loss of anticipated profits had he received and fed the cattle. Defendant moved to strike these allegations from the petition. The trial court sustained the motion. Later plaintiff moved to amend his petition by restoring these paragraphs. The trial court denied the motion. At the trial the plaintiff made an offer of proof of the above matters. The trial court sustained defendant's objections to this offer. Plaintiff cross-appeals, assigning these rulings as error. We see no necessity of determining procedural questions suggested by defendant.

Defendant here contracted to pay "All damages to crops, surfaces, fences, or other improvements on said premises for and because of the laying of each line of pipe * * *."

The damages recoverable under a contract for the payment of damages depend on the terms of the contract. Where a party contracts to pay certain specified damages he impliedly excludes all damages not so expressed unless a contrary intent is plainly indicated. This is but an application of the maxim that an expression of one thing is the exclusion of another, which we have followed. See, School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550; Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409. See, also, 17 C. J. S., Contracts, § 312, p. 730; 12 Am. Jur., Contracts, § 239, p. 765. This rule has been applied to contracts of the kind here involved. See, Fulkerson v. Great Lakes Pipe Line Co., 335 Mo. 1058, 75 S. W. 2d 844; Shell Pipe Line Corporation v. Coston (Tex. Civ. App.), 35 S. W. 2d 1056; O'Connor v. Great Lakes Pipe Line Co., 63 F. 2d 523.

We think it patent that defendant did not contract to pay damages for loss of profits on a prospective cattle-feeding operation. The trial court did not err in its

rulings on this matter. The cross-appeal is accordingly denied.

The judgment of the trial court is reversed and the cause is remanded with directions to sustain defendant's motions and to further reduce the amount of the verdict and judgment in the sums of $1,200 and $2,800. Stated otherwise, judgment is directed to be entered for the plaintiff in the sum of $535.

REVERSED AND REMANDED WITH DIRECTIONS.

THE SUMMIT FIDELITY AND SURETY COMPANY OF AKRON, OHIO, A CORPORATION, ET AL., APPELLEES, V. FRANK G. NIMTZ ET AL., APPELLANTS.

64 N. W. 2d 803

Filed June 4, 1954. No. 33512.

1. **Courts.** The judges of the municipal court of the city of Omaha are authorized by statute to promulgate rules of procedure and practice in said court not in conflict with the laws governing such matters.
2. ———. Subject to conformity to constitutional and statutory limitations and provisions, courts have inherent power to make reasonable rules for the regulation of their practice and the conduct of their business.
3. **Mandamus.** Before the court is warranted in granting a peremptory writ of mandamus, it must be made to appear that the relator had a clear legal right to the performance by the respondent of the duty which it is sought to enforce, and that nothing essential to that right will be taken by intendment.
4. ———. The statute authorizing issuance of a peremptory writ of mandamus without notice refers to cases in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative that notice must be dispensed with in order to prevent a failure of justice.
5. **Constitutional Law.** This court will refuse to pass upon the constitutionality of a rule promulgated by a court unless it is necessary for a proper disposition of an action pending in this court.

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

Edward F. Fogarty, Herbert M. Fitle, Bernard E. Vinardi, and *Neal H. Hilmes,* for appellants.

Eugene D. O'Sullivan, for appellees.

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

MESSMORE, J.

The relators filed a petition in the district court for Douglas County praying forthwith for a writ of mandamus against the five judges of the municipal court of the city of Omaha and the chief of police of the city of Omaha requiring the respondents to cease enforcing municipal court rule No. 12; from barring the relators from carrying on their bonding business in the municipal court of Omaha; to accept the appeal bond tendered on behalf of Fred H. Goodhart by relators; and to nullify the proceedings against relators taken under rule No. 12 of the municipal court. On the same day the petition was filed, and without notice of any kind to the respondents, the district court issued a peremptory writ of mandamus as prayed. The respondents perfected appeal to this court from the order granting the peremptory writ of mandamus which was based solely upon the allegations of the petition.

The petition, insofar as it need be considered in this appeal, alleged in substance as follows: That the Summit Fidelity and Surety Company, an Ohio corporation, was qualified to do business in the State of Nebraska as a bonding and surety company, writing also bail bonds in criminal cases; that L. S. Cornett and Verna L. Cornett were residents of Omaha, Douglas County, Nebraska, who were licensed resident agents and attorneys in fact of the surety company; that George Vanous was a resident of Omaha, Nebraska, and an agent, servant, and employee of L. S. Cornett and Verna L. Cornett and as

such also transacted general bonding business for the surety company; and that on April 30, 1953, the judges of the municipal court of the city of Omaha passed and were enforcing rule No. 12 of the municipal court relating to professional bondsmen. This rule provides in part: "(a) A professional bondsman shall be deemed any person, corporation or agent thereof who receives directly or indirectly any fee, gain or reward as compensation for acting as surety on any recognizance required by law to be filed in any matter pending in this Court. (b) No professional bondsman shall be accepted as surety upon any recognizance unless authorized to act as surety by the Judges of this Court. (c) Any person desiring to act as professional bondsman shall make application for approval by the Judges, * * *," and then certain information as to assets, debts, criminal record, moral character, a list of employees and agents, and a list of all defaults is required to be furnished. There are other requirements, among which are: "(e) Bondsmen shall be excluded from inside the rail of the criminal court rooms and from the Judge's chambers except when their presence is necessary for official court business. (f) Neither bondsmen nor their agents shall loiter in the court room, corridors or elsewhere in or near Police Headquarters for the purpose of soliciting business or any other purpose. * * * (k) No bondsman shall at any time have access to the cell blocks or other places of detention in either the Central or South Side Police Headquarters. (1) Any bondsman who fails to meet any of the qualifications herein enumerated or who violates any of the laws of the United States, the State of Nebraska, or the Rules of this Court, shall after due notice and hearing be removed from the approved list of bondsmen." Then the rule makes reference to the bond schedule which need not be set out here.

The petition further alleged that, although applicants L. S. Cornett and Verna L. Cornett contended that rule No. 12 of the municipal court was without warrant or

authority in law, in an effort to promote harmony Verna L. Cornett sought to comply with the order of the court, and filed an application to be qualified by the municipal court as a professional bond writer in said court, and stated specifically in the application that L. S. Cornett would in no way, directly or indirectly, be identified, interested, or connected with said insurance writing in the Omaha police courts and would derive no benefits therefrom. The application was signed by Verna L. Cornett. This application was disapproved by the judges of the municipal court of the city of Omaha on April 30, 1953.

The petition further alleged that on May 1, 1953, the chief of police of the city of Omaha posted, or caused to be posted, in the police stations of Omaha a notice quoting the resolution of the judges of the municipal court of the city of Omaha. This notice referred to L. S. Cornett, professional bondsman, and was to the effect that he had been convicted of charges arising from his activities as a professional bondsman, which conviction had been sustained by the Supreme Court of this state, and also made reference to George Vanous, a business associate, agent, or employee of L. S. Cornett, and prohibited these persons from acting in any capacity in providing bonds of any nature in matters pending in the municipal court for Omaha, Nebraska, the prohibition to be effective from the date thereof and to continue until further order of the court. It was further ordered that L. S. Cornett and George Vanous, their associates, agents, and employees should not loiter in or about any of the courtrooms of the municipal court of Omaha, Nebraska.

By letter dated May 13, 1953, the application of Verna L. Cornett to act as a professional bondswoman in matters pending in the municipal court was disapproved by the judges of that court.

The petition further alleged that on July 17, 1953, the relators filed in the municipal court an application to

recall the order of May 13, 1953, and to annul the order of the court posted in the south side and central police stations on May 1, 1953, which was heard by the municipal court on July 24, 1953, and denied by it on August 28, 1953. On September 10, 1953, the relators, through their attorney, tendered to one of the judges of the municipal court an appeal bond for one Fred H. Goodhart which was refused by said judge because the municipal judges had agreed unanimously not to accept bonds of the relators.

The petition further alleged that relators were prevented from transacting any bail bond or any other bonding business in or through the municipal court by virtue of the unlawful and ultra vires acts and doings of the respondents, and that great and irreparable damage and injury was being caused to the relators without adequate remedy at law. The petition then alleged legal propositions affecting the legality of rule No. 12, which, insofar as necessary, will be referred to in the opinion.

The order of the district court, by the peremptory writ of mandamus, recited that the respondents attempted to regulate, hinder, and hamper the efforts of the relators to exercise their rights to carry on a bonding business pursuant to their having been duly qualified to do a general surety and bonding business by the Department of Insurance of the State of Nebraska, and had refused to vacate said rule and properly perform their legal duty in the premises by accepting relators' legal and proper bonds duly tendered to them. The command of the writ of mandamus appears previously in the opinion.

For convenience the parties will be referred to as relators and respondents.

The respondents assign as error that the peremptory writ of mandamus granted by the district court is contrary to law and should not have been issued against the respondents.

The judges of the municipal court may promulgate rules of procedure and practice in said court, not in conflict with the laws governing such matters. § 26-1,202, R. R. S. 1943.

In the case of Uerling v. State, 125 Neb. 374, 250 N. W. 243, this court said: "Subject to conformity to constitutional and statutory limitations and provisions, courts have inherent power to make reasonable rules for the regulation of their practice and the conduct of their business. 15 C. J. 901-915."

"While courts are very generally authorized by statute to make their own rules for the regulation of their practice and the conduct of their business, a court has, even in the absence of any statutory provision or regulation in reference thereto, inherent power to make such rules, subject to limitations based on reasonableness and conformity to constitutional and statutory provisions." 21 C. J. S., Courts, § 170, p. 261.

"Court rules of practice are adopted to facilitate the business of the court and to promote the orderly and expeditious administration of justice and for the benefit of the parties as well as for the benefit of the court." 21 C. J. S., Courts, § 170, p. 264.

This brings us to the proposition as to whether or not the business of professional bondsmen offering bonds before the municipal court of the city of Omaha is of such a nature that it is a business that may be regulated.

As stated in McDonough v. Goodcell, 13 Cal. 2d 741, 91 P. 2d 1035, 123 A. L. R. 1205: "Coming to the merits of the present application for the writ it must first be said without hesitation, that the conduct of a bail bond business is such a business as is subject to reasonable regulation under the police power of the state. The legislature has properly determined that abuses have arisen or may arise which make it necessary or desirable that there be some public supervision of that business."

In the case of Concord Casualty & Surety Co. v.

United States, 69 F. 2d 78, it is said: "The court is not without protection if the surety company is deemed a poor moral or unsafe risk. If the surety company should so conduct its business as to lose the confidence of the court or a judge thereof, the judge to whom an undertaking is submitted in any case for approval could refuse to approve it. * * * The District Court might by rule refuse to accept bonds of any named surety company. Like any other financial risk in giving an undertaking or guaranty, a moral risk as well as the material risk is involved."

State ex rel. Howell v. Schiele, 85 Ohio App. 356, 88 N. E. 2d 215, affirmed 153 Ohio St. 235, 91 N. E. 2d 5, was a case wherein the relator sought a writ of mandamus to compel the city treasurer to issue him a professional bondsman's license. The writ of mandamus was denied. The court said: "That the business of acting as a surety for pay upon court bonds, particularly in criminal cases, has a relation to the public safety and welfare we think is too clear for argument or extended citation of supporting precedents at this late date. A cursory examination discloses that in most, if not all, of the states recognition of this relationship has led to regulation of the calling in one form or another. * * * And so long as the regulation has a reasonable relation to the object to be accomplished and operates uniformly upon all pursuing the calling, it cannot be challenged, with success, as violating constitutional provisions guaranteeing due process of law and equal operation of the law."

In Jackson v. Beavers, 156 Ga. 71, 118 S. E. 751, the court said: "The business of professional bondsmen affords peculiar opportunity for fraud and imposition upon the persons whom they serve. Besides, such business may be so conducted as to seriously interfere with the fair and proper administration of the criminal laws. The unscrupulous may devise means and methods for the escape of violators of the penal statutes. They may use improper and illegal means to secure the acquittal

of their clients. For these and other reasons which could be given, this business comes within the police power of the State. Under this power the right of contract is not unlimited, but is subject to regulation."

It is true, as contended for by the relators, the regulation of professional bondsmen has been considered in the exercise of the police power by some states. This fact however is not conclusive that courts such as the municipal court of the city of Omaha would be barred from promulgating rules governing and regulating professional bondsmen offering bonds in such courts within the limitations prescribed by law as heretofore pointed out.

The fact that the Department of Insurance authorized the relators to do business in this state, and that L. S. Cornett and Verna L. Cornett are certified by the Department of Insurance as duly licensed resident agents of the Summit Fidelity and Surety Company, relator, does not make it mandatory that any court in the State of Nebraska accept any bond tendered in behalf of such company by such relators or their employees and servants. The acceptance and approval of bonds such as referred to in the instant case is a judicial function of the court. See § 29-901, R. S. Supp., 1953. See, also, Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N. W. 449.

We come to the principal proposition in this appeal, and that is whether or not the trial court erred as contended for by the respondents in granting the peremptory writ of mandamus.

Section 25-2159, R. R. S. 1943, provides: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued; * * *."

Before the court is warranted in granting a peremptory writ of mandamus, it must be made to appear that

the relator has a clear legal right to the performance by the respondent of the duty it is sought to enforce, and that nothing essential to that right will be taken by intendment. See State ex rel. Niles v. Weston, 67 Neb. 175, 93 N. W. 182.

It is only when there is no room for controversy as to the right of the applicant, and when from the nature of the facts set forth in the supporting affidavit a court can take judicial knowledge that a valid excuse is impossible, that a peremptory writ may issue without notice. See, State ex rel. Platte Valley Irr. Dist. v. Cochran, 139 Neb. 324, 297 N. W. 587; State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N. W. 1016.

As stated in Horton v. State ex rel. Hayden, 60 Neb. 701, 84 N. W. 87: "This statute undoubtedly provides for the issuance of the peremptory writ without notice where the court or judge can clearly see that the refusal of the respondent to perform some duty resulting from his office, trust or station, can admit of no possible justification. Cases may arise in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative that notice must be dispensed with in order to prevent a failure of justice." See, also, State ex rel. Platte Valley Irr. Dist. v. Cochran, *supra.*

A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. See, State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862; State ex rel. Bates v. Morgan, 154 Neb. 234, 47 N. W. 2d 512; State ex rel. Bintz v. State Board of Examiners, 155 Neb. 99, 50 N. W. 2d 784.

The relators' petition does not establish a clear legal duty on the part of the respondents; it does not preclude a valid excuse or possible justification on the part of the respondents; it does offer issues of fact; it does not establish an imperative necessity for prompt action; and it does permit of dispute and controversy. Accordingly,

a peremptory writ of mandamus could not be granted under the above-cited statutes of the state and under the foregoing decisions of this court. The peremptory writ of mandamus afforded no opportunity to establish the need and necessity for the rule here in question, the abuses sought to be eliminated thereby, and the reasons for excluding relators from a professional bond business before the court. It did not afford opportunity to present law determining the extent of the judicial discretion and the court's authority and power in such matters.

Where there are allegations of fact which for their existence depend on proofs to be introduced on the hearing or trial, the peremptory writ of mandamus may not issue, as we construe section 25-2159, R. R. S. 1943. See Mayer v. State ex rel. Wilkinson, 52 Neb. 764, 73 N. W. 214.

The relators make reference to an appeal bond tendered to a judge of the municipal court which was refused by the judge apparently in conformity with the rule in question. In any event, the person for whom the bond was tendered is not a party in this mandamus proceeding. Section 25-301, R. R. S. 1943, provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304, R. R. S. 1943. The exceptions stated in section 25-304, R. R. S. 1943, are in no way applicable to this person.

Other matters have been raised on this appeal which need not be determined in view of our holding.

It is not the function of this court, under the circumstances presented in this appeal, to pass upon the validity of the rule in question.

The conclusion reached renders it not only unnecessary but improper for us to pass upon the constitutionality of the rule promulgated by the municipal court of the city of Omaha. It is a general rule that courts will not pass upon the constitutionality of a statute, or

a rule such as appears here, unless it becomes necessary to a proper disposition of a case properly pending before the court. Since the proceeding instituted in the district court was not the proper remedy to review the validity of the rule in question, the constitutionality of the same was therefore not properly before this court for decision. See State ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28.

The district court erred in granting the peremptory writ, and its judgment awarding the writ is reversed, the writ quashed, and relators ordered to pay all costs.

REVERSED.

ARTHUR E. ANDERSON, APPELLEE, V. EARL COWGER, DOING BUSINESS AS COWGER SALES COMPANY, APPELLANT.

65 N. W. 2d 51

Filed June 11, 1954. No. 33488.

1. **Workmen's Compensation.** In order that a recovery may be had in an action under the workmen's compensation law it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death.
2. ———. In order to recover the burden is on the claimant to prove the foregoing by a preponderance of the evidence.
3. ———. An accident, within the meaning of the statute, shall be construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of injury.
4. ———. Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptom indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.
5. ———. Mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the workmen's compensation law.
6. ———. 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.

7. ———. For workmen's compensation purposes "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

8. ———. "Earning power," as used in subdivision (2), section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.

9. ———. The measure of compensation in such a case is 66 2/3 percent of the amount or percentage of impairment in general earning capacity, applied to the wages received by the workman at the time of the injury.

10. ———. If the payment of wages was intended to be in lieu of compensation, credit for the wages is allowed.

11. ———. If an employee is paid his regular wage, although he does no work at all, it is a reasonable inference that the allowance is in lieu of compensation.

12. ———. However, the employer can claim no credit if he denied his workmen's compensation liability while paying the wages.

APPEAL from the district court for Nuckolls County: STANLEY BARTOS, JUDGE. *Affirmed in part, and in part modified with directions.*

Robert H. Downing, for appellant.

George F. Johnson, for appellee.

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

WENKE, J.

This appeal from the district court for Nuckolls County involves a workmen's compensation claim. The district court found in favor of claimant Arthur E. Anderson and awarded him compensation at the rate of $26

per week, or a total of $559, for 21½ weeks for total temporary disability and $6.50 per week, from and after July 31, 1952, but for not more than 278½ weeks, for permanent partial disability of 25 percent. The court also awarded claimant $321 for doctor and hospital bills. From this award Earl Cowger, doing business as Cowger Sales Company, appealed and claimant has cross-appealed.

The questions raised by the appeal, as stated by the parties, are as follows: Is the evidence sufficient to show appellee suffered a compensable injury caused by an accident arising out of and in the course of his employment; if an award is justified what should be the extent thereof; and if an award is justified and the extent thereof determined, is the appellant entitled to any credits thereon by reason of the payments he has made to appellee?

On an appeal to this court in a workmen's compensation case the cause will be considered de novo upon the record before us. See, Gilbert v. Metropolitan Utilities Dist., 156 Neb. 750, 57 N. W. 2d 770; Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522; Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293; Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212; Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315; Herbert v. State, 124 Neb. 312, 246 N. W. 454.

Appellant was, at all times here material, the owner and operator of a wholesale grocery business at Superior, Nebraska. Appellee had been working for appellant about 21 years. At the time herein material he was employed as a combination salesman and warehouseman, working on the first 3 days of each week as a salesman and on the last 3 days thereof as a warehouseman. As a salesman he sold merchandise and took orders therefor in the towns surrounding Superior. These towns included Guide Rock, Nebraska. As a warehouseman he filled orders, loaded and unloaded trucks, and gen-

erally handled merchandise. For rendering these services appellee received $60 a week.

On Monday, March 3, 1952, appellee was working as a salesman. That morning, although the traveling conditions were bad due to a snowstorm, he drove to Guide Rock. Guide Rock is about 20 miles from Superior. There he called on the trade and took their orders. After he completed his work at Guide Rock it was his intention to drive on to Red Cloud, Nebraska. However, because the storm kept getting worse and the snow was beginning to block the highways, he decided to return to Superior. He started back shortly after 1 p. m., followed in another car by a salesman with the name of Kirchhoff. Kirchhoff was driving his own car. These two salesmen had arranged to drive back to Superior at the same time. Pursuant to their arrangement appellee took the lead. About 4 miles north of Superior appellee, as he was traveling east on Highway No. 3, ran into a snowdrift or snowbank located thereon. This occurred at a point just west of where Highway No. 3 intersects with Highway No. 14, the latter running north from Superior.

In order that a recovery may be had in an action under the workmen's compensation law it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death. Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658; Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592; Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Herbert v. State, *supra.*

In order to recover the burden is on the claimant to prove the foregoing by a preponderance of the evidence. Ruderman v. Forman Bros., *supra;* Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739; Hassmann v. City of Bloomfield, *supra;* Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1; Roccaforte v. State Furniture Co., 142 Neb. 768, 7 N. W. 2d 656; Herbert v. State, *supra.*

Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability. Rose v. City of Fairmont, 140 Neb. 550, 300 N. W. 574; Pixa v. Grainger Bros. Co., *supra.*

An accident, within the meaning of the statute, shall be construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of injury. § 48-151, R. R. S. 1943; Ruderman v. Forman Bros., *supra;* Muff v. Brainard, 150 Neb. 650, 35 N. W. 2d 597.

Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by our statute. Beam v. Goodyear Tire & Rubber Co., *supra;* Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492.

In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation law, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking. Beam v. Goodyear Tire & Rubber Co., *supra;* Hassmann v. City of Bloomfield, *supra;* Hamilton v. Huebner, *supra.*

At the place where appellee ran into a snowdrift or snowbank the state's highway department maintenance employees were trying to open up a passageway through the snow that had drifted onto Highway No. 3. They were using a snowplow for this purpose and bucking

into the drift trying to get an opening through it. They had not been able to do so.

The wind was blowing the snow from the north at 40 to 50 miles an hour. Appellee, because of this snow, was at the time momentarily driving blind and consequently did not have an opportunity to apply his brakes before he hit the snowdrift or snowbank. He hit it while driving at a speed of about 25 miles an hour. When he hit it his car came to a sudden stop. At the time he was holding the steering wheel with both hands and the sudden stop jarred his arms and shoulders. After he had stayed in his car for about 5 minutes he smelled gas fumes so he decided to get out, but because of the depth to which the snow was banked around his car he was not able to open any of its doors. He therefore rolled down the window of the right door and crawled out onto the snow. After getting to where he could walk he waded through the snow a distance estimated to be between 30 and 50 yards. In going this distance the snow was over his knees and, because of the force of the wind, he found it difficult to stand up and walk. When he finally reached the highway department's snowplow he got into the cab thereof.

We think these facts show appellee suffered an accident that arose out of and in the course of his employment. In this regard we have not overlooked the fact that appellee testified his exertion in walking through the snow from his car to the snowplow was no greater than that normally incident to his employment as a warehouseman where his duties included lifting sacks of sugar and salt weighing up to 100 pounds each and stacking them in piles as high as he could reach. In this respect we have often said that mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the workmen's compensation law. See, Muff v. Brainard, *supra;* Hamilton v. Huebner, *supra;* Roccaforte v. State Furniture Co., *supra*; Rose v. City

of Fairmont, *supra;* Gilkeson v. Northern Gas Engineering Co., 127 Neb. 124, 254 N. W. 714.

But here the accident did not consist solely of appellee's exertion in wading through the snow. This had been preceded by the jarring he received when his car came to a sudden stop. There was also the additional fact that he was walking through a snowstorm in freezing weather with the wind blowing up to 50 miles an hour.

Considering these other elements, we think the exertion here was greater than that ordinarily incident to appellee's employment and that the facts of the case cause it to fall more nearly within a situation comparable to those involved in Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698, 230 N. W. 688; and Manning v. Pomerene, *supra.*

We also think the facts of this case are comparable to those wherein compensation has been allowed when the employment in any particular case brings with it greater exposure to the elements than those to which the general public in the community were exposed. See, Laudenklos v. Department of Roads & Irrigation, 132 Neb. 234, 271 N. W. 790; Herbert v. State, *supra;* McNeil v. Omaha Flour Mills Co., 129 Neb. 329, 261 N. W. 694; Young v. Western Furniture & Mfg. Co., 101 Neb. 696, 164 N. W. 712, L. R. A. 1918B 1001.

We come then to the question of "objective symptoms of an injury" within the meaning of section 48-151, R. R. S. 1943. We have already set forth what may constitute such.

Shortly after appellee got in the cab of the snowplow its operator started for Superior. It took him somewhere between 15 and 20 minutes to get to the Hill Terminal filling station just north of Superior on Highway No. 14. About half way there appellee developed cramps. When the snowplow got to the station it stopped and appellee got out and walked into the station and went as far as the far end of a counter located there-

in and there leaned on it for support. Suddenly he staggered from the counter, his face turned kind of black, his mouth and nose filled up, and he passed out. Dr. Mason of Superior was called and attended him, taking him to the Brodstone Memorial Hospital in Superior. Appellee's condition was diagnosed as acute occlusion of the coronary artery.

In the case of Flammer v. Bethlehem Steel Co., 268 App. Div. 944, 51 N. Y. S. 2d 258, affirmed in Flammer v. Bethlehem Steel Co., 295 N. Y. 817, 66 N. E. 2d 588, it was held that the death of a plant patrolman from coronary occlusion which occurred while he was working in unusual and extreme weather conditions and while traveling through heavy snow and exposed to cold was compensable.

We announced the same principle in Schirmer v. Cedar County Farmers Telephone Co., 139 Neb. 182, 296 N. W. 875. Therein we said that when an employee suffers an accident in the course of his employment and, as a direct result thereof, suffers a coronary thrombosis the disability resulting therefrom is compensable.

The question then arises, has appellee established a causal connection between the accident he suffered and the cause of his disability?

Appellee was, at the time, 41 years of age, 5 feet 7 inches in height, and weighed between 185 and 190 pounds. He had always been in good health and had not needed the services of a doctor since getting out of school in the twenties. However, he had been examined by a doctor when he entered the armed services of his country in May 1943, and again when discharged therefrom in November 1945. On neither of these occasions did the doctor examining him make any comment about his health. Dr. Mason, who attended appellee at the Hill Terminal filling station very shortly after he became ill and who attended him all during his illness, testified his then condition had not necessarily been preceded by some diseased condition of the arteries of

his heart but that such condition may or may not have existed. He testified that in his opinion appellee had suffered coronary occlusion secondary to overexertion. He based his opinion on the history given him by appellee which was as follows: "* * * that he had stalled his car in the snowdrift and in the process of getting out of the car and attempting to dig out, he overexerted. It was in a very severe blizzard, and shortly after that on the way back when being brought back to town in a highway department truck he began having heart pain or pain in his chest * * *. He was in cramps at the time I examined him, * * *."

We have often said that 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. Ruderman v. Forman Bros., *supra;* Beam v. Goodyear Tire & Rubber Co., *supra;* Meester v. Schultz, *supra;* Muff v. Brainard, *supra*; Hassmann v. City of Bloomfield, *supra;* Hamilton v. Huebner, *supra;* Pixa v. Grainger Bros. Co., *supra.*

In this respect appellant calls our attention to the fact that the history of the case on which Dr. Mason based his opinion contained the statement that appellee overexerted himself "in the process of getting out of the car and attempting to dig out," whereas the fact is he did so in the process of getting out of the car and wading some 30 to 50 yards through snow over his knees in a snowstorm with winds up to 50 miles an hour. In this respect appellant cites the following from our opinion in Hamilton v. Huebner, *supra:* " 'The value of the opinion of an expert witness is dependant on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true.' Williams v. Watson Bros. Transportation Co., *supra* (145 Neb. 466, 16 N. W. 2d 199)."

Dr. Mason went on to testify that appellee's exposure

to the blizzard conditions and the jar he received when his car ran into the snowdrift were factors in causing his heart attack. In fact he testified that all of the factors to which he had testified caused appellee's condition. Happening when it did, with reference to the accident, we find such to be the fact.

Having come to the conclusion that the evidence establishes appellee suffered injury from the accident, which arose out of and in the course of his employment that resulted in his disability, the question arises, what was the extent of such disability?

"For workmen's compensation purposes 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262. See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561.

Appellee remained in the hospital for 3 weeks. Thereafter he was taken to his home. He stayed at home until August 1, 1952, in order to regain his health. There is no question but what, during this period of time, he was temporarily totally disabled.

On August 1, 1952, he returned to work. For about a month he was only able to work for about 2 hours in the mornings. During the second month he worked half days. Thereafter he put in full time but only doing sales work as Dr. Mason had advised him not to do certain things such as heavy lifting. This prevented him from doing his former work as a warehouseman. Appellee is still under Dr. Mason's care, the doctor checking him about once a month. Dr. Mason testified that while appellee can do light work he cannot do a laborer's work and, because of his condition, thinks his present disability is 25 percent. He thinks appellee may have further improvement. Appellee has at all times, since

March 3, 1952, drawn his regular pay check of $60 per week.

Section 48-121, R. R. S. 1943, provides by subsection (2), that: "For disability partial in character, * * * the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, * * * but not beyond three hundred weeks after the date of the accident causing disability. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability."

"Earning power," as used in subsection (2), section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. See Micek v. Omaha Steel Works, 136 Neb. 843, 287 N. W. 645.

This is more fully discussed in the foregoing-cited opinion as follows: "The test, under subdivision 2 of section 48-121, supra, is whether any element of plaintiff's earning power has been impaired. The term wages is not a complete synonym for earning power. The ability to earn wages in one's employment is, obviously, a primary base in the admeasurement of earning power, but several other component factors are also involved. These include eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work in which engaged. If any one or more of these four elements of earning power are affected and only partially impaired, as the result of an accident arising out of and in the course of employment, and the disability is not one covered by subdivision 3 of section 48-121, Comp. St. 1929, the right to compensation is

governed by subdivision 2 of such section. The right in such cases rests, as we have indicated, upon the fact that some preexisting element of earning capacity has been impaired." Micek v. Omaha Steel Works, *supra.*

Thus it will be seen that the compensation provided for by subsection (2) of section 48-121, R. R. S. 1943, is the difference between the wages received at the time of the injury and the earning power of the employee thereafter, that is, any partial disability compensation is to be determined by proof of impairment of earning power. If, after his injury, an employee receives the same or a higher wage than before that would be indicative of the fact that his earning power had not been impaired. Such fact, however, would not necessarily be conclusive since after the injury the employee might, for various reasons, receive the same or higher wages although his earning power had been impaired. Epsten v. Hancock-Epsten Co., 101 Neb. 442, 163 N. W. 767.

Here there is evidence tending to show that appellee is unable to perform all of the duties of his former employment and that his eligibility to procure employment generally has been reduced. We find the evidence justifies a finding that his earning power has been impaired. Certainly during August and September 1952, it was more than 25 percent. In Dr. Mason's opinion appellee has and is suffering a 25 percent permanent partial disability. We think the evidence sustains his opinion in this regard. If appellee improves, as Dr. Mason thinks he may, then appellant can take proper action based thereon.

We come then to the extent of the compensation that should be allowed for a 25 percent impairment. This is the issue to which appellee's cross-appeal is directed. The trial court fixed the amount at $6.50 per week. The statute fixes the amount at 66⅔ percent of the difference between the wages he was receiving and the earning power of the employee thereafter. As stated in Micek v. Omaha Steel Works, *supra:* "* * * the measure of

compensation in such a case is 66⅔ per cent. of the amount * * * or percentage of impairment in general earning capacity, applied to the wages received by the workman at the time of the injury, * * *."

Applying this formula to the wages appellee was receiving on March 3, 1952, the amount appellee was entitled to for 278½ weeks was $10 per week instead of $6.50.

We come then to the question of whether appellant should be given credit on these allowances out of the $60 per week that he has at all times been paying appellee. We think the following general principles quoted from Volume 2 of Prof. Arthur Larson's The Law of Workmen's Compensation are sound and have application:

"If the payment of wages was intended to be in lieu of compensation, credit for the wages is allowed." § 57.41, p. 18.

"* * * the employer can claim no credit if he denied his workmen's compensation liability while paying the wages." § 57.43, p. 20.

As to the first of these principles the author states: "However, since there is seldom any direct evidence on whether such an intention lay behind the payment, it must be inferred from the circumstances surrounding the payment." § 57.41, p. 18. He then goes on to say: "If he is paid his regular wage although he does no work at all, it is a reasonable inference that the allowance is in lieu of compensation." § 57.42, p. 19.

We have said of the provisions of the Workmen's Compensation Act that: "* * * the public has an interest in their due enforcement and observance which it is the duty of the court to protect, even without regard to the wishes of the parties. The act of which they form a part creates new remedies and new liabilities. The manner in which it operates is to be found within the legislation itself." Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42.

Section 48-137, R. R. S. 1943, provides: "* * * all claims for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 48-173. * * * Where, however, payments of compensation have been made in any case, such limitation shall not take effect until the expiration of one year from the time of the making of the last payment."

In Ashton v. Blue River Power Co., *supra,* we quoted with approval from Chase v. Emery Mfg. Co., 271 Pa. St. 265, the following construction of a like statute: "This section was placed in the act to prevent imposition on unwary employees; that is, to prevent money being paid for a period of time after an injury under some verbal arrangement, causing the employee to neglect presenting the agreement in some form as provided by law. The year limitation under the act, would begin to run from the last payment."

" 'The workmen's compensation act "is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it." ' Baade v. Omaha Flour Mills Co., 118 Neb. 445." Speas v. Boone County, 119 Neb. 58, 227 N. W. 87.

In construing a similar statute the Supreme Court of Illinois in Olney Seed Co. v. Industrial Commission, 403 Ill. 587, 88 N. E. 2d 24, laid down the following rules:

"* * * that the making of a claim within six months after the last weekly payment of the employer did not satisfy the requirements of section 24 of the Workmen's Compensation Act, where the evidence showed that the employer denied all liability under the act, and had made the payments voluntarily, without reference to the act, to help the employee.

"* * * that where an employer, with knowledge of

an accidental injury, makes payments to an injured employee during a period of time when the employee is unable to work, and liability under the compensation act is not denied, such payments will be construed to have been made in consequence of the employer's liability. In that case a claim for compensation filed within six months after the last payment of wages was deemed to have been filed in apt time."

That court, in discussing the question here involved, said: "We are of the opinion that the principle announced in those cases is applicable to the present case, where payments during a period of temporary total incapacity are involved. Those cases have construed wages paid by an employer who did not deny liability under the act, and who had knowledge of the employee's accidental injury, to be payment of compensation as contemplated by the act, for the purpose of fixing the time in which an employee must file a claim. Simple justice and consistency, in the absence of any statutory direction to the contrary, demands that payments of wages under such circumstances operate as a discharge, or partial discharge as the case may be, of the employer's monetary liability under the act. The payment of wages by the employer cannot be construed as having been made under the act for one purpose and then, under the same factual situation, be construed as not having been made under the act for another purpose."

Conversely, where the evidence shows the employer denied all liability under the act, and had made the payments voluntarily, without reference to the act, the payment of wages under such circumstances should not operate as a discharge, or partial discharge, as the case may be, of the employer's monetary liability under the act.

This court has often held, as already stated in the opinion, that if, after his injury, an employee receives the same or a higher wage than before that would be indicative of the fact that his earning power had not

been impaired but that such fact would not necessarily be conclusive since after the injury the employee might, for various reasons, receive the same or higher wages although his earning power had been impaired. The latter is the situation here after appellee returned to work. To say, however, that the employer is entitled to credit on the compensation allowed for partial disability from the wages paid is, in effect, to make such a rule meaningless unless the employee seeks employment elsewhere.

The general rule, in this regard, is stated in Department of Motor Vehicles v. Industrial Accident Commission, 14 Cal. 2d 189, 93 P. 2d 131, as follows: "* * * where an employee has received a permanent disability but is thereafter able to return to work and earn a salary for such service rendered, he is entitled to receive both disability indemnity payments and salary."

In McGhee v. Sinclair Refining Co., 146 Kan. 653, 73 P. 2d 39, 118 A. L. R. 725, that court held that the action of the commissioner in requiring in his award that the employer should have credit on the amount due the employee because of the wages paid to the employee between the time of his injury and the date of the award would bring about the practical result of nullifying the effect of the authorities in that jurisdiction to the effect that the fact that the workman returned to work for the same employer or for another employer at the same or higher wages does not prevent him from receiving compensation when the workmen's compensation commission and the trial court have found on substantial evidence that he has sustained a compensable injury.

After October 1, 1952, it is apparent appellee was giving full services as a salesman for the wages he was then being paid. Under such a situation it would certainly be inconsistent to say that part of what he earned should be credited to the appellant on his liability for compensation owing the appellee.

Basically wages and compensation, although arising out of an employer-employee relationship, are not alike. Wages arise out of the relationship, as such, while compensation arises only if the employee suffers an injury by reason of an accident arising out of and in the course of his employment, which injury causes either disability or death. The latter is in lieu of the employee's former common law right to recover damages in case of negligence. To say that the payment of wages is in fact the payment of compensation, when liability for the latter is denied, is both inconsistent with the facts and the intent of the employer.

We are cited to our holding in Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, as a basis for allowing credit for payment here made, but in that case liability was admitted and compensation voluntarily paid for 16 weeks and 2 days. It was only after the doctor had advised the employee that he could return to work, and he did so, that the employer quit paying compensation and paid him wages. He returned to work on March 6, 1944, but had to quit on May 1, 1944, because he was not able to perform the work. The doctor's advice had not proved to be correct. Under these circumstances, and properly so, the employer was held to be entitled to receive credit on his compensation liability for the wages paid because it is apparent there was never any intention on the part of the employer to deny liability if, in fact, the employee was still disabled.

The record shows that appellee made no actual demand upon appellant for compensation until sometime shortly after he returned to work on August 1, 1952, and there is nothing in the record to affirmatively show appellant actually denied such liability at any time during the period from March 3 to July 31, 1952, while appellee was temporarily totally disabled. Thus the evidence adduced fails to overcome the reasonable inference that the payment of wages during this period was in lieu of compensation. We, therefore, come to the conclusion that

appellant is entitled to receive credit for the payment of $559 which was allowed appellee for temporary total disability for the 21½ weeks from March 3 to July 31, 1952.

We therefore affirm that part of the district court's decree awarding appellee compensation for temporary total disability at the rate of $26 per week for 21½ weeks or a total of $559, and the sum of $321 for doctor and hospital bills, but direct that appellant be given credit for having paid the $559 so awarded. We modify that part of the decree awarding him $6.50 per week, from and after July 31, 1952, but not for more than 278½ weeks, for permanent partial disability of 25 percent and direct the trial court to enter a decree in behalf of appellee in that regard awarding him $10 per week, from and after July 31, 1952, but for not more than 278½ weeks, for permanent partial disability of 25 percent.

Under authority of section 48-125, R. R. S. 1943, we award appellee an attorney's fee of $250 for services of his attorney in this court, same to be taxed as costs. All costs are taxed to appellant.

AFFIRMED IN PART, AND IN PART MODIFIED WITH DIRECTIONS.

IN RE DELINQUENCY OF GARY ROTH ET AL. STATE OF NEBRASKA, APPELLEE, V. GARY ROTH ET AL., APPELLANTS.
64 N. W. 2d 799

Filed June 11, 1954. Nos. 33550, 33551.

1. **Infants: Courts.** In committing a boy to the industrial school the juvenile court is without power to fix a definite time of detention.
2. **Infants: Process.** The provisions of section 43-206, R. R. S. 1943, for issuance and service of process is jurisdictional.
3. ———: ———. In the absence of the issuance and service of process in conformity with section 43-206, R. R. S. 1943, or a waiver thereof, an order committing a child to the industrial school is void for want of jurisdiction.

4. **Judgments.** A judgment rendered where there is no proper service of process may be collaterally impeached.
5. **Process.** Where neither the record nor the files in a case furnish proof of service of process a finding of the court that due and legal notice of the filing and pendency of an action was given will not supply the lack of the facts necessary to confer jurisdiction.
6. **Infants: Trial.** A child charged with delinquency is entitled to be proceeded against in the manner provided by statute and is entitled to the safeguards essential to a fair and impartial trial.

APPEAL from the district court for Seward County: HARRY D. LANDIS, JUDGE. *Reversed.*

McKillip, Barth & Blevens and *Ivan A. Blevens,* for appellants.

Clarence S. Beck, Attorney General, *Homer L. Kyle,* and *Russell A. Souchek,* for appellee.

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

YEAGER, J.

This is an action which was instituted by the county attorney of Seward County, Nebraska, who filed a petition charging that Gary Roth, Lonnie Stutzman, and Vaughn Waln were delinquent children within the meaning of the Juvenile Court Act of the State of Nebraska. The alleged acts constituting delinquency were set out in the petition but it is not deemed necessary to repeat them herein. The petition was filed September 24, 1953.

Proceedings were had whereby the three were, on October 3, 1953, committed to the Boys' Training School at Kearney, Nebraska, until they attained the age of 21 years unless sooner paroled or legally discharged.

Nothing is authentically known as to the character of the proceedings except what is disclosed by the order of commitment. There is a purported bill of exceptions but it contains only a certificate of the court reporter that no evidence was taken by him and a certificate of the trial judge made February 6, 1954, containing a recital of certain routine procedural details.

The record presents for consideration on review only the order of commitment with its recitals and the implications and inferences which flow therefrom, the attacks made on the order in the district court after its rendition, the rulings thereon, and the application thereto of controlling principles.

After the order of commitment was rendered Gary Roth by his father and the father in his own behalf, and Lonnie Stutzman by his father and the father in his own behalf, filed motions for new trial. The motions were overruled. No appeal was taken from the rulings and in the view taken of the present proceeding it is not deemed necessary to make any further comment concerning them.

At the same time that the motions for new trial were filed applications and motions to set aside the commitments were filed. Instead of setting aside the commitments the court purportedly modified them as to Roth and Stutzman so as to reduce the period of commitment to December 24, 1953.

It should be pointed out that Vaughn Waln is not a party to any proceeding in this court.

The parties are in agreement that the purported modifications were a nullity and that notwithstanding them, under law, if the original order was otherwise valid, the commitments remained in full force and effect as to the period of commitment.

The principle making invalid the modifications is the following: "In committing a boy to the industrial school, the juvenile court cannot fix a definite term of detention, since that is fixed by law, and any limitation written into the warrant of commitment will be treated as surplusage." Cohen v. Clark, 107 Neb. 849, 187 N. W. 120.

After this modified order was rendered Gary Roth and his father and Lonnie Stutzman and his father made a motion to vacate it and also a motion to vacate the original order.

The applications to set aside the original commitment contain numerous specifications, but since there is no bill of exceptions it is concluded that but one may receive consideration here. That one is that the court did not have jurisdiction over the minors for want of service of summons or other process, as required by section 43-206, R. R. S. 1943.

This specification by its substance declares that the commitments are void for the reason that the court was without jurisdiction for failure to serve the process required by the statute.

The provision of section 43-206, R. R. S. 1943, to the extent necessary to state it at this point in the opinion is as follows: "Upon the filing of the complaint, a summons shall issue requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons, which time shall not be less than twenty-four hours after service. * * * on the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner. * * *."

The transcript does not disclose a compliance with this provision of the statute literally or substantially either as to service of process or as to hearing. The only other source of information on the subject is the order of commitment itself.

The order fails to show that summons was ever served on the parents of these boys. That the parents had custody and control is not questioned. It shows only in this connection that the parents were present at the time of rendition of the order of commitment.

It is the rule that a judgment rendered where there has been no service of process is void and it may be collaterally impeached. Alden Mercantile Co. v. Randall, 102 Neb. 738, 169 N. W. 433; Ehlers v. Grove, 147 Neb. 704, 24 N. W. 2d 866.

In Vandervort v. Finnell, 96 Neb. 515, 148 N. W. 332,

it was held that where neither the record nor the files in a case furnish proof of service of process a finding of the court that due and legal notice of the filing and pendency of the action was given will not supply the lack of the facts necessary to confer jurisdiction.

On this question there is a divergence of opinion in the decisions of other jurisdictions. Note, 68 A. L. R. 385 et seq.

However that may be, here there is no such recital nor one of similar import. The order here recites only that the parents were present at the time of rendition of the order of commitment, whereas the statute requires the issuance of summons and the allowance of not less than 24 hours for appearance at the designated place.

It must be said therefore that the order of commitment was rendered without jurisdiction and that it is void unless it may be said that the service of statutory process was waived. The appellee insists that there was a waiver.

The order does not declare that the service of process was waived. The appellee contends substantially however that since the parents were present when the boys were committed that service of process must be presumed to have been waived. To sustain this point of view they rely on the rule that voluntary appearance is the equivalent of service of process. In support of this proposition are cited section 25-516, R. R. S. 1943; Cropsey v. Wiggenhorn, 3 Neb. 108; Jensen v. Hinckley, 55 Utah 306, 185 P. 716; and Akers v. State, 114 Ind. App. 195, 51 N. E. 2d 91.

This rule properly applied and under proper circumstances is a sound one, but it has no application unless it is made to appear that there has been a bona fide appearance under circumstances which would justify a reasonable conclusion that the party submitted himself to the court's jurisdiction and his cause for determination by it. No such reasonable conclusion can flow from a mere showing, as is the situation here, that parties were

present in court when judgment was rendered.

The language of the statute (section 43-206, R. R. S. 1943) as well as reason appears to indicate that service of process in the manner provided should be regarded as jurisdictional. The purpose of the requirement clearly is to apprise the parent or custodian timely of a charge against the child and to afford a reasonable opportunity to safeguard his rights, interests, and liberty.

Without that protection a child of tender years could well become the victim of the merciless and be deprived of the constitutional and traditional safeguards which are guaranteed to even society's most depraved adult. Such a situation would be intolerable. See, Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308; Ripley v. Godden, *ante* p. 246, 63 N. W. 2d 151.

The Legislature never intended by the Juvenile Court Act to deprive children, who are unable under law to provide for their own protection, of the right to be protected against any such chance of injustice and oppression. It obviously intended that in order that jurisdiction should attach for the purpose of determining whether or not a child is a delinquent that the processes prescribed by statute should be complied with.

The order of commitment in question herein was entered without jurisdiction and accordingly the judgment of the district court is reversed.

REVERSED.

CARTER, J., dissenting.

The journal entries committing the two defendants involved in these cases state that their cases come on for final hearing with their fathers personally present in the courtroom. This constitutes an appearance and a waiver of the service of summons required by section 43-206, R. R. S. 1943. A motion to vacate the order of commitment was filed by the defendants and their respective fathers. It was considered and ruled on by the court. This is undisputable proof of the appearance of the father of each of the minor defendants. The

record thus made denotes absolute verity and affirmatively shows appearances of the fathers of the defendants. It is a waiver of process and a submission of their persons to the jurisdiction of the court. I submit that the court had jurisdiction of the defendants and that the judgment of the trial court should be affirmed.

FRED M. ATTEBERY ET AL., APPELLEES, V. O. D. PRENTICE ET AL., APPELLANTS.
65 N. W. 2d 138

Filed June 18, 1954. No. 33525.

1. **Wills.** In searching for the intention of the testator the court must examine the entire will, consider all its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
2. ———. It is the duty of the courts in construing a will to carry into effect the true intent of the testator, so far as that intent can be collected from the whole instrument, if it is not inconsistent with rules of law.
3. **Estates.** The relation of a life tenant to his remaindermen is that of a quasi trustee. The relation is the same if a power of disposal is annexed to the life estate.
4. **Wills.** There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof. Where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if, by a reasonable construction, it can be avoided.
5. **Occupying Claimants.** Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same.

APPEAL from the district court for Sioux County: EARL L. MEYER, JUDGE. *Affirmed as modified.*

Mothersead, Wright & Simmons, for appellants.

Neighbors & Danielson, for appellees.

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

WENKE, J.

This is an appeal from the district court for Sioux County. It primarily involves the construction of the last will and testament of O. T. Attebery, deceased.

O. T. Attebery died on August 24, 1942, a resident of Scotts Bluff County. He left a last will and testament which was duly allowed and admitted to probate by the county court of Scotts Bluff County on September 22, 1942. This will, insofar as here material, is as follows:

"Second: I give, devise, and bequeath unto my wife, Ellelia Attebery, all of my real estate wheresoever situated, to have and to hold during the period of her natural life, but with full power and authority to sell and convey the same or any part or portion thereof at any time when it may be advantageous or profitable to do so or when it becomes necessary for her support, said support to be such as is suitable for persons of her age and social position, and of a like character to which she was accustomed during the later years of our married life. The remainder of said real estate, if any, on the death of my wife, I give, devise, and bequeath to Henry B. Attebery, Richard L. Attebery, Fred M. Attebery, Charles W. Attebery, Harry E. Attebery, Lena Fuhrer Francil, Susie Wissenberg, and Sadie Strufing, share and share alike.

"Third: I give, devise, and bequeath unto my said wife, Ellelia Attebery, all my personal property of every description, with the request and direction that she shall execute a will leaving the remainder of such personal property as she shall be possessed of at her death to the beneficiaries named in the paragraph numbered second, of this my will, share and share alike.

"Fourth: In case of the death of myself and wife in a common disaster all of my said property of every

description, real, personal, or mixed, shall immediately descend to and vest in the beneficiaries named in the paragraph numbered second of this my will, share and share alike."

Among the assets of the estate was a ranch consisting of 8,360 acres of deeded land and a lease on a section of state school land. On July 1, 1951, the widow conveyed this land and assigned the lease on the section of school land to O. D. Prentice.

The consideration for the deed was an annuity contract secured by a mortgage on the real estate conveyed. By the terms of this contract O. D. Prentice agreed to pay the widow, during each year of her natural life the sum of $6,000, the same to be paid on the first day of July of each year commencing with July 1, 1951; to pay to her executor or administrator, upon her death, that part of the annual payment which had accrued up to the time of her death; to satisfy any and all claims which he had against her for professional services already rendered as her doctor; to make no charge for any professional services he might render to her in the future; and to pay any and all doctor and hospital bills which she might incur.

The widow died on December 16, 1952. Shortly after her death some of the parties named as remaindermen in the will of O. T. Attebery learned they were such. Thereafter, on December 29, 1952, the living remaindermen named in the will, and the heirs or successors of those who had died, commenced this action against O. D. Prentice and his wife, Mary Lou. The purpose of the action is to have the deed and conveyance from Ellelia Attebery to O. D. Prentice vacated, canceled, and annulled; to have the mortgage, dated June 30, 1951, and recorded in book 28 of mortgages, pages 191-192, canceled and annulled, and the purported lien thereof removed; to have the title to the real estate above described quieted in the plaintiffs; to require O. D. Prentice and Mary Lou Prentice to make an assignment

to plaintiffs of the lease from the State of Nebraska covering Section 16, Township 25 North, Range 57 West of the Sixth P. M., Sioux County, Nebraska, upon the payment by plaintiffs to defendants of a sum equal to the amount of the bonus paid to the State of Nebraska for said lease; and to have O. D. Prentice account to plaintiffs for the rents and income from said property.

The trial court found generally for the plaintiffs and decreed, insofar as here material, that upon payment by the plaintiffs into court the sum of $3,694.64 for the benefit of O. D. Prentice that the purported deed from Ellelia Attebery to the defendant O. D. Prentice dated July 1, 1951, be vacated, canceled, and annulled; that the mortgage dated June 30, 1951, be vacated, canceled, and annulled, and the purported lien of said mortgage upon the real property described in said mortgage be removed; that title to the real property described in the above-described deed be quieted in plaintiffs; and that the defendants assign to plaintiffs the school land lease from the State of Nebraska.

Defendants filed a motion for a new trial and have perfected this appeal from the overruling thereof.

Under the will the widow became possessed of a life estate in the ranch with a power of sale. See, Perigo v. Perigo, *ante* p. 733, 64 N. W. 2d 789; Annable v. Ricedorff, 140 Neb. 93, 299 N. W. 373; Abbott v. Wagner, 108 Neb. 359, 188 N. W. 113.

The character of the remainder as a vested estate is not affected by the conferring upon the life tenant the power to sell and convey the premises for certain purposes. Abbott v. Wagner, *supra;* Ashbaugh v. Wright, 152 Minn. 57, 188 N. W. 157. In other words, the widow did not become vested of the fee by reason of the authority vested in her by the will.

Based on the many cases and authorities cited it seems to be appellants' thought that the power of sale given the widow was sufficiently broad that thereunder she had an absolute and unlimited power of disposition and

could dispose of the real estate of which her husband died seized, or any part thereof, whenever she pleased as long as she felt it was in any way advantageous or profitable to her, provided she acted in good faith and did not waste or squander the property for the purpose of preventing the remainder from going to the remaindermen.

Also, it appears to be appellants' thought that her decisions on the question of what was necessary for her support required the exercise of judgment and discretion on her part and, if fairly and honestly made, would be conclusive.

In Perigo v. Perigo, *supra,* quoting from Kramer v. Larson, *ante* p. 404, 63 N. W. 2d 349, with approval, we held:

" 'In searching for the intention of the testator the court must examine the entire will, consider all its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.

" 'The intention of the testator as determined from the will must be given effect if it is not inconsistent with any rule of law.' "

Therein we also held, by quoting from Hill v. Hill, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. N. S. 198, that: " 'It is the duty of the courts in construing a will to carry into effect the true intent of the testator, so far as that intent can be collected from the whole instrument, if not inconsistent with the rules of law; but the law imputes to the testator a knowledge of those rules, and he will be presumed to have executed his will with an understanding that the objects of his bounty may demand their portions in accordance therewith.' "

Taking his will as a whole, O. T. Attebery gave to his wife, Ellelia Attebery, the life use of all his real estate with the remainder to "Henry B. Attebery, Richard L. Attebery, Fred M. Attebery, Charles W. Attebery, Harry

E. Attebery, Lena Fuhrer Francil, Susie Wissenberg, and Sadie Strufing, share and share alike." In connection therewith he gave the owner of the life use full power and authority to sell and convey the same, or any part or portion thereof, at any time when it became advantageous or profitable to do so, that is, advantageous or profitable to all parties interested therein. In addition to the income therefrom, in order to be sure his widow would always have sufficient for her support in a manner suitable for a person of her age and social position and in keeping with the standard to which she had become accustomed, he gave her full power and authority to sell and convey such real estate, or any part or portion thereof, when it became necessary for her to do so for that purpose.

The right here given the widow to dispose of the corpus of the property was a limited right and could only be exercised by her consistent with the objects and purposes for which the authority was given. Abbott v. Wagner, *supra.*

Ordinarily courts will not interfere with the discretion of the life tenant in the exercise of this authority but he is not necessarily the sole and ultimate judge thereof. A court of equity will review his judgment and, if the evidence adduced shows he has exceeded the authority given him, revise his judgment. Abbott v. Wagner, *supra;* Beliveau v. Beliveau, 217 Minn. 235, 14 N. W. 2d 360; Morford v. Dieffenbacker, 54 Mich. 593, 20 N. W. 600.

We will consider first the widow's authority to sell and convey in case it became necessary for her support. Under the terms of the will we think the widow was entitled to support solely from the estate without regard to her own separate means of support. See, Annotation, 101 A. L. R. 1465; In re Worman's Estate, 231 Iowa 1351, 4 N. W. 2d 373.

In considering the record we apply the following: "It is the duty of this court in an equity case to try

the issues de novo and to reach an independent decision without being influenced by the findings of the trial court except if the evidence is in irreconcilable conflict this court may consider that the trial court saw the witnesses, observed their manner of testifying, and accepted one version of the facts rather than the opposite." Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602.

The evidence shows that when the estate of her husband was settled the widow had a bank account of about $14,644; United States Government bonds, purchased in 1941 and 1942, with a value at maturity of $1,200; the life use of the home in which she lived; and the income from the ranch. That on July 1, 1951, when she conveyed the ranch, she had bank accounts totalling about $36,000; United States Government bonds with a value at maturity of $12,200, of which $11,000 had been purchased since the year of her husband's death; the life use of the home; and the life income from the ranch. On July 1, 1951, the ranch was leased until May 1, 1953, for a rental of $2,800 per year, and had an oil and gas lease thereon which was yielding delay rentals of $2,020 per year. The taxes on the ranch were between $900 and $1,000 per year.

It is self-evident, from the foregoing, that the income which the widow had been and was receiving from the ranch since her husband's death up to July 1, 1951, had been more than adequate for her support and had permitted her to substantially increase her own funds. In this regard the evidence establishes she was leasing the ranch for less than its fair rental value. There was absolutely no necessity or need for her selling the ranch for her support.

We come then to the question of whether or not she was authorized under the power and authority to sell and convey the same, or any part thereof, because it was advantageous or profitable to do so. We think this authority relates to all those interested therein, which would include remaindermen. It is apparent the widow,

whose duty it was to keep the improvements on the ranch in repair, had neglected this duty although the income was sufficient for that purpose.

The only advantage gained by the sale flowed to the widow. She was of the age of 68 years and 5 months at the time and it appears she did not like the responsibility of looking after the ranch, which included making necessary improvements and keeping the improvements thereon in repair; that the sale relieved her of this worry and gave her a feeling of security and peace of mind; and that it gave her some increase in her annual income, although not needed for her support. On the other hand it completely deprived the remaindermen of all rights therein as, under the contract, there would be nothing left for them whenever she died.

The relation of a life tenant to his remaindermen is that of a quasi trustee. The relation is the same if a power of disposal is annexed to the life estate. See, Beliveau v. Beliveau, *supra;* Mallett v. Hall, 129 Me. 148, 150 A. 531; Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. 61.

As stated in Mallett v. Hall, *supra:* "The life tenant is a trustee for the benefit of the remainderman only in the sense that the duty rests upon him merely to have due regard for the rights of those in remainder."

And, as stated in Beliveau v. Beliveau, *supra:* "* * * a life tenant is a quasi trustee of the property in the sense that he cannot injure or dispose of it to the injury of the remainderman, even though a power of disposition and encroachment are annexed to the life estate."

Here a ranch, reasonably worth at the time not less than $133,000, was conveyed by the widow at a time when no need existed for doing so, as far as her support is concerned, and certainly the benefits she would gain would not overcome the large loss the remaindermen would suffer. To permit this conveyance to stand would not only be unfair to the remaindermen but would permit the life tenant to perpetrate a fraud on them.

We think the evidence requires that the deed be set aside, the mortgage canceled and the lien thereof removed from the records of Sioux County, and the title to the lands quieted in the appellees. The trial court having so decreed, we affirm its action in so doing.

At the time of his death, O. T. Attebery was the owner of a lease on a section of the state's school lands. It was part of the real estate belonging to his estate. Beltner v. Carlson, 153 Neb. 797, 46 N. W. 2d 153. It apparently expired sometime after July 1, 1951. When a new lease was put up for sale it was successfully bid in by the widow. She then assigned it to O. D. Prentice. We think this lease was all part of the same transaction and that it should be returned to the appellees. We therefore affirm the trial court's decree so directing.

Sadie Strufing, one of the remaindermen named in the will, died prior to the testator. She was his sister-in-law and not a blood relative so her heirs took no interest under the will. See, § 30-228, R. R. S. 1943; Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713; In re Estate of Strelow, 117 Neb. 168, 220 N. W. 251; Woelk v. Luckhardt, 134 Neb. 55, 277 N. W. 836, 115 A. L. R. 437.

It is appellants' thought, because of the foregoing, that O. T. Attebery died intestate as to a ⅛ interest in this property because, as stated in Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917: "It is elementary that real estate not disposed of by will becomes intestate property and descends to the heirs at law of the testatrix." If such is the case, of course, the widow, there being no children, would inherit a one-half of the ⅛th or a 1/16th interest therein.

The trial court did not pass on this question because it was neither pleaded nor raised at the time of the trial and was first called to its attention by the motion for new trial.

It is apparent from his will that O. T. Attebery intended to make a complete testamentary disposition of all of his property by providing for his wife during her

lifetime and for certain persons after her death. We think what was said by the court in Bragg v. Litchfield, 212 Mass. 148, 98 N. E. 673, is applicable to the will here. Therein the court said: "In the present case we think that it appears from the will taken as a whole that the testator intended the provision which he made for his widow to be a full and final provision for her."

As stated in Goodrich v. Bonham, 142 Neb. 489, 6 N. W. 2d 788: "'There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof, and where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by any reasonable construction it can be avoided.' 69 C. J. 91. Consistent with this rule this court has held that in construing a will it is presumed that the testator intended to dispose of his entire estate unless the contrary is apparent from the will itself. Jones v. Hudson, 93 Neb. 561, 141 N. W. 141; In re Estate of Zimmerman, 122 Neb. 812, 241 N. W. 553; Luenenborg v. Luenenborg, 128 Neb. 624, 259 N. W. 649."

We think a proper construction of the will is that when O. T. Attebery died the other seven remaindermen, or their heirs, became vested with the remainder interest in the real estate of which he died seized subject only to the rights of the widow and that he did not die intestate as to any part thereof.

In making its accounting it is apparent that the trial court inadvertently failed to give appellants credit for taxes paid in the sum of $931.85 and payment on the lease of $104.60. The correct amount which appellees should pay into court is $4,731.09 and not $3,694.64.

While in possession of the ranch O. D. Prentice spent over $11,000 for material and labor in making, or attempting to make, certain repairs and improvements on the ranch. Nothing was allowed by the trial court for

these expenditures. We think he is entitled to be reimbursed for these repairs and improvements to the amount that he can show they enhanced the value of the real estate. Dougherty v. White, 112 Neb. 675, 200 N. W. 884, 36 A. L. R. 425.

As stated in Gombert v. Lyon, 72 Neb. 319, 100 N. W. 414, quoting from Lothrop v. Michaelson, 44 Neb. 633, 63 N. W. 28: " 'Where an occupying claimant is allowed for valuable and lasting improvements made while in possession, the measure of his recovery is the amount the real estate increased in value by reason of such improvements, and not the cost of making the same.' "

Prentice testified these repairs and improvements increased the value of the ranch in the amount he had expended. His cross-examination does not support such a conclusion. There certainly is no sufficient basis, from all the evidence adduced, to support such a finding. It is evident this issue was not sufficiently presented at the trial to permit the trial court to make any proper finding in regard thereto. If this rather large sum really enhanced the value of the ranch property we think, as a matter of equity, Prentice should be given a right to recover the amount thereof. When the cause is returned to the trial court the appellants should be given such privilege if request therefor is made within 20 days.

Having come to the foregoing conclusions, we do not find it necessary to discuss other matters raised by the appeal, such as the contention that the deed was obtained by undue influence; the inadequacy of the consideration therefor; the effect of the fact that Prentice and Ellelia Attebery stood in the relationship of doctor and patient, particularly in view of her age, and the weakened condition of her health and mind as affecting her ability to comprehend the effect of her act; and the question of the admissibility of the testimony of attorney Robert L. Gilbert.

We modify the decree of the trial court in accordance

with the conclusions we have herein reached and, as modified, the decree is affirmed with directions to the trial court to enter a decree in accordance herewith. All costs are taxed to appellants.

AFFIRMED AS MODIFIED.

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1. Where it appears that a witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of an automobile, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject. *Ambrozi v. Fry* 18
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2. A gift upon condition to a charitable corporation to further the purposes of the corporation is governed by the same principles of law as a gift to a charitable trust. *Board of Trustees of York College v. Cheney* 292
3. Under the doctrine of cy pres, if a definite function or duty cannot be performed in exact conformity with the scheme of the person who provided therefor, the function or duty must be performed with as close approximation to such scheme as is reasonably practicable. *Board of Trustees of York College v. Cheney* 292
4. The cy pres doctrine has no existence or operation when the donor himself has declared how the gift should be used in the event of the failure of the charitable use to which he, in the first instance, directed it should be devoted. *Board of Trustees of York College v. Cheney* 292
5. If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust. *Board of Trustees of York College v. Cheney* 292

Constitutional Law.
1. A statute imposing liability on the spouse of a mentally ill person to pay the cost of maintenance in a state hospital is constitutional. *County of Hamilton v. Thomsen* 254
2. The title to an act which recites that it relates to state institutions, and provides procedure for the recovery of cost of maintenance of patients in state hospitals, is not subject to attack on constitutional ground that it contains more than one subject. *County of Hamilton v. Thomsen* 254
3. If the general purpose of a legislative act is expressed in the title and the matter contained in the body of the act is germane thereto, the title is sufficient to satisfy constitutional requirements. *County of Hamilton v. Thomsen* 254
4. No rule of constitutional interpretation is violated by a legislative provision declaring retroactively a procedural method of recovery upon an existing substantive right. *County of Hamilton v. Thomsen* 254
5. Due process of law in respect to individual taxpayers is not involved in equalization between the counties as performed by the State Board of Equalization

and Assessment. *County of Douglas v. State Board of Equalization & Assessment* 325
County of Howard v. State Board of Equalization & Assessment 339

6. The police power is inherent in the effective conduct and maintenance of government. It is to be upheld even though the regulation affects adversely property rights of some firm, business, or individual. *Graham v. Graybar Electric Co.* 527
7. The zoning of property is permissible under the police power and its exercise may not be denied on the ground that individual property rights may be adversely affected. *Graham v. Graybar Electric Co.* 527
8. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; and it is, in legal contemplation, as inoperative as though it had never been passed. *Board of Educational Lands & Funds v. Gillett* 558
9. What is true of a legislative act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never at any time been possessed of any legal force. *Board of Educational Lands & Funds v. Gillett* 558
10. The Supreme Court will refuse to pass upon the constitutionality of a rule promulgated by a lower court unless it is necessary for a proper disposition of an action pending in the Supreme Court. *Summit Fidelity & Surety Co. v. Nimtz* 762

Contempt.

1. To establish contempt of court for failure to pay amounts fixed in a decree of divorce for the support of children, the evidence must disclose not only failure to comply with the decree but also that the failure was willful. *Frye v. Frye* 694
2. Contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction. *Frye v. Frye* 694
3. In a contempt proceeding before a conviction will lie, guilt must be established beyond a reasonable doubt. *Frye v. Frye* 694

Continuances.

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. *Vore v. State* 222

Contracts.

1. The damages recoverable under a contract depend on the terms thereof. *Shamblen v. Great Lakes Pipe Line Co.* 752
2. Where a party contracts to pay certain specified damages, he impliedly excludes all damages not so expressed unless a contrary intent is plainly indicated. *Shamblen v. Great Lakes Pipe Line Co.* 752

Corporations.

1. If a purported corporation has no existence, either de jure or de facto, it is subject to collateral attack by private persons as well as the state. *Baum v. Baum Holding Co.* 197
2. If a company has corporate existence, either de jure or de facto, a suit questioning its corporate capacity must be by direct attack by the state by quo warranto proceedings. *Baum v. Baum Holding Co.* 197
3. In order for a de facto corporation to exist there must be a statute authorizing a corporation de jure. *Baum v. Baum Holding Co.* 197
4. Where there was a colorable compliance with statutory requirements and an actual user of corporate power, holding company became a corporation de facto upon amendment of statute authorizing such corporations. *Baum v. Baum Holding Co.* 197
5. The power granted by statute for corporations to own and hold capital stock of another corporation is an independent as distinguished from an incidental power. *Baum v. Baum Holding Co.* 197
6. A corporation owning and holding stock in another corporation is authorized to vote such stock. *Baum v. Baum Holding Co.* 197
7. When a company is made a party defendant in a suit questioning its existence as a corporation, it is a recognition of its corporate existence. *Baum v. Baum Holding Co.* 197
8. The stock owned by a corporation may be voted as directed by a majority of the stockholders of the corporation. *Baum v. Baum Holding Co.* 197
9. Provisions contained in the articles of incorporation may be sustained as a contractual obligation, though they may appear invalid as an infringement upon

the right of ownership of property. *Baum v. Baum Holding Co.* 197

10. The organization of a holding company for the express purpose of gaining control of another corporation is not an unlawful object. *Baum v. Baum Holding Co.* 197

11. Majority stockholders may be held responsible for fraud or a breach of trust toward minority stockholders. *Baum v. Baum Holding Co.* 197

12. Majority stockholders and directors may be compelled at the suit of the corporation or an injured stockholder to comply with articles of incorporation with respect to distribution of earnings. *Baum v. Baum Holding Co.* 197

Costs.

The ordinary rule is that the successful party is entitled to a judgment for costs. *City of Seward v. Gruntorad* 143

Courts.

1. A review of a finding and adjudication of the district court that a child is dependent and neglected, that his mother is not a suitable person to have his custody, and that the custody of the child should be committed to the Child Welfare Department, may be had by an appeal to the Supreme Court. *Ripley v. Godden* 246

2. An adjudication of delinquency of a minor child is an order in a special proceeding, it affects a substantial right, and it is a final order for purposes of an appeal to the Supreme Court. *Ripley v. Godden* 246

3. The Juvenile Court Act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of contested issues of fact. *Ripley v. Godden* 246

4. Where official reporter is prevented from taking testimony, it is reversible error if litigant is prejudiced thereby. *Ripley v. Godden* 246

5. A contested issue of fact in a proceeding authorized by the Juvenile Court Act must be heard and determined by substantial observance of the rules of evidence and procedure applicable to hearings had without a jury in civil cases. *Ripley v. Godden* 246

6. Reference in a statute to a proceeding as being a

summary one does not permit disregard of the essential processes, rules, and procedure for trying contested issues of fact in court. *Ripley v. Godden* 246

7. The authority of a court in proceedings for the annexation of territory to a municipality is restricted to a consideration and determination of whether conditions exist which justify the annexation. *Village of Niobrara v. Tichy* 517

8. The rule which ordinarily precludes a court from taking judicial notice of its own records in other actions does not prevent it from applying the principle of stare decisis. *Board of Educational Lands & Funds v. Gillett* 558

9. Res judicata and stare decisis are distinguishable in that the former may relate to both law and facts whereas the latter relates to legal principles only. The former binds parties and privies, whereas the latter governs a decision on the same question between strangers to the record. *Board of Educational Lands & Funds v. Gillett* 558

10. The Constitution confers upon the county court original and exclusive jurisdiction over all lawful claims and demands of every kind against the estate of a deceased person. *DeWitt v. Sampson* 653

11. The county court in the exercise of its probate jurisdiction, as a distinct and independent branch of jurisdiction, has no power to construe wills. *DeWitt v. Sampson* 653

12. The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but it has no jurisdiction to construe wills to determine rights of devisees or legatees or to bind heirs, legatees, or other persons claiming benefits of a will. *DeWitt v. Sampson* 653

13. A court is not required to permit a litigant to trifle with the processes of the court by asserting therein under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself. *Chiles v. Cudahy Packing Co.* 713

14. The judges of the municipal court of the city of Omaha are authorized by statute to promulgate rules of procedure and practice in said court not in conflict with the laws governing such matters. *Summit Fidelity & Surety Co. v. Nimtz* 762

15. Subject to constitutional and statutory limitations and provisions, courts have inherent power to make reasonable rules for the regulation of their practice and the conduct of their business. *Summit Fidelity & Surety Co. v. Nimtz* 762
16. In committing a boy to the industrial school, the juvenile court is without power to fix a definite time of detention. *State v. Roth* 789

Criminal Law.
1. An instruction in a criminal case is ordinarily erroneous that infringes upon the right of a jury to judge the credibility of witnesses and the weight to be given their testimony. *Rakes v. State* 55
2. An appellate court may modify a divisible sentence by striking out an illegal part. *Kroger v. State* 73
3. When a defendant has been found guilty of separate offenses on separate charges, the better practice is to impose separate sentences on each charge. *Kroger v. State* 73
4. 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. *Lovings v. State* 134
5. In a criminal case, it is only where there is a total failure of competent proof or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. *Lovings v. State* 134
6. In a criminal prosecution any testimony otherwise competent which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Lovings v. State* 134
7. Instructions are to be considered together. If as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Lovings v. State* 134
8. The right of appeal exists in favor of a defendant even though he has pleaded guilty to the charge against him. *Benson v. State* 168

9. The right of appeal from a sentence imposed by a municipal court may be exercised at any time within 10 days from the date of the judgment. *Benson v. State* 168
10. The right of appeal from a sentence imposed by a municipal court is dependent upon the defendant entering into a written recognizance, or by the deposit of a cash bond in a sum to be fixed by the justice of the peace in lieu of a written recognizance. *Benson v. State* 168
11. The liability of a county for the per diem and mileage of defendant's witnesses in a prosecution for a felony must arise from some express provision of the statutes and not by implication. *Vore v. State* 222
12. A statutory provision that the defendant in a criminal case is entitled to secure the attendance of witnesses in his behalf from without the state does not authorize the courts to procure their attendance at the expense of the county. *Vore v. State* 222
13. Statute did not authorize the taking of the depositions of witnesses for the defendant at the expense of the county. *Vore v. State* 222
14. A court may properly sentence a convicted criminal to consecutive terms in the penitentiary for separate offenses. *Culpen v. Hann* 390
15. Where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order. *Culpen v. Hann* 390

Crops.

In case a crop is matured the value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market. *Ballmer v. Smith* 495

Damages.

1. When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside a verdict. *Ambrozi v. Fry* 18
2. If the jury finds the defendant in a personal injury action is not chargeable with negligence, an error relating to the subject of damages is necessarily harmless. *Perrine v. Hokser* 190
3. The general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or

speculative damages, such as the loss of speculative profits, will not be allowed. *Ballmer v. Smith* 495

4. In case a crop is matured the value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market. *Ballmer v. Smith* 495

5. A new trial will be granted in a personal injury action when the verdict is apparently the result of passion and prejudice and is inadequate. *Forrest v. Masters* 506

6. In an action for the benefit of a parent for negligently causing the death of a child, the measure of damages is the present worth in money of contributions of which the parent is shown to have been deprived. *Forrest v. Masters* 506

7. Contributions which are speculative or conjectural may not be properly included in fixing the amount of damage sustained by a parent through death of a child. *Forrest v. Masters* 506

8. The damages recoverable under a contract depend on the terms thereof. *Shamblen v. Great Lakes Pipe Line Co.* 752

9. Where a party contracts to pay certain specified damages, he impliedly excludes all damages not so expressed unless a contrary intent is plainly indicated. *Shamblen v. Great Lakes Pipe Line Co.* 752

Deeds.

1. The law recognizes the right of the aged to control and dispose of their own property and to choose the recipients of their bounty. *Eggert v. Schroeder* 65

2. Courts should not set aside the disposition of property made by deed without good reason based upon clear and satisfactory proof. *Eggert v. Schroeder* 65

3. Undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. *Eggert v. Schroeder* 65

4. Undue influence is made out, in case of a deed, where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *Eggert v. Schroeder* 65

5. Undue influence is never presumed. One attacking an instrument on the ground that its execution was

so procured has the burden resting on him to prove that fact. *Eggert v. Schroeder* 65

6. To set aside a deed on the ground of want of mental capacity, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of its execution that he could not understand and comprehend the purport and effect of what he was then doing. *Eggert v. Schroeder* 65

7. Where it is sought to cancel a deed for the want of mental capacity of the grantor, the burden of proof is on the one who alleges the mental incapacity. *Eggert v. Schroeder* 65

Depositions.

An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him. It may be competent and admissible in evidence in contradiction and impeachment of his present claim and his other evidence given at the trial. *Peake v. Omaha Cold Storage Co.* 676

Divorce.

1. An action for divorce is required to be tried in the Supreme Court de novo upon the record of the case made in the district court. *Schwarting v. Schwarting* 99

2. Jurisdiction relative to divorce is given by statute. Every power exercised by the court with reference thereto must look for its source in the statute or it does not exist. *Schwarting v. Schwarting* 99

3. Extreme cruelty is defined. *Schwarting v. Schwarting* 99

4. A decree of divorce may be granted only when the evidence brings the case within the terms of the statute providing for such relief. *Schwarting v. Schwarting* 99

5. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties. *Schwarting v. Schwarting* 99
Pestel v. Pestel 611

6. A general rule by which to measure the exact amount or degree of corroboration required in a divorce case cannot be formulated. Each case must be determined upon its facts and circumstances. *Schwarting v. Schwarting* 99

7. A divorce decree is not conclusive in a subsequent habeas corpus proceeding where the parties to the two proceedings are not the same. *Lakey v. Gudgel* 116

8. The courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. *Lakey v. Gudgel* 116
9. Divorce cases are tried de novo on appeal to the Supreme Court subject to the rule with respect to determining credibility of witnesses. *Schlueter v. Schlueter* 233
10. In divorce action where evidence is in conflict, Supreme Court will give consideration to the conclusion of the district court upon reliability of witnesses. *Schlueter v. Schlueter* 233
11. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. *Schlueter v. Schlueter* 233
12. Elements constituting extreme cruelty in divorce case stated. *Schlueter v. Schlueter* 233
13. Rule for determining amount of alimony and division of property in divorce case stated. *Schlueter v. Schlueter* 233
Spencer v. Spencer 629
14. Where appeal is properly lodged in Supreme Court, any order by the district court awarding temporary alimony during the pendency of the action is void. *Schlueter v. Schlueter* 233
15. In determining the sufficiency of the evidence in a divorce case the degree of corroboration required relates itself to the facts of the particular case. But this does not eliminate the statutory requirement of corroboration of the essential facts. *Pestel v. Pestel* 611
16. Any unjustifiable conduct on the part of a spouse which destroys the legitimate ends and objects of matrimony may constitute extreme cruelty. *Spencer v. Spencer* 629
17. To establish contempt of court for failure to pay amounts fixed in a decree of divorce for the support of children, the evidence must disclose not only failure to comply with the decree but also that the failure was willful. *Frye v. Frye* 694

Drains.

1. Landowner may construct ditch wholly on own land and discharge waters collected into natural watercourse. *Lackaff v. Bogue* 174

2. Special statute on drainage of lakes controls over general statute on drainage of land. *Lackaff v. Bogue* 174
3. Where it is established that a party has attempted to drain a natural lake without obtaining required approval, injunction and damages should be awarded to parties injured thereby. *Lackaff v. Bogue* 174

Easements.

If an easement is specific in its terms it is decisive of the limits of the easement. If an easement is not specifically defined, the easement is such as is reasonably necessary and convenient for the purpose for which it was created. *Scheer v. Kansas-Nebraska Natural Gas Co.* 668

Elections.

If the conduct of a political subdivision has been such as to estop it to assert the right to insistence upon the general rule that courts will not usually inquire into the validity of an election in advance, a court may enjoin an election proposed to be held within the subdivision. *Noble v. City of Lincoln* 457

Eminent Domain.

1. The 50-day period for the filing of a petition in the district court on an appeal in eminent domain proceedings begins to run with the date of the filing of notice of appeal in the county court. *City of Seward v. Gruntorad* 143
2. A petition for condemnation of an easement for a pipeline which specifically sets forth its course across condemnee's land and describes its extent as that which is necessary and required for the laying, relaying, maintaining, and operating of the pipeline and appurtenances thereto, is sufficient as against a collateral attack. *Scheer v. Kansas-Nebraska Natural Gas Co.* 668
3. The rule of res judicata applies to judgments in actions and proceedings relating to the taking or injury of property under the power of eminent domain. *Scheer v. Kansas-Nebraska Natural Gas Co.* 668
4. An appeal in a condemnation proceeding under the provisions of the Eminent Domain Act contemplates the filing of pleadings and a framing of issues in a judicial proceeding in the district court. *Scheer v. Kansas-Nebraska Natural Gas Co.* 668

5. The extent and quantity of lands sought to be taken under the power of eminent domain are legislative and not judicial questions. A determination of the question as to whether or not the requirements of the statute have been met is judicial in character and does not encroach upon the legislative power. *Scheer v. Kansas-Nebraska Natural Gas Co.* 668

Equity.

The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction. It is not enough that there is a remedy at law; it must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Michelsen v. Dwyer* 427

Estates.

The relation of a life tenant, with power of disposal, to his remaindermen is that of a quasi trustee. *Attebery v. Prentice* 795

Estoppel.

1. If the conduct of a political subdivision has been such as to estop it to assert the right to insistence upon the general rule that courts will not usually inquire into the validity of an election in advance, a court may enjoin an election proposed to be held within the subdivision. *Noble v. City of Lincoln* 457
2. Where a municipality has gained a clear and decided advantage by acts relied upon as estoppel, the validity of a proposed amendment to the charter of a home rule city may be tested upon that ground before adoption thereof. *Noble v. City of Lincoln* 457

Evidence.

1. Where it appears that a witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of an automobile, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject. *Ambrozi v. Fry* 18
2. Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of an automobile, it is error to permit the giving of an estimate. *Ambrozi v. Fry* 18
3. Evidence of an oral agreement within the statute of frauds is not admissible where proper objections

are made if there are no allegations of fact taking it out of such statute. *Benes v. Reed* 128

4. 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. *Lovings v. State* 134

5. In a criminal prosecution any testimony otherwise competent which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Lovings v. State* 134

6. Supreme Court, on appeal, will give consideration to the fact that the trial court made a view of the premises. *Lackaff v. Bogue* 174

7. Courts do not usually take judicial notice of a municipal ordinance. To have the benefit of it as evidence a party must plead and prove the existence of the ordinance. *Perrine v. Hokser* 190

8. Reports of an ex parte investigation made by investigators from the police department and the Child Welfare Department are not competent evidence and may not be considered by the court in the hearing and decision of a disputed issue of fact. *Ripley v. Godden* 246

9. Duly certified copies of records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, are evidence in all cases of equal credibility with the original records or papers so filed. *County of Hamilton v. Thomsen* 254

10. The records of the Board of Control pertaining to the control and operation of state institutions under its jurisdiction are business records. *County of Hamilton v. Thomsen* 254

11. The business record of acts, conditions, or events of the Board of Control to the extent that they are relevant are competent evidence if identified properly by the custodian or other qualified witness and proved to the satisfaction of the court. *County of Hamilton v. Thomsen* 254

12. In the absence of evidence to the contrary a pre-

sumption obtains that official acts, including ministerial acts, or duties have been properly performed. *County of Hamilton v. Thomsen* 254

13. The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly and with authority, in the absence of evidence to the contrary. In such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts. *County of Hamilton v. Thomsen* 254

14. The records of the proceedings of the county commissioners pertaining to laying out a road, required by law to be kept and which are unambiguous, cannot be modified by parol testimony in a collateral proceeding. *Barrett v. Hand* 273

15. A photograph is properly admissible as evidence if it be shown that it is a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry. *Bedford v. Herman* 400

16. The refusal of the trial court to admit photographs in evidence is not prejudicial error if they, together with evidence received, fail to establish a cause of action. *Bedford v. Herman* 400

17. When testimony is offered and admitted without objection being made thereto, error cannot be predicated thereon by the district court when reviewing its own proceedings on motion for a new trial. *Vielehr v. Malone* 436

18. All courts must take judicial notice of the public law prevailing within the forum. *Board of Educational Lands & Funds v. Gillett* 558

19. The rule which ordinarily precludes a court from taking judicial notice of its own records in other actions does not prevent it from applying the principle of stare decisis. *Board of Educational Lands & Funds v. Gillett* 558

20. Judicial notice of a matter means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. It has no other effect than to relieve one of the parties of the burden of resorting to the usual forms of evidence. *Board of Educational Lands & Funds v. Gillett* 558

21. A nonexpert witness may under certain circumstances testify as to the mental condition of a person after

giving the facts and circumstances upon which the opinion is based. *Schlitz v. Topp* 583

22. An extrajudicial admission appearing in the deposition of a party taken before trial is not ordinarily final and conclusive upon him. It may be competent and admissible in evidence in contradiction and impeachment of his present claim and his other evidence given at the trial. *Peake v. Omaha Cold Storage Co.* 676

23. Circumstantial evidence is sufficient to sustain a verdict depending solely thereon for support if the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Shamblen v. Great Lakes Pipe Line Co.* 752

24. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. *Shamblen v. Great Lakes Pipe Line Co.* 752

25. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. *Shamblen v. Great Lakes Pipe Line Co.* 752

Executions.

Crypts, lots, tombs, niches, or vaults of a mausoleum association are exempt from taxation, execution, attachment, or any other lien or process. *Omaha Nat. Bank v. West Lawn Mausoleum Assn.* 412

Executors and Administrators.

1. The Constitution confers upon the county court original and exclusive jurisdiction over all lawful claims and demands of every kind against the estate of a deceased person. *DeWitt v. Sampson* 653

2. The construction of a will by the county court for the information and benefit of the executor in order to advise him as to what course to pursue adjudicates only his rights and liabilities in the execution of his office. *DeWitt v. Sampson* 653

Forcible Entry and Detainer.

1. A complaint of unlawful and forcible detention

need not aver facts which show that defendant unlawfully and forcibly detains possession of the premises. The complaint is sufficient if it is in the language of the statute. *Board of Educational Lands & Funds v. Gillett* 558

2. A complaint in forcible entry and detainer which accurately describes the premises and distinctly charges an unlawful and forcible detention thereof by defendant is sufficient. *Board of Educational Lands & Funds v. Gillett* 558

3. Since forcible entry and detainer is a civil remedy to recover the possession of premises unlawfully and with force withheld from the plaintiff, it is sufficient to sustain the charge that the party unlawfully in possession refuses to vacate the premises on lawful notice so to do. *Board of Educational Lands & Funds v. Gillett* 558

4. The party against whom judgment is rendered in forcible entry and detainer cases may obtain a review of the case by writ of error, or by appeal to the extent that a right of appeal is given by constitutional or statutory provisions. *Sporer v. Herlik* 644

5. The forcible entry and detainer statute provides a speedy and summary remedy, quasi-criminal in its nature, and the ordinary rules of pleading and practice of the code do not apply. *Sporer v. Herlik* 644

Fraud.

1. An action for fraud must be commenced within 4 years of the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry. *Abels v. Bennett* 699

2. In an action for fraud commenced more than 4 years after the perpetration of the fraud, the plaintiff must show by pleading and proof that he is entitled to additional time because of lack of knowledge of the fraud. *Abels v. Bennett* 699

3. The recording of a fraudulent deed is not generally sufficient to charge the defrauded party with notice or knowledge of the fraud as of the date the deed is filed for record. *Abels v. Bennett* 699

4. The statute of limitations begins to run from the recording of a fraudulent deed if it is accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which

if pursued would result in discovery of the fraud. *Abels v. Bennett* 699

5. A defrauded party must be diligent and prudent in his effort to detect the fraud. Means of knowledge thereof are equivalent to knowledge. *Abels v. Bennett* 699

Frauds, Statute of.

1. A pleading affirmatively showing reliance by the vendor on an oral contract for the sale of goods exceeding $500 in value is demurrable where it does not state facts taking the contract out of the statute of frauds. *Benes v. Reed* 128
2. A delivery alone by the vendor is not sufficient to take an oral contract out of the statute of frauds. There must also be a receipt and acceptance by the vendee of the goods sold to have that effect. *Benes v. Reed* 128
3. Under a general denial the defendant may avail himself of the defense of the statute of frauds. *Benes v. Reed* 128
4. An allegation that goods were sold and delivered to the vendee is an insufficient pleading of receipt and acceptance of the goods by the vendee. *Benes v. Reed* 128
5. Evidence of an oral agreement within the statute of frauds is not admissible where proper objections are made if there are no allegations of fact taking it out of such statute. *Benes v. Reed* 128
6. If receipt and acceptance is relied upon to take an oral agreement out of the statute of frauds, it must be pleaded in the petition; otherwise the petition is demurrable and evidence of the oral agreement subject to objection. *Benes v. Reed* 128
7. The claimant to the estate of a deceased person under an alleged oral contract must establish the terms thereof by clear, satisfactory, and unequivocal evidence. *Peterson v. Peterson* 551
8. An oral contract to devise property is void as within the statute of frauds. Even though proved by clear and satisfactory evidence, a claim based upon such contract is not enforceable unless there has been such performance as the law requires. *Peterson v. Peterson* 551
9. To remove oral contract from operation of statute of frauds, performance must be such as is referable solely to the contract sought to be enforced, and

not such as might be referable to some other and different contract. *Peterson v. Peterson* 551

10. To obtain specific performance of an oral contract within the statute of frauds, a party seeking that relief must prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. *Peterson v. Peterson* 551

Fraudulent Conveyances.

1. A conveyance between close relatives is presumptively fraudulent as to an existing creditor. In litigation between a creditor and parties to the conveyance testing the validity thereof, the burden is on the parties to it to establish the good faith of the transaction. *Creason v. Wells* 78
2. If real estate is purchased and paid for by a wife with her money, but deeded to her husband, he holds the title in trust for his wife, and she is not prevented from claiming the land against his creditors unless by her conduct she induced them to believe that the husband was the actual owner of the property and to extend credit to him because thereof. *Creason v. Wells* 78
3. Proof that a conveyance of real estate by a husband to his wife was made in good faith and for an adequate consideration is sufficient to sustain the conveyance against an attack on it by a creditor of the husband. *Creason v. Wells* 78
4. A creditor whose debt did not exist at the time of a voluntary conveyance by the debtor cannot attack such conveyance for fraud, unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time. *Creason v. Wells* 78

Gifts.

1. In a case of gift and voluntary conveyance from a parent to a child, no presumption of fraud or undue influence arises as between the parties thereto from the mere fact of the relation. *Eggert v. Schroeder* 65
2. The natural and lawful influence arising from the relationship of parent and child will not render a gift voidable unless this influence has been so used as to

confuse the judgment and control the will of the donor. *Eggert v. Schroeder* 65

Habeas Corpus.

1. The custody of a child is to be determined by its best interests with due regard for the superior rights of a fit, proper, and suitable parent. *Lakey v. Gudgel* 116
2. A petition for a writ of habeas corpus must state a cause of action, and if it does not the court should enter an order denying the writ. *Culpen v. Hann* 390

Highways.

1. A left-hand turn across a public highway between intersections is fraught with danger. One making such a movement is required to exercise a degree of care commensurate with the danger. *Ambrozi v. Fry* 18
2. Traffic control signals or directions by police officers have precedence over stop signs. *Styskal v. Brickey* 208
3. A "go" signal at a street intersection is only a qualified permission to the driver of an automobile to proceed carefully in the direction indicated. *Styskal v. Brickey* 208
4. A motor vehicle having started to cross an intersecting street in accordance with a signal light is ordinarily entitled to complete the crossing notwithstanding a change in the light. *Styskal v. Brickey* 208
5. The driver of a motor vehicle entering a street intersection with a traffic light in his favor is under obligation to use due care and to yield the right-of-way to vehicles in the intersection. His right-of-way is subject to the rights of those already in the intersection. *Styskal v. Brickey* 208
6. A traveler actually hindered may personally remove an obstruction in a highway, but it is a condition to the exercise of the right that the removal does not involve a breach of the peace and that due care is exercised in effecting the removal. *Barrett v. Hand* 273
7. The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages for the taking have been ascertained and paid, or provision made for their payment. *Barrett v. Hand* 273

8. Provision for payment of damages is necessary even though the road being established is on a section line. *Barrett v. Hand* 273

9. A public highway, while being used as such, can only be vacated by the county board in the manner prescribed by law, a proper petition for that purpose being necessary. *Barrett v. Hand* 273

10. The records of the proceedings of the county commissioners pertaining to laying out a road, required by law to be kept and which are unambiguous, cannot be modified by parol testimony in a collateral proceeding. *Barrett v. Hand* 273

11. An elector residing within 5 miles of a public road has such special interest therein, independent of that which he has in common with the public, as will enable him to maintain a suit to restrain the unlawful closing of such road to public travel. *Barrett v. Hand* 273

12. The public is entitled to a free passage along any portion of a highway not in the actual use of some other traveler. *Michelsen v. Dwyer* 427

13. In the absence of statute or ordinance, a pedestrian is not guilty of contributory negligence as a matter of law in walking longitudinally in a street or highway. *Forrest v. Masters* 506

Infants.

1. The custody of a child is to be determined by its best interests with due regard for the superior rights of a fit, proper, and suitable parent. *Lakey v. Gudgel* 116

2. In committing a boy to the industrial school, the juvenile court is without power to fix a definite time of detention. *State v. Roth* 789

3. The provisions of the Juvenile Court Act for issuance and service of process is jurisdictional. *State v. Roth* 789

4. In the absence of the issuance and service of process in conformity with the Juvenile Court Act or a waiver thereof, an order committing a child to the industrial school is void for want of jurisdiction. *State v. Roth* 789

5. A child charged with delinquency is entitled to be proceeded against in the manner provided by statute and is entitled to the safeguards essential to a fair and impartial trial. *State v. Roth* 789

Injunctions.

1. An injunction will not lie unless the right is clear, the damage is irreparable, and a remedy at law is inadequate. *Lackaff v. Bogue* 174
2. Acts which destroy or result in a serious change of property either physically or in the character in which it has been held or enjoyed constitute an irreparable injury. *Lackaff v. Bogue* 174
3. Where remedy at law requires the bringing of successive actions, injunction will lie. *Lackaff v. Bogue* 174
4. Equity looks to the nature of the injury inflicted, together with the fact of its constant repetition or continuation, rather than to the magnitude of the damages inflicted, as the ground of affording relief. *Lackaff v. Bogue* 174
5. Owner of land upon which natural lake is formed has no right to remove an impediment to its flowage. A party injured by such removal has right to injunction and damages. *Lackaff v. Bogue* 174
6. The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages for the taking have been ascertained and paid, or provision made for their payment. *Barrett v. Hand* 273
7. Provision for payment of damages is necessary even though the road being established is on a section line. *Barrett v. Hand* 273
8. An elector residing within 5 miles of a public road has such special interest therein, independent of that which he has in common with the public, as will enable him to maintain a suit to restrain the unlawful closing of such road to public travel. *Barrett v. Hand* 273
9. A private person seeking to restrain a public nuisance must show some special injury peculiar to himself aside from and independent of the general injury to the public. In the absence thereof, the injury should be redressed by suitable proceedings brought in behalf of the public. *Michelsen v. Dwyer* 427
10. If a private person shows damage which is special and peculiar to himself, and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction. *Michelsen v. Dwyer* 427
11. The remedy by injunction is wholly preventative. It will not issue to afford a remedy for what is past but only to prevent future mischief. Rights, if any,

already lost, and wrongs, if such, already perpetrated, cannot be restrained or remedied by injunction. *Michelsen v. Dwyer* 427

12. Where a city has entered upon and partially carried out the construction of a project by virtue of an amendment to its charter, an election to repeal such amendment and devote the money raised and property acquired to different purposes will be enjoined. *Noble v. City of Lincoln* 457

Insane Persons.

1. The spouse of a patient in a state hospital is obligated to pay an amount equal to per capita cost of maintenance where such spouse has sufficient estate and income for that purpose. *County of Hamilton v. Thomsen* 254
2. The absence of a statute allocating funds received by a county of the state as the result of legal action against a spouse to enforce his obligation to support and maintain a patient in a state hospital is not available as a defense to the action. *County of Hamilton v. Thomsen* 254

Intoxicating Liquors.

1. Blood test statute for determination of intoxication is in derogation of the common law and subject to strict construction. *Vore v. State* 222
2. Where it is shown by chemical analysis that the amount of alcohol in the subject's body fluid is less than 0.15 percent by weight, no presumption of intoxication arises under such statute, and it is prejudicial error to submit such issue to the jury. *Vore v. State* 222

Joint Tenancy.

1. The creation as well as the continued existence of an estate in joint tenancy requires a unity of possession, a unity of interest, a unity of time, and a unity of title in all holding an interest in such estate. *Buford v. Dahlke* 39
2. Any act of a joint tenant which destroys one or more of the necessary coexistent unities of the joint tenancy operates as a severance thereof and extinguishes the right of survivorship. *Buford v. Dahlke* 39
3. A contract by a husband and wife to sell real estate owned by them as joint tenants destroys the

joint tenancy in the real estate and effects an equitable conversion into personalty even though they retain legal title to the real estate as security for a part of the purchase price. *Buford v. Dahlke* 39

4. A joint tenancy may be created only by contract and the purpose to do so must be clearly expressed. Otherwise the tenancy is presumed to be in common. *Buford v. Dahlke* 39

Judgments.

1. To obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact and, second, that he is entitled to a judgment as a matter of law. *Healy v. Metropolitan Utilities Dist.* 151
2. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed. *Healy v. Metropolitan Utilities Dist.* 151
3. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Healy v. Metropolitan Utilities Dist.* 151
4. On motion for summary judgment, the credibility of witnesses, who give evidence by affidavit or deposition, is not ordinarily material. Unless there is a dispute of fact, no reason exists ordinarily for attacking their credibility. *Healy v. Metropolitan Utilities Dist.* 151
5. Where a party resisting a summary judgment intends to dispute facts by attacking the credibility of the witnesses of the movant, indicating a reasonable basis for such attack, a genuine issue of fact usually exists. *Healy v. Metropolitan Utilities Dist.* 151
6. Where the evidence in a claimed fraudulent transaction rests exclusively within the knowledge of those seeking summary judgment, it may be inequitable and unjust to grant summary judgment where the resisting party has no means to successfully meet the facts stated in the supporting affidavit. In such cases justice and fairness require a denial of a summary judgment. *Healy v. Metropolitan Utilities Dist.* 151
7. A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judg-

ment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective. *Healy v. Metropolitan Utilities Dist.* 151

8. The summary judgment is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged. *Healy v. Metropolitan Utilities Dist.* 151

9. Summary judgment was not intended, nor can it be used, to deprive a litigant of a fair and impartial trial. It is only where the situation exists that its terms imply and entitle the movant to judgment as a matter of law that it may be used to avoid an unnecessary trial. *Healy v. Metropolitan Utilities Dist.* 151

10. The decision of questions presented to the Supreme Court in reviewing the proceedings of the district court becomes the law of the case and for purposes of the litigation settles conclusively the matters adjudicated expressly or by necessary implication. *Noble v. City of Lincoln* 457

11. The law of the case applies to not only questions actually and formally presented but to all questions existing in the record and necessarily involved in the decision. *Noble v. City of Lincoln* 457

12. A party shows cause for not performing a duty required by a final judgment of a court where he has promptly, diligently, and as effectually as the situation permits attempted to perform it but has been prevented by something beyond his control. *Noble v. City of Lincoln* 457

13. If municipal corporation acquires jurisdiction of annexation proceedings, its action may not be collaterally attacked. *Village of Niobrara v. Tichy* 517

14. Res judicata and stare decisis are distinguishable in that the former may relate to both law and facts whereas the latter relates to legal principles only. The former binds parties and privies, whereas the latter governs a decision on the same question between strangers to the record. *Board of Educational Lands & Funds v. Gillett* 558

15. The term default judgment is now ordinarily applied where default occurs after appearance as well as before. It may be rendered against a defendant who fails to take some step required within the time limited by statute or authoritative order or rule

of court, or after issues joined fails to appear at the hearing or trial when the same is called or set for trial. *Sporer v. Herlik* 644

16. A judgment on the merits in the trial of a civil action constitutes an effective bar and estoppel in a subsequent action upon the same claim or demand, not only as to every matter offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose. *Scheer v. Kansas-Nebraska Natural Gas Co.* 668

17. The rule of res judicata applies to judgments in actions and proceedings relating to the taking or injury of property under the power of eminent domain. *Scheer v. Kansas-Nebraska Natural Gas Co.* 668

18. A judgment rendered where there is no proper service of process may be collaterally impeached. *State v. Roth* 789

Juries.

In impaneling a jury, all challenges for cause should be decided by the court. Appropriate explanatory statements of the trial court with relation thereto during voir dire examination are not instructions required to be in writing. *Rakes v. State* 55

Justices of the Peace.

The defendant in an action before a justice of the peace wherein a fine or imprisonment, or both, have been imposed has the right of appeal to the district court. *Benson v. State* 168

Liens.

When a person procures, contracts with, or hires another person to feed and care for any livestock, the person so procured, contracted with, or hired has a first lien upon such property for feed and care bestowed by him for the contract price, and in case no price has been agreed upon, then for the reasonable value of the feed and care. *Stickell v. Haggerty* 34

Limitations of Actions.

1. The maxim that lapse of time does not bar the right of the state is an attribute of sovereignty and applies only to the state and not to counties and other political subdivisions of the state. *County of Adams v. Ernst* 15

2. An action by a county to recover quarterly payments made to a state hospital for the insane is based on a liability created by statute and is within the general statute of limitations barring recovery after 4 years. *County of Adams v. Ernst* 15
3. A cause of action accrues when a suit may be maintained thereon. The statute of limitations begins to run at that time. *County of Adams v. Ernst* 15
4. Money loaned without an agreement as to time of repayment is in law due immediately, and the statute of limitations begins to run at once against the lender. *Grant v. Williams* 107
5. Whenever it is in the power of a person to enforce his demand his cause of action has accrued. *Grant v. Williams* 107
6. An action is not upon an agreement, contract, or promise in writing if the writing relied upon as the basis of the action contains no promise to do the thing for the nonperformance of which the action is brought or states no fact from which the law implies an obligation to do that thing. *Grant v. Williams* 107
7. The benefit of the statute of limitations is personal and will be waived unless pleaded. *Vielehr v. Malone* 436
8. The statute of limitations must be pleaded either by answer or demurrer. *Vielehr v. Malone* 436
9. When a petition shows on its face that the action therein stated is barred by the statute of limitations, a general demurrer will raise the defense. *Vielehr v. Malone* 436
10. When it is not apparent from the face of the petition that the action is barred, the statute of limitations as a defense must be raised by an answer. *Vielehr v. Malone* 436
11. The voluntary payment of part of a debt arising on contract, a written acknowledgment of it, or a promise in writing to pay it tolls the statute of limitations except as is otherwise provided by statute. *Alexanderson v. Wessman* 614
12. The execution and delivery of a real estate mortgage to secure payment of a promissory note constitute an acknowledgment of the note and a promise to pay it. *Alexanderson v. Wessman* 614
13. A mortgage on real estate constitutes a lien thereon for only 10 years from the maturity of the debt secured by it unless the statute of limiitations is

tolled by some act authorized by law. *Alexanderson v. Wessman* 614

14. A subsequent encumbrancer, within the meaning of the statute of limitations, is one who acquires his encumbrance for value after the statute has run against the prior encumbrance shown on the record. *Alexanderson v. Wessman* 614

15. Exception stated in statute of limitations is applicable only to subsequent purchasers and encumbrancers for value and only affects the rights of mortgagees against such third persons. *Alexanderson v. Wessman* 614

16. Separate statutory provisions presenting period of limitations for instituting actions on real estate mortgages do not conflict, and one provision does not give any right or protect any interest of mortgagee over the other. *Alexanderson v. Wessman* 614

17. An action for fraud must be commenced within 4 years of the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary intelligence and prudence on inquiry. *Abels v. Bennett* 699

18. In an action for fraud commenced more than 4 years after the perpetration of the fraud, the plaintiff must show by pleading and proof that he is entitled to additional time because of lack of knowledge of the fraud. *Abels v. Bennett* 699

19. The recording of a fraudulent deed is not generally sufficient to charge the defrauded party with notice or knowledge of the fraud as of the date the deed is filed for record. *Abels v. Bennett* 699

20. The statute of limitations begins to run from the recording of a fraudulent deed if it is accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry which if pursued would result in discovery of the fraud. *Abels v. Bennett* 699

21. A defrauded party must be diligent and prudent in his effort to detect the fraud. Means of knowledge thereof are equivalent to knowledge. *Abels v. Bennett* 699

Mandamus.

1. Courts have no power by mandamus to control the decision of those matters which are left by statute to the discretion of the governing body of a governmental agency. *State ex rel. League of Municipalities v. Loup River P. P. Dist.* 160

2. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. *State ex rel. League of Municipalities v. Loup River P. P. Dist.* 160
3. While classed as a law action, mandamus 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. League of Municipalities v. Loup River P. P. Dist.* 160
4. Before a court is warranted in granting a peremptory writ of mandamus, it must be made to appear that the relator had a clear legal right to the performance by the respondent of the duty which it is sought to enforce, and that nothing essential to that right will be taken by intendment. *Summit Fidelity & Surety Co. v. Nimtz* 762
5. The statute authorizing issuance of a peremptory writ of mandamus without notice refers to cases in which the refusal of a public officer to discharge an official duty is so obviously inexcusable and the necessity for prompt action so imperative that notice must be dispensed with in order to prevent a failure of justice. *Summit Fidelity & Surety Co. v. Nimtz* 762

Marriage.
1. A common-law marriage is not valid in this state unless entered into prior to the adoption in 1923 of statute banning same. *Ragan v. Ragan* 51
2. Where the evidence affirmatively shows that there was no mutual consent by the parties to assume the status of husband and wife before enactment of statute banning common-law marriages, cohabitation or other subsequent conduct does not support a claim that a common-law marriage existed. *Ragan v. Ragan* 51
3. A meretricious relationship continued over a long period of time raises no presumption of a common-law marriage where it affirmatively appears that no mutual consent was ever entered into to assume the status of husband and wife. *Ragan v. Ragan* 51
4. Since common-law marriages are invalid in this state unless entered into prior to 1923, continuous habitation in this state by parties to an invalid marriage ceremony will be held meretricious from its conception. *Binger v. Binger* 444

5. Where parties to an invalid marriage continue to reside in this state, temporary sojourns or trips to a state where common-law marriages are recognized will not result in a valid marriage. *Binger v. Binger* 444

Master and Servant.

1. In the furnishing of appliances and machinery, a master is not an insurer of the safety thereof to an employee, but is only liable for negligence. *Ring v. Kruse* 1
2. The master is liable to a servant for personal injuries sustained by him in the course and scope of his employment by reason of the master's negligence, except as modified by statute, or by application of the doctrines of assumed risk, contributory negligence, and fellow servants. *Ring v. Kruse* 1
3. Where a servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care he should have known of their existence, he assumes the risk of injury incident thereto. *Ring v. Kruse* 1
4. An employee is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them. *Ring v. Kruse*..... 1
5. In the absence of any statutory regulation where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger. *Ring v. Kruse* 1
6. Where the servant has equal or better means of knowledge as to an open or obvious danger than the master, he will be charged with such negligence as to bar a recovery. Where it does not appear that the master knew or with ordinary care ought to have known of the defect which caused the injury, and it does appear that the servant had equal means with the master of ascertaining its existence, the servant cannot recover. *Ring v. Kruse* 1
7. Rule stated as to when employees are fellow servants. *Ring v. Kruse* 1
8. If the nature of the act establishes that an accident was caused by the negligence of a fellow servant, and not by any defect in the place to work or in the

tools or instrumentalities to be used, the employer is not liable. *Ring v. Kruse* 1

9. If the place to work and the tools and instrumentalities with which to work are reasonably safe, the employer is not ordinarily liable for a misuse of such tools and instrumentalities by a fellow employee who is employed with reasonable care as to his fitness and carefulness. *Ring v. Kruse* 1

10. The employer is not required to anticipate the negligence of a competent employee. He may rely on the presumption that each such employee will exercise due care not only to avoid injury to himself, but to his coemployees. *Ring v. Kruse* 1

Money Received.

1. An action in the nature of one for money had and received lies wherever the defendant has obtained possession of money which in justice and fairness he ought to refund. *Boman v. Olson* 636

2. Implicit in the right of recovery for money had and received is a requirement that the plaintiff show that defendant actually received his money or its equivalent. *Boman v. Olson* 636

Municipal Corporations.

1. Courts do not usually take judicial notice of a municipal ordinance. To have the benefit of it as evidence a party must plead and prove the existence of the ordinance. *Perrine v. Hokser* 190

2. The right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience. Ordinarily the question of public necessity or convenience is for the governing body of the municipality. *Michelsen v. Dwyer* 427

3. An obstruction of a street in a city by a structure is a public nuisance unless it is authorized in a proper case by competent authority. *Michelsen v. Dwyer* 427

4. The rights which an owner of abutting property possesses in a street are different in kind from those possessed by one whose interest is only that of a right-of-way along the street. *Michelsen v. Dwyer* 427

5. Ordinarily, abutting property owners have a sufficient special interest to entitle them to maintain

a proceeding to remove obstructions in a street. *Michelsen v. Dwyer* 427

6. Where a municipality has gained a clear and decided advantage by acts relied upon as estoppel, the validity of a proposed amendment to the charter of a home rule city may be tested upon that ground before adoption thereof. *Noble v. City of Lincoln* 457
7. Where a city has entered upon and partially carried out the construction of a project by virtue of an amendment to its charter, an election to repeal such amendment and devote the money raised and property acquired to different purposes will be enjoined. *Noble v. City of Lincoln* 457
8. Generally, a taxpayer may not intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. *Noble v. City of Lincoln* 457
9. In the absence of statute or ordinance, a pedestrian is not guilty of contributory negligence as a matter of law in walking longitudinally in a street or highway. *Forrest v. Masters* 506
10. The fixing of boundaries of a municipal corporation is a legislative function. *Village of Niobrara v. Tichy* 517
11. The authority of a court in proceedings for the annexation of territory to a municipality is restricted to a consideration and determination of whether conditions exist which justify the annexation. *Village of Niobrara v. Tichy* 517
12. The power of a village to enlarge its corporate area is limited by statute to annexing contiguous territory. *Village of Niobrara v. Tichy* 517
13. The terms contiguous territory and adjacent territory are used synonymously and interchangeably in the statute on the subject of annexation of territory to the corporate area of a village. *Village of Niobrara v. Tichy* 517
14. Territory sought to be annexed to a village is contiguous to it if a substantial part of the boundary of the territory is coexistent with a part of the boundary of the village. *Village of Niobrara v. Tichy* 517
15. The requirement of continuity of territory is mandatory. A municipality seeking to have annexation of territory to its corporate area must allege and establish it. *Village of Niobrara v. Tichy* 517
16. A village is not authorized either to consent to an-

nexation of territory that is not contiguous to the village or to attempt to take the territory into the village as a part of its corporate area by ordinance. *Village of Niobrara v. Tichy* 517

17. A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional provision or legislative enactment. *Village of Niobrara v. Tichy* 517

18. Power delegated by the Legislature to a municipal corporation to extend its boundaries by annexing territory must be exercised in strict accord with the statute conferring it. *Village of Niobrara v. Tichy* 517

19. Annexation of territory outside the corporate limits of a municipality is not authorized by platting into lots and blocks, filing of plat, dedication of streets and alleys, or taxation for municipal purposes. *Village of Niobrara v. Tichy* 517

20. If municipal corporation acquires jurisdiction of annexation proceedings, its action may not be collaterally attacked. *Village of Niobrara v. Tichy* 517

21. The validity or invalidity of spot zoning depends upon more than the size of the spot. *Graham v. Graybar Electric Co.* 527

22. The fact that property which is zoned residential is near property which is zoned first industrial does not make the zoning ordinance illegal. *Graham v. Graybar Electric Co.* 527

23. The zoning of property is permissible under the police power and its exercise may not be denied on the ground that individual property rights may be adversely affected. *Graham v. Graybar Electric Co.* 527

24. 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 discretion has been clearly shown, it is not the province of the courts to interfere. *Graham v. Graybar Electric Co.* 527

25. Where the provisions of a zoning ordinance are expressed in common words of everyday use, they are to be interpreted and enforced according to their generally accepted meaning. *Henke v. Zimmer* 697

26. The paving of streets by a municipality to improve the locality, as distinguished from the public generally, is a matter of local concern. *State ex rel. Martin v. Cunningham* 708

27. The levy and assessment of benefits for paving of streets, including the manner of payment and the interest rates thereon, are controlled by the charter in a home rule city and not by the state statute. *State ex rel. Martin v. Cunningham* 708

Negligence.

1. Essential elements of petition charging actionable negligence stated. *Ring v. Kruse* 1
2. In the furnishing of appliances and machinery, a master is not an insurer of the safety thereof to an employee, but is only liable for negligence. *Ring v. Kruse* 1
3. The master is liable to a servant for personal injuries sustained by him in the course and scope of his employment by reason of the master's negligence, except as modified by statute, or by application of the doctrines of assumed risk, contributory negligence, and fellow servants. *Ring v. Kruse* 1
4. Where a servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care he should have known of their existence, he assumes the risk of injury incident thereto. *Ring v. Kruse* 1
5. An employee is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them. *Ring v. Kruse* 1
6. In the absence of any statutory regulation where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger. *Ring v. Kruse* 1
7. Where the servant has equal or better means of knowledge as to an open or obvious danger than the master, he will be charged with such negligence as to bar a recovery. Where it does not appear that the master knew or with ordinary care ought to have known of the defect which caused the injury, and it does appear that the servant had equal means with the master of ascertaining its existence, the servant cannot recover. *Ring v. Kruse* 1
8. Rule stated as to when employees are fellow servants. *Ring v. Kruse* 1

9. If the nature of the act establishes that an accident was caused by the negligence of a fellow servant, and not by any defect in the place to work or in the tools or instrumentalities to be used, the employer is not liable. *Ring v. Kruse* 1

10. If the place to work and the tools and instrumentalities with which to work are reasonably safe, the employer is not ordinarily liable for a misuse of such tools and instrumentalities by a fellow employee who is employed with reasonable care as to his fitness and carefulness. *Ring v. Kruse* 1

11. The employer is not required to anticipate the negligence of a competent employee. He may rely on the presumption that each such employee will exercise due care not only to avoid injury to himself, but to his coemployees. *Ring v. Kruse* 1

12. A left-hand turn across a public highway between intersections is fraught with danger. One making such a movement is required to exercise a degree of care commensurate with the danger. *Ambrozi v. Fry* 18

13. Under Minnesota rule, contributory negligence is the failure to exercise the care that a person of ordinary prudence would exercise under similar circumstances, and if such failure contributes in any degree as a proximate cause, there can be no recovery. *Portis v. Chicago, M. St. P. & P. R. R. Co.* 28

14. The Minnesota rule is that a plaintiff's negligence is sufficient to bar a recovery, if it proximately contributes to the result in any degree. *Portis v. Chicago, M. St. P. & P. R. R Co.* 28

15. The last clear chance rule has no application where the negligence of the party seeking to invoke it is active and continuous up to the time of the injury. *Portis v. Chicago, M. St. P. & P. R. R. Co.* 28

16. Denial of negligence and allegation that negligence of a third person was the sole and proximate cause of accident and resulting damages imposes no burden upon defendant, but is consistent with and provable under the general issue. *Harding v. Hoffman* 86

18. Where the jury is properly instructed upon the burden of proving negligence as a proximate cause of the injury, the issue of unavoidable accident is sufficiently submitted and ordinarily it is not reversible error to either give or refuse an instruction on that issue. *Harding v. Hoffman* 86

18. An instruction which does not limit negligence to that charged in the plaintiff's pleading, but authorizes

recovery for negligence generally, is objectionable. *Styskal v. Brickey* 208

19. Conduct of a third party as the sole proximate cause of an accident is provable under the general issue. The jury should be instructed on the effect of such conduct. *Styskal v. Brickey* 208

20. In Iowa, the burden of proof is upon plaintiff to prove both proximate cause and freedom from contributory negligence. *Simpson v. John J. Meier Co.* 264

21. In Iowa, the rule is that if the alleged negligence of the injured party contributed in any way or in any degree directly to the injury there can be no recovery. *Simpson v. John J. Meier Co.* 264

22. In Iowa, contributory negligence must be causal but it need not be the sole or proximate cause of the injury. *Simpson v. John J. Meier Co.* 264

23. In Iowa, plaintiff's alleged negligence must be such as contributes proximately to the injury, but if it does so in whole or in part in any manner or to any degree, there can be no recovery on his behalf. *Simpson v. John J. Meier Co.* 264

24. Negligence may be proved by circumstantial evidence and physical facts. All that the law requires is that the facts and circumstances proved, together with the inferences that may be properly drawn therefrom, shall indicate with reasonable certainty the negligent act charged. *Gilliland v. Wood* 286

25. If original negligence is of a character which according to the usual experience of mankind is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence. *Naegele v. Dollen* 373

26. A person is charged with the knowledge that a loaded gun is a dangerous instrumentality, and in dealing with it he is charged with the highest degree of care to prevent injuries to others. *Naegele v. Dollen* 373

27. Negligence is never presumed or inferred from the mere happening of an accident. *Bedford v. Herman* 400

28. Circumstantial evidence sufficient to submit an issue of negligence to a jury must be such that a reasonable inference arises showing that the person charged was negligent and that such inference is the only one that can be reasonably drawn therefrom. *Bedford v. Herman* 400

29. In a jury case where different minds may reasonably

draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court. *Driekosen v. Black, Sivalls & Bryson* 531

30. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts. Where some new efficient cause intervenes and produces the injury, it is the dominant cause. *Driekosen v. Black, Sivalls & Bryson* 531

31. If the original negligence is of a character which is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it and the subsequent mischief will be held to be the result of the original negligence. *Driekosen v. Black, Sivalls & Bryson* 531

32. In a negligence action, the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for the jury. *Driekosen v. Black, Sivalls & Bryson* 531

33. A plaintiff is not bound to exclude the possibility that an accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed. *Driekosen v. Black, Sivalls & Bryson* 531

34. Where contributory negligence is pleaded as a defense, but there is not competent evidence to support the same, it is prejudicial error to submit such issue to the jury and requires the granting of a new trial. *Driekosen v. Black, Sivalls & Bryson* 531

35. A vendor, manufacturer, or supplier of a chattel that is likely to be dangerous when used and which is purchased as safe for use in reliance upon representations of the safety thereof, is liable for damages proximately caused by the failure to exercise reasonable competence and care to supply the chattel in a condition safe for use. *Driekosen v. Black, Sivalls & Bryson* 531

36. Gross negligence means great or excessive negligence. It indicates the absence of even slight care in the performance of a duty. *Lusk v. County of York* 662

37. What amounts to gross negligence in any given

case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. *Lusk v. County of York* 662

38. When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law. *Lusk v. County of York* 662

39. The burden of proof is upon an invited guest, to prove by a preponderance of the evidence, that the owner or operator was guilty of gross negligence. Failure to so prove is insufficient to warrant a recovery in favor of the guest. *Lusk v. County of York* 662

40. Where a witness does not have a reasonable basis upon which to formulate an opinion as to the speed of an automobile, he should not be allowed to testify in regard thereto. *Peake v. Omaha Cold Storage Co.* 676

41. Where a driver of an automobile is suddenly confronted by an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. *Peake v. Omaha Cold Storage Co.* 676

42. A litigant injured in an accident who has placed himself in a position of peril is not entitled to an instruction under the last clear chance doctrine where it appears that he had the means at hand up to the time of the accident to have avoided injury. *Peake v. Omaha Cold Storage Co.* 676

43. The presumption of due care arising out of the natural instinct of self-preservation is not evidence but a mere rule of law, and obtains only in the absence of evidence justifying reasonable inferences one way or another upon the subject. *Peake v. Omaha Cold Storage Co.* 676

New Trial.

1. The purpose of a new trial is to enable the court to correct errors that occurred in the conduct of the trial. *Vielehr v. Malone* 436

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

unsuccessful party. *Vielehr v. Malone* 436
3. When testimony is offered and admitted without objection being made thereto, error cannot be predicated thereon by the district court when reviewing its own proceedings on motion for a new trial. *Vielehr v. Malone* 436
4. A new trial will be granted in a personal injury action when the verdict is apparently the result of passion and prejudice and is inadequate. *Forrest v. Masters* 506

Nuisances.
1. An obstruction or encumbrance of a street in a city by a structure is a public nuisance unless it is authorized in a proper case by competent authority. *Michelsen v. Dwyer* 427
2. A private person seeking to restrain a public nuisance must show some special injury peculiar to himself aside from and independent of the general injury to the public. In the absence thereof, the injury should be redressed by suitable proceedings brought in behalf of the public. *Michelsen v. Dwyer* 427
3. If a private person shows damage which is special and peculiar to himself, and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction. *Michelsen v. Dwyer* 427

Occupying Claimants.
The measure of recovery of an occupying claimant is the amount that real estate was increased in value by reason of valuable and lasting improvements made thereon. *Attebery v. Prentice* 795

Officers.
1. In the absence of evidence to the contrary a presumption obtains that official acts, including ministerial acts, or duties have been properly performed. *County of Hamilton v. Thomsen* 254
2. The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly and with authority, in the absence of evidence to the contrary. In such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are persumptive proof of the existence of such other acts. *County of Hamilton v. Thomsen* 254

3. Generally, a taxpayer may not intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. *Noble v. City of Lincoln* 457

Parent and Child.

1. In a case of gift and voluntary conveyance from a parent to a child, no presumption of fraud or undue influence arises as between the parties thereto from the mere fact of the relation. *Eggert v. Schroeder* 65
2. A parent may not be deprived of the custody of his child until it is established that he is unfit to perform the duties of a parent or has forfeited the right to the custody of the child. *Lakey v. Gudgel* 116
   Ripley v. Godden 246
3. The custody of a child is to be determined by its best interest with due regard to the superior rights of a fit and suitable parent. *Ripley v. Godden* 246
4. In an action for the benefit of a parent for negligently causing the death of a child, the measure of damages is the present worth in money of contributions of which the parent is shown to have been deprived. *Forrest v. Masters* 506

Parties.

1. Any person who has or claims an interest in the matter in litigation may become a party to an action by a proper pleading without leave of court at any time before the trial of the case commences. *Noble v. City of Lincoln* 457
2. The interest required as a prerequisite of intervention is a direct and legal interest of such character that the person seeking to intervene will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. *Noble v. City of Lincoln* 457
3. The ultimate facts showing an interest in the litigation must be alleged by the party seeking to intervene in an action. A statement that he has an interest therein is a conclusion and insufficient. *Noble v. City of Lincoln* 457

Pleading.

1. An appeal from a judgment of dismissal of the case after a general demurrer to the petition has been sustained presents for decision the sufficiency of the

facts well pleaded to state a cause of action. *Buford v. Dahlke* 39

2. Denial of negligence and allegation that negligence of a third person was the sole and proximate cause of accident and resulting damages imposes no burden upon defendant, but is consistent with and provable under the general issue. *Harding v. Hoffman* 86

3. A pleading affirmatively showing reliance by the vendor on an oral contract for the sale of goods exceeding $500 in value is demurrable where it does not state facts taking the contract out of the statute of frauds. *Benes v. Reed* 128

4. Under a general denial the defendant may avail himself of the defense of the statute of frauds. *Benes v. Reed* 128

5. An allegation that goods were sold and delivered to the vendee is an insufficient pleading of receipt and acceptance of the goods by the vendee. *Benes v. Reed* 128

6. If receipt and acceptance is relied upon to take an oral agreement out of the statute of frauds, it must be pleaded in the petition; otherwise the petition is demurrable and evidence of the oral agreement subject to objection. *Benes v. Reed* 128

7. Where no ruling is shown on a demurrer to a pleading and it appears that thereafter trial was had, the demurrer will be held to have been waived. *State ex rel. League of Municipalities v. Loup River P. P. Dist.* 160

8. A motion may properly be overruled when it cannot be allowed in substantially the same terms as requested. *Vore v. State* 222

9. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. *Freeman v. Elder* 364

10. A general demurrer tests the substantive legal rights of parties upon admitted facts. If the petition states facts which entitle the plaintiff to relief, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. *Freeman v. Elder* 364

11. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part

thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant. *Freeman v. Elder* 364

12. A petition challenged by demurrer charges what by reasonable and fair intendment may be implied from the facts stated. *Naegele v. Dollen* 373
13. A general demurrer admits the truth of all facts well pleaded as well as the intendments and inferences that may reasonably be drawn from the pleaded facts. *Naegele v. Dollen* 373
14. The benefit of the statute of limitations is personal and will be waived unless pleaded. *Vielehr v. Malone* 436
15. The statute of limitations must be pleaded either by answer or demurrer. *Vielehr v. Malone* 436
16. When a petition shows on its face that the action therein stated is barred by the statute of limitations, a general demurrer will raise the defense. *Vielehr v. Malone* 436
17. When it is not apparent from the face of the petition that the action is barred, the statute of limitations as a defense must be raised by an answer. *Vielehr v. Malone* 436

Pledges.

A mausoleum association may issue bonds, not exceeding ninety percent of the value of the realty and improvements, payable out of future receipts of the association. *Omaha Nat. Bank v. West Lawn Mausoleum Assn.* 412

Process.

1. The provisions of the Juvenile Court Act for issuance and service of process is jurisdictional. *State v. Roth* 789
2. In the absence of the issuance and service of process in conformity with the Juvenile Court Act or a waiver thereof, an order committing a child to the industrial school is void for want of jurisdiction. *State v. Roth* 789
3. Where neither the record nor the files in a case furnish proof of service of process, a finding of the court that due and legal notice of the filing and pendency of an action was given will not supply the lack of the facts necessary to confer jurisdiction. *State v. Roth* 789

Public Service Commissions.

1. Courts should review or interfere with administrative and legislative action of the State Railway Commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. *Christensen v. Highway Motor Freight* 601
2. The State Railway Commission has original jurisdiction and the sole power over certificates of convenience and necessity. Such proceedings are administrative or legislative in character. *Christensen v. Highway Motor Freight* 601
3. On appeal from an order of the State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrary. *Christensen v. Highway Motor Freight* 601
4. The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity. *Christensen v. Highway Motor Freight* 601
5. Controlling questions in determining the issuance of a certificate of convenience and necessity by the State Railway Commission are stated. *Christensen v. Highway Motor Freight* 601
6. The object of control over motor carriers by the State Railway Commission is to secure adequate sustained service for the public at minimum cost and to protect and conserve investments already made for that purpose. Primary consideration must be given to the public rather than to individuals. *Christensen v. Highway Motor Freight* 601

Quo Warranto.

If a company has corporate existence, either de jure or de facto, a suit questioning its corporate capacity must be by direct attack by the state by quo warranto proceedings. *Baum v. Baum Holding Co.* 197

Rape.

1. An accused charged with rape cannot be convicted solely on the uncorroborated testimony of prosecutrix. However, corroboration may consist of circumstances supporting the testimony of prosecutrix. *Lovings v. State* 134

2. The slightest penetration of the sexual organ of the female is sufficient to constitute rape, and may be proved by either direct or circumstantial evidence. *Lovings v. State* 134

Receivers.

The district court may appoint a receiver to operate and manage the business of a mausoleum association. *Omaha Nat. Bank v. West Lawn Mausoleum Assn.* 412

Replevin.

In replevin, the burden is on the plaintiff to prove that at the time of the commencement of the action he was the owner of the property sought to be replevied, that he was entitled to the immediate possession of it, and that the defendant wrongfully detained it. *Stickell v. Haggerty* 34

Sales.

A vendor, manufacturer, or supplier of a chattel that is likely to be dangerous when used and which is purchased as safe for use in reliance upon representations of the safety thereof, is liable for damages proximately caused by the failure to exercise reasonable competence and care to supply the chattel in a condition safe for use. *Driekosen v. Black, Sivalls & Bryson* 531

Set-Off and Counterclaim.

A counterclaim is waived where defendant moves for and procures a dismissal of plaintiff's cause of action without first withdrawing his counterclaim. *Bedford v. Herman* 400

Specific Performance.

1. In an action for specific performance of a contract containing concurrent conditions, the plaintiff must allege and prove performance, or a tender of performance, of the conditions on his part to be performed, or such facts as will show that such tender would have been unavailing. *Freeman v. Elder* 364
2. Where vendor is unable to convey property because of defect in quality or quantity of estate, innocent vendee may have specific performance with abatement of part of purchase price. *Freeman v. Elder* 364
3. Specific performance with abatement will not be enforced where it would be productive of inequity

or would have the effect of making a new contract between the parties, or where there is no basis upon which to ascertain the amount of the compensation or abatement with any degree of certainty. *Freeman v. Elder* 364

4. The claimant to the estate of a deceased person under an alleged oral contract must establish the terms thereof by clear, satisfactory, and unequivocal evidence. *Peterson v. Peterson* 551

5. An oral contract to devise property is void as within the statute of frauds. Even though proved by clear and satisfactory evidence, a claim based upon such contract is not enforceable unless there has been such performance as the law requires. *Peterson v. Peterson* 551

6. To remove oral contract from operation of statute of frauds, performance must be such as is referable solely to contract sought to be enforced, and not such as might be referable to some other and different contract. *Peterson v. Peterson* 551

7. To obtain specific performance of an oral contract within the statute of frauds, a party seeking that relief must prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract. *Peterson v. Peterson* 551

Statutes.

1. In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. The intent as deduced from the whole will prevail over that of a particular part considered separately. *City of Seward v. Gruntorad* 143

2. Where the interpretation of a statute is reasonable and not in conflict with legislative intent, it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. It is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. *City of Seward v. Gruntorad* 143

3. An interpretation which gives effect to the statute will be chosen instead of one which defeats it. An interpretation which gives effect to the entire language will be selected as against one which does not. *City of Seward v. Gruntorad* 143
4. Reference in a statute to a proceeding as being a summary one does not permit disregard of the essential processes, rules, and procedure for trying contested issues of fact in court. *Ripley v. Godden* 246
5. A statute imposing liability on the spouse of a mentally ill person to pay the cost of maintenance in a state hospital is constitutional. *County of Hamilton v. Thomsen* 254
6. The title to an act which recites that it relates to state institutions, and provides procedure for the recovery of cost of maintenance of patients in state hospitals, is not subject to attack on constitutional ground that it contains more than one subject. *County of Hamilton v. Thomsen* 254
7. If the general purpose of a legislative act is expressed in the title and the matter contained in the body of the act is germane thereto, the title is sufficient to satisfy constitutional requirements. *County of Hamilton v. Thomsen* 254
8. No rule of constitutional interpretation is violated by a legislative provision declaring retroactively a procedural method of recovery upon an existing substantive right. *County of Hamilton v. Thomsen* 254
9. An interpretation given to a statutory or constitutional provision by the court of last resort becomes a standard to be applied in all cases, and is binding upon all departments of government, including the Legislature. *Board of Educational Lands & Funds v. Gillett* 558

Taxation.

1. It is the function of the State Board of Equalization and Assessment to examine the assessment rolls of the various counties and, by the process of equalization, raise or lower the valuations therein contained to conform to the requirement that taxable property shall be assessed at fifty percent of its actual value. *County of Grant v. State Board of Equalization & Assessment* 310
County of Douglas v. State Board of Equalization & Assessment 325

County of Howard v. State Board of Equalization & Assessment 339
County of Buffalo v. State Board of Equalization & Assessment 353

2. The statute does not require any particular method of procedure to be followed by the State Board of Equalization and Assessment in equalizing the assessment of property. It may adopt any reasonable method for that purpose. *County of Grant v. State Board of Equalization & Assessment* 310
County of Douglas v. State Board of Equalization & Assessment 325
County of Howard v. State Board of Equalization & Assessment 339
County of Buffalo v. State Board of Equalization & Assessment 353

3. The notice sent out by the State Board of Equalization and Assessment was sufficient. *County of Grant v. State Board of Equalization & Assessment* 310
County of Douglas v. State Board of Equalization & Assessment 325
County of Howard v. State Board of Equalization & Assessment 339
County of Buffalo v. State Board of Equalization & Assessment 353

4. The State Board of Equalization and Assessment has the power, in equalizing assessments, to increase or decrease the assessed valuation of any classes or kinds of property in any county or tax district. *County of Grant v. State Board of Equalization & Assessment* 310
County of Douglas v. State Board of Equalization & Assessment 325
County of Howard v. State Board of Equalization & Assessment 339
County of Buffalo v. State Board of Equalization & Assessment 353

5. The presumption is that when the State Board of Equalization and Assessment values any classes or kinds of property for assessment purposes it acts fairly and impartially in fixing such valuation. *County of Grant v. State Board of Equalization & Assessment* 310
County of Douglas v. State Board of Equalization & Assessment 325
County of Howard v. State Board of Equalization & Assessment 339

County of Buffalo v. State Board of Equalization & Assessment 353

6. Where a county appeals from the action of the State Board of Equalization and Assessment in the matter of the assessment of property for taxation, the burden is upon the county to show that the decision is arbitrary. *County of Grant v. State Board of Equalization & Assessment* 310
County of Douglas v. State Board of Equalization & Assessment 325
County of Howard v. State Board of Equalization & Assessment 339
County of Buffalo v. State Board of Equalization & Assessment 353

7. It is not the function of the State Board of Equalization and Assessment to deal with assessments of individuals, either directly or as a board of review; that is the function of the county board of equalization. *County of Grant v. State Board of Equalization & Assessment* 310
County of Douglas v. State Board of Equalization & Assessment 325
County of Howard v. State Board of Equalization & Assessment 339
County of Buffalo v. State Board of Equalization & Assessment 353

8. Statutory provisions which require a county assessor to prepare an abstract of the assessment rolls of his county and forward it to the State Board of Equalization and Assessment on or before July 1, do not invalidate a subsequent preparation and filing. *County of Douglas v. State Board of Equalization & Assessment* 325
Fromkin v. State 377

9. Due process of law in respect to individual taxpayers is not involved in equalization between the counties as performed by the State Board of Equalization and Assessment. *County of Douglas v. State Board of Equalization & Assessment* 325
County of Howard v. State Board of Equalization & Assessment 339

10. The State Board of Equalization and Assessment is not required to have a stenographer, nor to keep a complete and exact record of all of its proceedings. *County of Douglas v. State Board of Equalization & Assessment* 325

County of Howard v. State Board of Equalization & Assessment 339

11. An interested party is not prevented from having a reporter and making a bill of exceptions of all or any part of the evidence adduced before the State Board of Equalization and Assessment. *County of Douglas v. State Board of Equalization & Assessment* 325
County of Howard v. State Board of Equalization & Assessment 339
County of Buffalo v. State Board of Equalization & Assessment 353

12. The statute does not require the State Board of Equalization and Assessment to have a stenographer, nor to keep a complete and exact record of all of its proceedings. Unless the statute so required, it was not necessary for the board to do so. *County of Buffalo v. State Board of Equalization & Assessment* 353

13. It is not required that the county clerk, county assessor, and chairman of the county board shall receive notice of meeting of State Board of Equalization and Assessment. Substantial compliance with the statute is had when the notice is mailed. *County of Buffalo v. State Board of Equalization & Assessment* 353

14. Length of term prescribed by statute for session of county board of equalization contemplates one continuous session. Once started the time continues to run. *Fromkin v. State* 377

15. Statutory power authorizing equalization of undervalued property is limited to particular items and pieces of property. It does not extend to any equalization of aggregate values between taxing districts. *Fromkin v. State* 377

16. The fact that the county board of equalization had no power to raise the values of property as fixed by the assessor does not affect the duty or power of the State Board of Equalization and Assessment. *Fromkin v. State* 377

17. The State Board of Equalization and Assessment has the power, in equalizing assessments, to increase or decrease the assessed valuation of any classes or kinds of property in any county or tax district, whenever in its judgment it shall be necessary to make such assessment conform to law. *Fromkin v. State* 377

18. The State Board of Equalization and Assessment may act upon whatever evidence it has before it and upon the general knowledge of its members without requiring other evidence. *Fromkin v. State* 377
19. The ascertainment of the ultimate fact that all the property of the state has been brought, for taxation purposes, to its full cash value rests on the judgment of the State Board of Equalization and Assessment. *Fromkin v. State* 377
20. In order that special assessments levied by a city or village may become a lien upon real estate it is necessary that they shall be certified to the county clerk and placed on the property tax lists to be collected in the same manner as state and county taxes. *Belza v. Village of Emerson* 641
21. The time for certification of taxes assessed by a city or village is July 15 of the year when the tax is assessed. *Belza v. Village of Emerson* 641
22. Special assessments become a lien upon real estate only if regularly assessed and levied as provided by law. *Belza v. Village of Emerson* 641
23. The record of special assessments must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power, and no omission of essential fact may be supplied by presumption. *Belza v. Village of Emerson* 641
24. The paving of streets by a municipality to improve the locality, as distinguished from the public generally, is a matter of local concern. *State ex rel. Martin v. Cunningham* 708
25. The levy and assessment of benefits for paving of streets, including the manner of payment and the interest rates thereon, are controlled by the charter in a home rule city and not by the state statute. *State ex rel. Martin v. Cunningham* 708

Tenancy in Common.

1. Where contract of sale is silent, the relationship of the vendors as owners of the contract is that of tenants in common. *Buford v. Dahlke* 39
2. A joint tenancy may be created only by contract and the purpose to do so must be clearly expressed. Otherwise the tenancy is presumed to be in common. *Buford v. Dahlke* 39

Trade Names.

1. A party having adopted a brand name for potatoes

which he buys, processes, and sells to consumers may file such brand for record with the Secretary of State. *Peterson & Co. v. Jay* 305
2. The filing of a brand as a trade name protects against wrongful infringement upon the use of the brand. *Peterson & Co. v. Jay* 305
3. The filing of a brand name with the Secretary of State does not protect against infringement unless the infringement is wrongful. *Peterson & Co. v. Jay* 305
4. Requirements stated upon which recovery may be had for wrongful infringement of a brand name. *Peterson & Co. v. Jay* 305
5. A condition of the right to prevent the use of an adopted brand name by another is that it must be established that there is competition in fact and that the use is calculated to deceive and cause the public to be confused. *Peterson & Co. v. Jay* 305

Trial.

1. Rule for consideration of motion for directed verdict stated. *Ring v. Kruse* 1
Evans v. Messick 485
Driekosen v. Black, Sivalls & Bryson 531
Lusk v. County of York 662
Peake v. Omaha Cold Storage Co. 676
2. Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than has previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. *Ambrozi v. Fry* 18
3. An instruction in a criminal case is ordinarily erroneous that infringes upon the right of a jury to judge the credibility of witnesses and the weight to be given their testimony. *Rakes v. State* 55
4. The rule that the court must not determine, express, or intimate the degree of credit or weight to be given to the testimony of a witness applies to the testimony of children. *Rakes v. State* 55
5. An instruction to a jury is reversible error that has the effect of invading or abridging a substantial right of a defendant in a criminal case. *Rakes v. State* 55
6. Insofar as cross-examination relates to facts in issue, it may be pursued by counsel as a matter of

right. When its object is to collaterally ascertain the credibility of a witness, its method and duration are ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error. *Rakes v. State* 55

7. A litigant has the right to cross-examine a witness produced against him to show the interest, bias, or prejudice of such witness. The extent to which such an examination may be carried rests very largely in the sound discretion of the trial court. *Rakes v. State* 55

8. When a witness upon cross-examination admits making statements out of court inconsistent with his evidence upon the trial, it is erroneous to permit other witnesses to testify to the statements admitted by the witness and to detail the circumstances under which the statements were made. *Rakes v. State* 55

9. Statutory provision that it shall be unnecessary to repeat same objection to testimony of same witness to predicate error has no application to further testimony of the same nature by other witnesses to which no objection has been made. *Rakes v. State*.... 55

10. An instruction reciting the provisions of statutes governing the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable a jury to observe and understand the duty of drivers at the time and place in question. *Harding v. Hoffman* 86

11. Where the jury is properly instructed upon the burden of proving negligence as a proximate cause of the injury, the issue of unavoidable accident is sufficiently submitted and ordinarily it is not reversible error to either give or refuse an instruction on that issue. *Harding v. Hoffman* 86

12. The court should instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not. *Harding v. Hoffman* 86

13. The verdict of a jury in an action at law based on conflicting evidence will not be disturbed unless clearly wrong. *Grant v. Williams* 107

14. The findings of a court in an action at law have the effect of a verdict of a jury and will not be disturbed unless clearly wrong. *Grant v. Williams* 107

15. In reviewing habeas corpus case involving custody of minor child, the Supreme Court will consider the

superior opportunity of the trial court to judge the credibility of the witnesses. *Lakey v. Gudgel* 116

16. In a criminal case, it is only where there is a total failure of competent proof or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. *Lovings v. State* 134

17. Instructions are to be considered together. If as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Lovings v. State* 134
Peake v. Omaha Cold Storage Co. 676

18. To obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact and, second, that he is entitled to a judgment as a matter of law. *Healy v. Metropolitan Utilities Dist.* 151

19. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed. *Healy v. Metropolitan Utilities Dist.* 151

20. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Healy v. Metropolitan Utilities Dist.* 151

21. On motion for summary judgment, the credibility of witnesses, who give evidence by affidavit or deposition, is not ordinarily material. Unless there is a dispute of fact, no reason exists ordinarily for attacking their credibility. *Healy v. Metropolitan Utilities Dist.* 151

22. Where a party resisting a summary judgment intends to dispute facts by attacking the credibility of the witnesses of the movant, indicating a reasonable basis for such attack, a genuine issue of fact usually exists. *Healy v. Metropolitan Utilities Dist.* 151

23. Where the evidence in a claimed fraudulent transaction rests exclusively within the knowledge of those seeking summary judgment, it may be inequitable and unjust to grant summary judgment where the resisting party has no means to successfully meet the facts stated in the supporting affidavit. In such cases justice and fairness require a

denial of a summary judgment. *Healy v. Metropolitan Utilities Dist.* 151

24. A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective. *Healy v. Metropolitan Utilities Dist.* 151

25. The summary judgment is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged. *Healy v. Metropolitan Utilities Dist.* 151

26. Summary judgment was not intended, nor can it be used, to deprive a litigant of a fair and impartial trial. It is only where the situation exists that its terms imply and entitle the movant to judgment as a matter of law that it may be used to avoid an unnecessary trial. *Healy v. Metropolitan Utilities Dist.* 151

27. Instructions to the jury should be confined to the issues presented by the pleadings and supported by evidence. *Perrine v. Hokser* 190

28. Parties to a lawsuit are entitled to have the jury pass upon the evidence without indulgence by the court in remarks to witness or comment upon the testimony tending to magnify or diminish it. *Styskal v. Brickey* 208

29. It is the duty of the trial judge to instruct the jury upon the law of the case, whether requested by counsel to do so or not. *Styskal v. Brickey* 208

30. Conduct of a third party as the sole proximate cause of an accident is provable under the general issue. The jury should be instructed on the effect of such conduct. *Styskal v. Brickey* 208

31. Where it is shown by chemical analysis that the amount of alcohol in the subject's body fluid is less than 0.15 percent by weight, no presumption of intoxication arises under such statute, and it is prejudicial error to submit such issue to the jury. *Vore v. State* 222

32. In Iowa, in determining the correctness of a trial court's ruling upon a motion to direct or dismiss, the court upon appeal therefrom must consider as true all of the facts established by plaintiff's evidence, and give him the benefit of all reasonable in-

ferences that may be drawn therefrom. *Simpson v. John J. Meier Co.* 264
33. In Iowa, where reasonable minds might reach different conclusions upon the issue of plaintiff's freedom from contributory negligence, the issue is for the jury, otherwise it is for the court as a matter of law. *Simpson v. John J. Meier Co.* 264
34. The submission of issues to the jury, which are not pleaded and upon which there is no evidence, is erroneous, and, if prejudice results, requires a reversal of the judgment. *Gilliland v. Wood* 286
35. Where the evidence shows that the operator of an automobile involved in an accident had a strong odor of intoxicating liquor on his breath, it is not error for the trial court to instruct with reference thereto. *Gilliland v. Wood* 286
36. If plaintiff is required to produce evidence to establish his cause of action when the defendants are in default of pleading to the petition, the plaintiff on appeal to the Supreme Court from a judgment of dismissal of the case is entitled to the advantage of the facts well pleaded by him and any additional material facts shown by the evidence. *Board of Trustees of York College v. Cheney* 292
37. A judgment of an equity court, unsupported by any competent evidence, cannot stand. *Ballmer v. Smith* 495
38. Instructions not complained of become the law of the case. If the verdict is not vulnerable to objections lodged against it when tested by such instructions, the assignments of error will not be sustained. *Forrest v. Masters* 506
39. A verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void. *Abrams v. Lange* 512
40. A verdict will be declared void for uncertainty only where it cannot be clearly ascertained what issues were passed upon by the jury. *Abrams v. Lange* 512
41. A verdict must conform to the pleadings as to parties and must be sufficiently definite to make certain the person or persons against whom it is rendered. *Abrams v. Lange* 512
42. If a verdict disposes of a plaintiff's cause of action as to less than all defendants in a case where the plaintiff may maintain action against one or all, the verdict will be upheld. *Abrams v. Lange* 512
43. The verdict of a jury in favor of one defendant is

not a verdict in favor of other defendants. As to the other defendants, there is merely a failure of the jury to find on the issues. *Abrams v. Lange* 512

44. In a jury case where different minds may reasonably draw different conclusions or inferences from the evidence adduced, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury. Where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court. *Driekosen v. Black, Sivalls & Bryson* 531

45. In a negligence action, the question of whether or not there was an intervening cause which removed the negligence of the defendant as the proximate cause is usually one for the jury. *Driekosen v. Black, Sivalls & Bryson* 531

46. A plaintiff is not bound to exclude the possibility that an accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed. *Driekosen v. Black, Sivalls & Bryson* 531

47. Where contributory negligence is pleaded as a defense but there is no competent evidence to support the same, it is prejudicial error to submit such issue to the jury and requires the granting of a new trial. *Driekosen v. Black, Sivalls & Bryson* 531

48. Both trial court and Supreme Court are required to give consideration to a view of the premises made by the trial court. *Hehnke v. Starr* 575

49. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict. *Schlitz v. Topp* 583

50. A refusal to permit the jury to view the premises involved in litigation is not reversible error in the absence of an abuse of discretion. *Peake v. Omaha Cold Storage Co.* 676

51. A court is not required to permit a litigant to trifle with the processes of the court by asserting therein under oath at different times the truth of each of two or more contradictory versions of an event or events in controversy according to the necessities of the particular occasion presenting itself. *Chiles v. Cudahy Packing Co.* 713

52. In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Horton v. Maruska* 723

53. Circumstantial evidence is sufficient to sustain a verdict depending solely thereon for support if the circumstances proved are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Shamblen v. Great Lakes Pipe Line Co.* 752

54. Where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. *Shamblen v. Great Lakes Pipe Line Co.* 752

55. A child charged with delinquency is entitled to be proceeded against in the manner provided by statute and is entitled to the safeguards essential to a fair and impartial trial. *State v. Roth* 789

Trusts.

1. A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose. *Board of Trustees of York College v. Cheney* 292

2. A gift upon condition to a charitable corporation to further the purposes of the corporation is governed by the same principles of law as a gift to a charitable trust. *Board of Trustees of York College v. Cheney* 292

3. Under the doctrine of cy pres, if a definite function or duty cannot be performed in exact conformity with the scheme of the person who provided therefor, the function or duty must be performed with as close approximation to such scheme as is reasonably practicable. *Board of Trustees of York College v. Cheney* 292

4. The cy pres doctrine has no existence or operation when the donor himself has declared how the gift should be used in the event of the failure of the

charitable use to which he, in the first instance, directed it should be devoted. *Board of Trustees of York College v. Cheney* 292

5. If the dominant purpose of a charitable trust is certain, it will not be denied execution because of absence of perfection of detail or the presence of immaterial and inappropriate language in the instrument creating the trust. *Board of Trustees of York College v. Cheney* 292

6. Where the title to real estate is conveyed inter vivos subject to payments to be made to third persons, an implied or constructive trust is created as between the trustee and the cestui que trust and may be enforced directly by a suit brought in their own names. *Vielehr v. Malone* 436

Vendor and Purchaser.

1. An executory contract for the sale of real estate, enforceable for and against vendor and vendee, is a present equitable conversion of real estate into personalty and of personalty into real estate. *Buford v. Dahlke* 39

2. A contract by a husband and wife to sell real estate owned by them as joint tenants destroys the joint tenancy in the real estate and effects an equitable conversion into personalty even though they retain legal title to the real estate as security for a part of the purchase price. *Buford v. Dahlke* 39

3. Where contract of sale is silent, the relationship of the vendors as owners of the contract is that of tenants in common. *Buford v. Dahlke* 39

4. Where vendor is unable to convey property because of defect in quality or quantity of estate, innocent vendee may have specific performance with abatement of part of purchase price. *Freeman v. Elder* 364

5. Specific performance with abatement will not be enforced where it would be productive of inequity or would have the effect of making a new contract between the parties, or where there is no basis upon which to ascertain the amount of the compensation or abatement with any degree of certainty. *Freeman v. Elder* 364

Waters.

1. Owner of land upon which natural lake is formed has no right to remove an impediment to its flow-

age. A party injured by such removal has right to injunction and damages. *Lackaff v. Bogue* 174

2. Landowner may construct ditch wholly on own land and discharge waters collected into natural watercourse. *Lackaff v. Bogue* 174

3. Special statute on drainage of lakes controls over general statute on drainage of land. *Lackaff v. Bogue* 174

4. Where it is established that a party has attempted to drain a natural lake without obtaining required approval, injunction and damages should be awarded to parties injured thereby. *Lackaff v. Bogue* 174

5. A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel upon his land, providing he does so within a reasonable time after the new channel formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part. *Ballmer v. Smith* 495

6. The owners of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage. No one has the lawful right by diversion or obstructions to interfere with its accustomed flow to the damage of another. *Ballmer v. Smith* 495

7. A riparian owner may not dam, retard, or bank against the floodwaters of a running stream to the injury of lower proprietors. *Ballmer v. Smith*..... 495

Wills.

1. A patent ambiguity in a will must be removed by interpretation. The intention of the testator must be found within the four corners of the will. *Kramer v. Larson* 404

2. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. *Kramer v. Larson* 404
Perigo v. Perigo 733
Attebery v. Prentice 795

3. The intention of the testator must be given effect

if it is not inconsistent with any rule of law. *Kramer v. Larson* 404
Perigo v. Perigo 733

4. The intention of the testator is the one expressed by the language of the will and not an entertained but unexpressed intention. *Kramer v. Larson* 404
5. A devise or bequest to heirs, without more, designates not only the persons who are to take but also the manner and proportions in which they will take, and if there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they take according to the law of intestate succession. *Kramer v. Larson* 404
6. If the testator gives and devises property to his heirs at law share and share alike, they each take an equal amount per capita and not per stirpes unless the will contains language showing the testator had a contrary intention. *Kramer v. Larson* 404
7. There is a presumption that a person who makes a testamentary disposition of his property did not intend it to be divided as though he died intestate. *Kramer v. Larson* 404
8. Where the testator disposed of his residuary estate to his heirs at law share and share alike except that he excluded from participation in the distribution certain heirs, it was persuasive that the testator did not intend that there should be a distribution of the residue of his estate per stirpes. *Kramer v. Larson* 404
9. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If a 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. *Schlitz v. Topp* 583
10. In order that a will may be rejected on the ground of mental incompetency of the testator, the evidence must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will. *Schlitz v. Topp* 583
11. If the mentality of a testator conforms to accepted tests at the time of the execution of a will, he may dispose of his property as he pleases. He is not required to recognize his relatives therein. *Schlitz v. Topp* 583
12. Although competent evidence of the testator's condition of mind long before, closely approaching, and

shortly after the time of execution of a will is admissible, it is received only to assist in revealing his state of mind at that time. *Schlitz v. Topp* 583

13. If the testator had the mental capacity to make a valid will, it is of no concern to the courts as to whether or not the testator was justified in making its provisions. *Schlitz v. Topp* 583

14. In giving an opinion as to the mental capacity of a testator to make a will, it must appear that a witness has in mind the quality of mental capacity essential to the making of a valid will. *Schlitz v. Topp* 583

15. The elements necessary to establish undue influence in the making of a will are: (1) That the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *Schlitz v. Topp* 583
Horton v. Maruska 723

16. To invalidate a will, undue influence must be of such character as to destroy the free agency of the testator and substitute another person's will for his own. *Schiltz v. Topp* 583
Horton v. Maruska 723

17. To require submission to a jury, the burden is on contestants to produce evidence tending to prove each of the four elements constituting undue influence. *Schlitz v. Topp* 583

18. Undue influence cannot be inferred alone from motive or opportunity. There must be some evidence, direct or circumstantial, to show that undue influence not only existed, but that it was exercised at the very time the will was executed. *Schlitz v. Topp* 583

19. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict. *Schlitz v. Topp* 583

20. In a will contest, 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. *Moore v. Moore* 620

21. In probating a will, the proponent must in the first instance produce evidence of the mental capacity of

the testator sufficient to make out a prima facie case. *Moore v. Moore* 620

22. A prima facie case is made when the party having the burden of proof has produced evidence sufficient to support an adjudication for him on the issue in litigation. *Moore v. Moore* 620

23. 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. *Moore v. Moore* 620

24. The introduction in evidence of a will including the recitals of an attestation clause do not establish prima facie that the testator was of sound mind when he signed the will, and do not relieve the proponent of producing testimony to that effect. *Moore v. Moore* 620

25. The county court in the exercise of its probate jurisdiction, as a distinct and independent branch of jurisdiction, has no power to construe wills. *DeWitt v. Sampson* 653

26. The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but it has no jurisdiction to construe wills to determine rights of devisees or legatees or to bind heirs, legatees, or other persons claiming benefits of a will. *DeWitt v. Sampson* 653

27. The construction of a will by the county court for the information and benefit of the executor in order to advise him as to what course to pursue adjudicates only his rights and liabilities in the execution of his office. *DeWitt v. Sampson* 653

28. The burden of proof to establish undue influence is on the party so alleging. *Horton v. Maruska* 723

29. Extrinsic evidence is not admissible to determine the intent of the testator unless there is a latent ambiguity. Such evidence is not admissible to determine the intent of the testator where the ambiguity is patent and not latent. *Perigo v. Perigo* 733

30. A patent ambiguity is one which appears upon the face of the will, which must be removed by construction according to settled legal principles and not by evidence. The intention of the testator is to be determined from the four corners of the will itself. *Perigo v. Perigo* 733

31. The intention which must be given effect is the one

the testator expressed by the language of the will and not an entertained but unexpressed intention. *Perigo v. Perigo* 733

32. In construing a will the courts should carry into effect the true intent of the testator, not inconsistent with rules of law, so far as that intent can be collected from the whole instrument. *Attebery v. Prentice* 795

33. There is a presumption that a testator intended to dispose of his entire estate. Where a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if, by a reasonable construction, it can be avoided. *Attebery v. Prentice* 795

Witnesses.

1. It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment. *Ambrozi v. Fry* 18

2. A witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issues for the purpose of contradicting him by other evidence if he should deny it. *Ambrozi v. Fry* 18

3. The question of competency of a witness is left to the sound discretion of the trial judge, leaving the jury to determine the credibility of the testimony. *Rakes v. State* 55

4. In jury cases, juries are ordinarily the sole judges of the credibility of witnesses and of the weight to be given their testimony. Juries have the right to credit or reject the whole or any part of the testimony of witnesses in the exercise of their judgment. *Rakes v. State* 55

5. The rule that the court must not determine, express, or intimate the degree of credit or weight to be given to the testimony of a witness applies to the testimony of children. *Rakes v. State* 55

6. The liability of a county for the per diem and mileage of defendant's witnesses in a prosecution for a felony must arise from some express provision of the statutes and not by implication. *Vore v. State* 222

7. A statutory provision that the defendant in a criminal action is entitled to secure the attendance of witnesses in his behalf from without the state does not authorize the courts to procure their attendance at the expense of the county. *Vore v. State* 222

8. Statute did not authorize the taking of the depositions of witnesses for the defendant at the expense of the county. *Vore v. State* 222
9. Failure to have witnesses sworn before giving testimony is prejudicial error if timely objection is made and the omission is not waived. *Ripley v. Godden* 246
10. A nonexpert witness may under certain circumstances testify as to the mental condition of a person after giving the facts and circumstances upon which the opinion is based. *Schlitz v. Topp* 583
11. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. *Shamblen v. Great Lakes Pipe Line Co.* 752

Workmen's Compensation.
1. A workmen's compensation case is triable de novo in the Supreme Court. *Chiles v. Cudahy Packing Co.* 713
2. The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by an accident arising out of and in the course of his employment. *Chiles v. Cudahy Packing Co.* 713
3. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. The rule does not dispense with the necessity that claimant prove his right to compensation, nor does it permit a court to award compensation where the requisite proof is lacking. *Chiles v. Cudahy Packing Co.* 713
4. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or conjectural or speculative evidence. *Chiles v. Cudahy Packing Co.* 713
Anderson v. Cowger 772
5. In order that a recovery may be had under the workmen's compensation law, it must be proved that an accident occurred arising out of and in the course of employment producing an injury that resulted in disability or death. *Anderson v. Cowger* 772
6. An accident, within the meaning of the workmen's compensation act, means an unexpected or unforseen event happening suddenly and violently with or without human fault and producing at the time objective symptoms of injury. *Anderson v. Cowger* 772

7. Symptoms of pain and anguish, or any other symptoms indicating a deleterious change in the bodily condition, may constitute objective symptoms as required by the Workmen's Compensation Act. *Anderson v. Cowger* 772
8. Mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act. *Anderson v. Cowger* 772
9. In order to recover under the Workmen's Compensation Act, the burden is on the claimant to prove his claim by a preponderance of the evidence. *Anderson v. Cowger* 772
10. For workmen's compensation purposes, "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Anderson v. Cowger* 772
11. "Earning power," under the Workmen's Compensation Act, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. *Anderson v. Cowger* 772
12. The measure of compensation for permanent partial disability is 66⅔ percent of the amount or percentage of impairment in general earning capacity, applied to the wages received by the workman at the time of the injury. *Anderson v. Cowger* 772
13. If the payment of wages was intended to be in lieu of compensation, credit for the wages is allowed. *Anderson v. Cowger* 772
14. If an employee is paid his regular wage although he does not work at all, it is a reasonable inference that the allowance is in lieu of compensation. *Anderson v. Cowger* 772
15. The employer cannot claim any credit if he denied his workmen's compensation liability while paying the wages. Where an employer denies liability, he cannot claim credit for wages paid on liability under Workmen's Compensation Act. *Anderson v. Cowger* 772