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VIOLA MAE MILLIGAN, APPELLEE, V. HARLAND S. MILLIGAN, ADMINISTRATOR OF THE ESTATE OF RENA S. MILLIGAN, DECEASED, ET AL., APPELLANTS.

74 N. W. 2d 74

Filed December 23, 1955. Nos. 33789, 33790.

1. Deeds. Whether or not a deed has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case.
2. ———. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.
3. ———. When a grantor deposits a deed with a third person, without reserving dominion or control over it, and with directions to the latter to hold the deed during the lifetime of the grantor and upon grantor's death to deliver it to the grantee, such a delivery is effectual to pass the title to the grantee.
4. ———. Where a grantor has thus conveyed his property, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed.
5. ———. Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to the deed, are incompetent as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed.

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

William H. Lamme and *Kenneth M. Olds*, for appellants.

Harry N. Larson and *Mark J. Ryan*, for appellee.

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

MESSMORE, J.

This is an action in equity brought in the district court for Dixon County by Viola Mae Milligan as plaintiff, against Harland S. Milligan, administrator of the estate of Rena S. Milligan, deceased, and the heirs of Rena S.

Milligan, deceased, to quiet title in the plaintiff to 380.19 acres of land in Dixon County. The trial court entered its decree, finding generally in favor of the plaintiff and against the defendants, and quieted title in the plaintiff to the real estate in question, subject to an accounting as between the plaintiff and the estate of Rena S. Milligan, deceased, for rents and profits received by the administrator since the death of Rena S. Milligan, and subject to a lien for federal estate taxes and state inheritance taxes to be apportioned. The trial court retained jurisdiction of the cause until the accounting as provided for in the decree should be made and completed, but provided nothing in the decree should prevent an appeal by any of the parties.

The trial court overruled separate motions for a new trial by various defendants.

The defendant, administrator Harland S. Milligan, and other defendant-heirs of Rena S. Milligan, deceased, filed notice of appeal, as did also the heirs of Dora M. Jaiser, deceased, sister of Rena S. Milligan, deceased.

All parties stipulated that for the purpose of this appeal, the cases should be consolidated.

For convenience we will refer to Rena S. Milligan as deceased or Rena S. Milligan, to Viola Mae Milligan as Viola or Viola Milligan, to Harland S. Milligan as administrator, and to John J. Gross as Gross.

The principal assignments of error set forth by defendants are as follows: The trial court erred in finding that there was a valid delivery of the deed in question to the plaintiff. The trial court erred in not finding that the deed in question had been withdrawn from the hands of the third party holder by the grantor with the consent of the grantee, thereby revoking and canceling delivery of the deed in escrow.

John J. Gross, a lawyer who practices his profession at West Point, Nebraska, became acquainted with and had known the deceased since 1943 or 1944, and over a period of years had performed legal services for her.

On August 28, 1947, at her request he prepared a deed conveying to Viola Milligan, recognized by the parties to this action as the same person as Viola Mae Milligan, 380.19 acres of land in Dixon County. This deed was signed by the deceased in the presence of John J. Gross and acknowledged before him as notary public.

At the same time, by direction of the deceased, he prepared a written instrument entitled "DELIVERY IN ESCROW." This instrument provided: "The attached Warranty Deed from Rena S. Milligan, single, to Viola Milligan, conveying (then appears the description of the land conveyed) containing 380.19/100 acres, is hereby delivered to John J. Gross, to be held by him for the use and benefit of Viola Milligan and by him to be turned over to said Viola Milligan when in his judgment and discretion he believes it proper to do so, and in any event he shall immediately turn the same over to said Viola Milligan upon the direction of the undersigned. In the event of the death of John J. Gross during the life time of Rena S. Milligan his executor or administrator shall deliver the same to such person as Rena S. Milligan shall designate to hold the same. In the event of the death of Rena S. Milligan, said John J. Gross shall immediately give said deed to Viola Milligan.

"This delivery is irrevocable and in no event is said deed to be returned to Rena S. Milligan or to be under her control in any manner except as herein provided.

"Signed this 28th day of August 1947.

Witness (Signed) Rena S. Milligan

(Signed) John J. Gross."

This deed and the above-written instrument were left with Gross, placed in a deposit box with the deceased's name on it, and placed in the vault in his office.

Mr. Gross also testified that in holding the deed he was acting under the instructions of the deceased and considered he was holding it for the grantee; and that on February 3, 1950, the deceased came to his office, told him she wanted the deed to the Dixon County land to

Viola, and "gave me to understand that she was going to deliver it to Viola personally." He gave her the deed and never saw it thereafter.

The farm involved in this case is the one which the deceased referred to as the "Mathiesen" farm.

The record further shows that Viola Mae Milligan is the widow of Emmett Milligan, deceased, brother of Rena S. Milligan, deceased. Before Rena died she was at Viola's home and told Viola about the deed being left with Gross, and that Viola ought to have the farm, meaning, when Rena passed away. On many occasions Rena told Viola that the Mathiesen farm was going to be hers. The record further discloses that the deceased had a paper in her hand; and told Viola that it was the deed to the farm in question, and that she had some debts to pay and had to borrow some money. Viola knew that the deceased was going to see a Mr. Crowell in Omaha for the purpose of mortgaging the property to procure money to pay indebtedness, and had no objection if Rena wanted to do so. Viola never saw the deed in question. All she saw was a photostatic copy of it at the time of the trial of this cause in the district court.

Mr. Crowell had known the deceased for 20 or 30 years and had transacted business in her behalf, attending to her affairs by agreement of deceased and himself. On January 16, 1950, the deceased consulted Crowell at his office in Omaha about raising money by means of a mortgage on land in Dixon County. Negotiations were had with reference to this matter, but the land in question was not mortgaged by the deceased.

In this connection, as stated in Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258: "Acts and declarations of the grantor subsequent to the time of the alleged delivery, in hostility to the deed, are incompetent as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed." See,

also, McDonald v. Miller, 73 N. D. 474, 16 N. W. 2d 270, 156 A. L. R. 1328; 31 C. J. S., Evidence, § 325, p. 1103; Pickworth v. Whitford, 228 Iowa 658, 293 N. W. 47; Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93; Johnson v. Petersen, 101 Neb. 504, 163 N. W. 869, 1 A. L. R. 1235; 2 Jones, Commentaries on Evidence (2d ed.), § 909, p. 1672; 20 Am. Jur., Evidence, § 605, p. 518; Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500.

It was stipulated that the deed in question remained in the possession of the deceased from the time it was given to her by Gross until a few days prior to her death when it was taken possession of by Crowell, and after her death it was delivered to Rolley W. Ley, special administrator of Rena S. Milligan's estate, and after the appointment of Harland S. Milligan as administrator of the estate, the deed was turned over to him and remained in his possession until it was made an exhibit in this case.

Whether or not a deed has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. Black v. Romig, 151 Neb. 61, 36 N. W. 2d 772; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. S. R. 532.

No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. Brown v. Westerfield, *supra*.

"The true rule appears to be that it is not essential to the validity of the deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument. Roepke v. Nutzmann, 95 Neb. 589; Johnson v. Becker, 251 Mich. 132; Sneathen v. Sneathen, 104 Mo. 201; Kittoe v. Willey, 121 Wis. 548; Gilmore v. Griffith, 187 Ia. 327; Hill v. Naylor, 99 Neb. 791." Blocho-

witz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A. L. R. 949.

In Newell v. Pierce, 131 Neb. 844, 270 N. W. 469, it was said: " 'The authorities uniformly hold that where a grantor has deposited a deed with a third person, to be delivered to the grantee after the death of the grantor, reserving no dominion or control over the same, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect a delivery thus completed.' Ann. 52 A. L. R. 1247, and cases therein cited."

There is no evidence in the record of any reservation or of any dominion or control over the deed in question on the part of the grantor. We are convinced that under this state of the facts, Rena S. Milligan, deceased, had absolutely conveyed her property as evidenced by the deed in evidence to Viola Mae Milligan, subject only to her life estate.

The defendants contend the trial court erred in failing to determine that the plaintiff-grantee specifically consented to the withdrawal of the deed from escrow thereby revoking and canceling the prior delivery in escrow.

The defendants offered in evidence parts of a deposition of the plaintiff, endeavoring to show that she consented to the withdrawal of the deed deposited in escrow by the grantor, thereby revoking the delivery of the deed and conveyance which had been made. This evidence was excluded by the trial court. We find nothing in the evidence, admitted or excluded, which shows any intention on the part of the grantee, Viola Milligan, to effect a revocation of the deed, nor is there any evidence, admitted or excluded, that the grantor, Rena S. Milligan, intended a revocation of the deed. The evidence is to the contrary. Viola Milligan was never given any choice as to granting her consent to repossession of the deed by the deceased. The deceased never asked Viola to approve what she had done. She simply

informed Viola what she had done after it was done. All the record shows is that in a very general way Viola was agreeable to anything Rena might wish to do. There is nothing about such an attitude which could serve to deprive Viola of property rights legally vested in her by the delivery of the deed in escrow to Gross. The return of the deed by Gross to the deceased, unaccompanied by a definite, specific intent of the grantor and the grantee to effect a revocation of the original delivery in escrow, as in this case, neither divests the grantee of the title nor raises an estoppel against her. See cases heretofore cited.

For the reasons given in this opinion the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

OTTO A. FRENTZEL, TRUSTEE, APPELLEE, V. ANNA SIEBRANDT, APPELLEE, IMPLEADED WITH LEOTA B. LEMKE ET AL., APPELLANTS.

73 N. W. 2d 652

Filed December 23, 1955. No. 33804.

1. **Reformation of Instruments.** A preponderance of evidence sufficient to justify reformation of a written instrument requires proof that is clear, convincing, and satisfactory.
2. **Contracts.** The law presumes that a person who makes a contract understands its meaning and effect and that he has the intention which its terms manifest.
3. **Trusts.** The beneficiaries of a trust created by their contract who are legally competent may authorize the trustee of the trust to extend it as they desire and upon such conditions as the creators of the trust designate.
4. **Contracts.** A written contract expressed by clear and unambiguous language is not subject to interpretation or construction.
5. ———. The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents.

APPEAL from the district court for Cuming County: FAY H. POLLOCK, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Sidner, Lee, Gunderson & Svoboda, for appellants.

Moodie & Burke and *Hugo M. Nicholson*, for appellees.

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

BOSLAUGH, J.

Otto A. Frentzel, as trustee of an express trust, sought instruction of the district court concerning distribution of property acquired and held by him for four beneficiaries by virtue of a written instrument executed by them, for a determination by the court that the accounts of the trustee were correct, and for any other proceedings necessary to finally dispose of the trust.

The situation making the action of the trustee appropriate resulted from the following circumstances: Nels P. Hansen, a resident of Cuming County, died December 1, 1935. His heirs were Karen Christina Hansen, his widow; and Anna Siebrandt, Louis J. Hansen, and Cecelia Benzien, his children. The estate of the deceased was administered in the county court of Cuming County. The heirs of the deceased executed an instrument in writing dated January 8, 1936, which recites that the heirs, the only parties in interest, made a settlement of a controversy involving the probate of a document purporting to be the will of the deceased to which objections were filed. The terms of the settlement were as follows: The real estate owned by the deceased should descend and vest as provided by the intestate laws of the state and all personal property remaining after administration of the estate of the deceased was completed should be distributed to Otto A. Frentzel as trustee to hold, collect, invest, and reinvest except the income and accumulations of the trust property should be paid annually or more frequently if possible to Karen Christina Hansen during her lifetime and at her death the trust should terminate and the trustee should distribute all the trust property equally to the children of Nels P. Hansen, deceased. The widow and children of

the deceased by the instrument assigned and transferred the personal property referred to above to the trustee. Otto A. Frentzel accepted the appointment and has been the trustee of the trust created by the instrument since the date thereof.

The beneficiaries of the trust executed an instrument in writing dated September 22, 1937, by the terms of which they authorized the trustee, when opportunity existed, to purchase with funds of the trust for it 120 acres of land in Cuming County by an expenditure of not to exceed $12,000. The instrument contained the further provisions that the real estate if acquired by the trustee should be held by him during the term of the trust and the net income therefrom should be disposed of as provided by the agreement creating the trust and that at the termination of the trust the real estate should be conveyed by the trustee to Cecelia Benzien, free of encumbrance, at a value of $12,000 "to apply in such amount upon the value of her beneficial interest in said trust and to be valued at such amount in the settlement of said trust." If the value of her interest therein was less than said sum she should pay to the trustee upon demand as a condition of receiving a conveyance of the land such amount as was required to equalize the shares in the trust of all the beneficiaries.

The beneficiaries of the trust executed an instrument in writing dated November 26, 1937, by the terms of which they authorized the trustee, when opportunity existed, to purchase with funds of the trust for it a quarter section of land in Cedar County by an expenditure not to exceed $11,250. This instrument contained provisions identical in effect to the one dated September 22, 1937, described above except the conveyance of the land by the trustee at the termination of the trust was required to be made to Louie J. Hansen at a valuation of $11,250.

Cecelia Benzien by an assignment in writing dated April 22, 1944, transferred all her interest in the trust

property to her children, Leota B. Lemke, Dolores L. Lemke, and Faye Y. Benzien who is named in this cause as Faye Y. Froehlich. Cecelia Benzien died on June 17, 1944. Louis J. Hansen died intestate on October 18, 1947, a resident of Cedar County and his estate was administered in the county court of that county. His heirs are his children, Leland M. Hansen, Ardis Hastings, Harold L. Hansen, Ivan L. Hansen, Raymond Hansen, Kenneth Hansen, Delma Erlenbusch, and Alice Halthus. Karen Christina Hansen, the widow of the deceased, died October 9, 1952. Her heirs are the appellants and the appellee, Anna Siebrandt.

The death of Karen Christina Hansen terminated the trust. There was a lack of harmony among Anna Siebrandt and the other beneficiaries of the trust as to the disposition and distribution of a part of the trust property and because thereof the trustee appropriately sought the direction and instruction of the court by the institution of the proceedings of which this appeal is a part.

The adjudication made by the trial court was as follows: That the acts and accounts of the trustee to March 23, 1954, were correct; that he account for his acts, receipts, and disbursements thereafter and jurisdiction was retained to hear and determine the correctness thereof; that the trustee should pay two items of expense for repairs made on the Cedar County land; that the indebtedness of Anna Siebrandt should be charged to and deducted from her distributive share of the trust property when distribution was made of the trust assets; that the Cedar County land, the east half of the southwest quarter and the west half of the southeast quarter, Section 16, Township 29 North, Range 3 East of the 6th P. M., should be conveyed by the trustee to the eight heirs of Louis J. Hansen, deceased, above named and described, at a value of $24,000 (instead of $11,250 as stated in the contract) to be charged against their distributive share of the trust property at that amount and any difference between it and the value of their dis-

tributive share was required to be paid by them to the trustee as a condition precedent to their receiving a conveyance of the land from the trustee; that the Cuming County land, the south half of the southeast quarter of Section 25 and the northeast quarter of the northeast quarter of Section 36, Township 24 North, Range 4 East of the 6th P. M., should be conveyed by the trustee to the children and assignees of Cecelia Benzien, above named and described, at a value of $31,500 (instead of $12,000 as stated in the contract) subject to the same provisions and conditions as were made in reference to the conveyance of the Cedar County land to the heirs of Louis J. Hansen, deceased, as above detailed; that if any amount required to be paid as a condition precedent to a conveyance of real estate by any person or group of persons was not satisfied within 6 months from the time the amount thereof was determined by the trustee, the real estate was required to be sold by him and the sale reported to the court for confirmation and distribution of the proceeds of the sale to the persons entitled thereto; and that the costs accrued in the cause should be paid by the trustee from funds of the trust and charged by him one-half to the assignees of Cecelia Benzien and one-half to the heirs of Louis J. Hansen, deceased. This appeal is from that judgment.

The appellee, Otto A. Frentzel, will be hereafter called the trustee, Anna Siebrandt will be spoken of as appellee, and the assignees and children of Cecelia Benzien and the heirs of Louis J. Hansen will be referred to as appellants. The true name of the son of Nels P. Hansen was Louie J. Hansen and he was the identical person sometimes named in this cause as Louis J. Hansen.

The substantial issue in this cause concerns the disposition to be made by the trustee of the land purchased by him by authority of the instruments dated September 22, 1937, and November 26, 1937. Appellee thinks they do not express the intention and agreement of the parties who executed them. She concedes that they were made

by the heirs of her father in the form and contents as they appear in the record; that there were negotiations between them and the trustee in the year 1937 concerning the purchase of real estate by the trustee by the use of funds of the trust as proposed and desired by her brother and her sister; that it was agreed by the heirs of Nels P. Hansen, deceased, that the trustee should be authorized to purchase the 120 acres of Cuming County land for not to exceed $12,000 and the 160 acres of Cedar County land for not to exceed $11,250; that the land should be retained during the term of the trust and the income therefrom paid to the widow of the deceased during that time; and that it was the intention and agreement of the persons who signed the instruments that upon the death of Karen Christina Hansen the Cuming County land should be conveyed by the trustee to Cecelia Benzien at a valuation of not less than $12,000, the cost thereof, and the Cedar County land should be conveyed to Louie J. Hansen at a valuation of not less than $11,250, the cost thereof. But she pleads in this cause that in the negotiations had no thought or consideration was given to the possibility that the land might appreciate in value during the term of the trust and that there was no meeting of the minds or agreement in respect thereto by the parties; that the instruments made by the parties above referred to are ambiguous and do not express the agreement of the parties who made them; that it was not intended that regardless of the value of the lands at the end of the trust they should be conveyed to Cecelia Benzien and Louie J. Hansen at the cost of the lands; that she signed the instruments but would not have done so if she had then had any reason to believe that the distribution of the trust estate would be otherwise than equal as originally agreed by the heirs of the deceased; that the instruments by virtue of which the lands were purchased should "be reformed to reflect the agreements of the parties thereto"; and that the lands should be ordered conveyed one-third

to appellee, one-third to assignees of Cecelia Benzien, and one-third to the heirs of Louie J. Hansen, deceased, or that they should be sold and the proceeds distributed in those proportions.

The attempt of appellee to establish a basis for reformation of the instruments by virtue of which the land was purchased by the trustee is that she only attended school to the 4th grade; that nothing was said in the negotiations and conversations concerning the purchase of land by the trustee about the possibility that the land might increase in value before the death of her mother; that she did not think of anything like that; that she would not have signed the instruments if it had occurred to her that the valuation of the land would double before the trust was closed; and that nothing was said about appreciation in value of the land but it was discussed that Cecelia Benzien and Louie J. Hansen were to take the land for the purchase price in any event when the trust ended without regard to how much it had depreciated in value.

The trust property at the time the trust was created was the personal property available for distribution when the administration of the estate of Nels P. Hansen was completed. It was owned by his heirs. The property was made a trust. It was created entirely by the agreement of the widow and children of the deceased who were competent and the individual owners of the trust property. The trust was created and existed by agreement and it could be modified by the same method. Investment could be made in whatever property and upon whatever terms the parties who were the owners stipulated. It was because of the agreements of the owners made subsequent to the creation of the trust that the trustee invested in land upon the terms prescribed by the beneficiaries of the trust by their written instruments. The record indicates that these originated in a very natural manner. The son of the deceased, a recent widower with eight children, wanted a farm to

live on with his family which would at the end of the trust become his farm. The youngest child of the deceased wanted land also. These two heirs were willing to hazard the interest they had in the assets of the trust that land would prove a safe investment and they consented to take the land at what it cost the trust in any event at the end of the trust. Appellee asserts that the parties intended to provide that in no event should Louie J. Hansen and Cecelia Benzien take title to the land for less than it cost the trust. This is precisely what the instruments entered into incident to the purchase of the land provide and it is what they are willing to do and contend that they are entitled to do.

There is no evidence of fraud, mistake, misrepresentation, or that any of the interested parties intended or attempted to secure an advantage over appellee whose intrinsic intelligence is not in dispute. She executed the writing whereby she and others assigned the property to a trustee for investment and management and there is no claim that she did not comprehend its meaning, effect, and purpose. It is reasonable to believe that she could and did understand the rather simple, definite, and unequivocal language in the agreements for the purchase of the farms. Her examination and testimony in this case indicate she is not an unintelligent person. These instruments had been in effect for 15 years at the time the trust terminated. There is evidence to justify a belief that appellee knew during this time that the lands were to go to her brother and sister at the conclusion of the trust in accordance with the terms of the instruments. Appellee on a number of occasions objected to the trustee spending anything for the betterment of the farms because that decreased the amount which would be available for distribution when the trust ended and would improve the farms for those who were to receive them. The facts and circumstances at the time the instruments were made, September 22, 1937, and November 26, 1937, their clear, complete, and un-

equivocal terms, and the absence of evidence that they do not express the agreement of the parties foreclose any basis for the reformation of the instruments. The burden upon this phase of the case was upon appellee. She has failed to sustain it. In Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850, it is said: "A preponderance of evidence sufficient to justify reformation of a written instrument requires proof that is clear, convincing, and satisfactory." The law presumes that the parties understood the import of their contracts and that they had the intention which their terms manifest. Shepard v. Shepard, 145 Neb. 12, 15 N. W. 2d 195; O-N-L Mills, Inc. v. Union Pacific R. R. Co., 151 Neb. 692, 39 N. W. 2d 501.

The argument and conclusions of appellee proceed from a misconception of the language of the instruments authorizing the purchase of the land by the trustee and providing for the disposition of it at the termination of the trust. This is indicated by her statement that the agreements contain specific provisions to apply in the event land decreased in value and they contain no provisions if land increased in value. The instruments evidencing the agreements of the parties contain no provision, specific or otherwise, which should apply and govern in the event the land decreased or increased in value. The precise and clear language is that at the conclusion of the trust the trustee was in any event authorized and obligated to convey the lands on the respective cost valuations, $12,000 as to Cecelia Benzien and $11,250 as to Louie J. Hansen. The language in this regard in the instrument concerning the Cuming County land is: "That upon the termination of said trust the above described premises shall be conveyed by said trustee to the above named Cecelia Benzien, free and clear of encumbrance, at the valuation of twelve thousand dollars ($12,000.00), to apply in such amount upon the value of her beneficial interest in said trust *and to be valued at such amount in the settlement of said trust.* In the event the beneficial interest of said Cecelia

Benzien is of the value of less than twelve thousand dollars ($12,000.00), she shall pay to said trustee upon demand and as a condition precedent to receiving such conveyance, such amount as is necessary to equalize the shares in said trust of all of said beneficiaries." (Emphasis supplied.) The instrument concerning the Cedar County land is in this respect identical in language except as to the name of the grantee, the valuation, the land involved, and the personal pronoun "he" in place of "she." The language quoted makes it obvious and definite that regardless of whether the land at the termination of the trust was of the same value as when it was bought or was higher or lower in value than the cost was wholly immaterial. The instruments made everything definite and certain as to the conveyance of the land. It was to be conveyed upon the termination of the trust by the trustee to a named person at the valuation of a stated number of dollars and the land was "to be valued at such amount in the settlement of said trust." This was a definite arrangement that in the final settlement the named grantees would get the land and the trustee would realize from them the exact amount the land cost the trust when it was purchased. Any increase or decrease in the value of the land was foreign to the transaction and the necessary understanding of the unequivocal language of the instruments. The only thing in the final settlement required of the grantees was that they pay to the trustee any amount necessary to equalize distribution.

The appellee adopts and repeats in the discussion of the case a statement from a memorandum of the trial court to the effect that Mrs. Siebrandt's adversaries do not precisely say whether they claim she intended to sell, donate, or forfeit her share of any profit that might result. An examination and consideration of the writing creating the trust, the instruments concerning the purchase and ultimate disposition of the land, and the facts and circumstances existing at the time they were

made fail to find any mention or reference to profit or loss affecting any person concerned or the slightest indication that anyone concerned in or affected by the matter of the purchase and disposition of the land intended that appellee should have any "share of any profit that might result." The plain, unambiguous language of the instruments she executed condemns this argument and speculation.

It is stressed by appellee that the original trust agreement required an equal distribution to the beneficiaries of the trust property at the conclusion of the trust and that if the instruments authorizing the purchase and distribution of land by the trustee provided for unequal distribution to the beneficiaries that would be in conflict with the original agreement. The instruments concerning the land purchased by the trustee do not require an unequal distribution of trust assets. These authorized the purchase of land and fixed the control and disposition of the land bought. They required the trust to realize the amount the trustee paid for the land. This amount will, of course, be a trust asset and will be distributed as the original trust contract provides. The discussion concerning inequality results only because of the unjustified assumption that the instruments do not mean what they plainly express and that appellee should enjoy the advantage of the alleged increased value of the land.

The argument made in this regard implies that the original trust agreement is sacrosanct and that its provisions could not be changed or modified even though all the parties concerned were competent to make a contract providing for changes in it. This is not a sound conclusion. 89 C. J. S., Trusts, § 87, p. 895, states: "Persons free to contract may grant trustees the power to extend the trust in any manner and under any conditions."

In Morris v. Broadview, Inc., 328 Ill. App. 267, 65 N. E. 2d 605, the court said: "It is true, as contended by

plaintiff, that courts of equity will not permit trustees to extend without authority the life of a trust. But neither reason nor authority has been advanced for denying the right of persons free to contract to grant to trustees the power to extend the trust in whatever manner and upon whatever conditions the creators of the trust may designate."

In Washington Loan & Trust Co. v. Colby, 108 F. 2d 743, the United States Court of Appeals for the District of Columbia stated the ruling as follows: "A sole beneficiary, or several or successive beneficiaries all of whom consent and none of whom suffer from disability, may direct that the performance of a trust be arrested, modified, or even extinguished. * * * The beneficiaries of a trust who suffer from no disability and who have full knowledge of the facts and of their legal rights, may direct the trustee in the investment of trust funds, and if losses are sustained, beneficiaries cannot complain."

An argument is made that the pleadings of appellants admit that the parties merely intended to protect appellee against loss if the land decreased in value and the word "loss" as used in the pleading comprehended her share of any profit resulting from the land becoming of a greater value than the cost of it when purchased by the trustee. The part of the pleading relied upon is a portion of a sentence of an extensive paragraph. It states that all the parties agreed to the purchase of the lands "except that Anna Siebrandt required that in the event of the purchase of land that the other parties, Louie J. Hansen and Cecelia Benzien, should take over said land at the conclusion of the trust period at the amount invested in said land so that there would be no risk of loss to the said Anna Siebrandt." It is said that this is a judicial admission, a limitation of the issues, and makes the fact indisputable that Anna Siebrandt was insulated against loss. This contention is an extravagant play on the word "loss." If appellee required that her brother and sister should take the land at the

end of the trust at the amount invested in it, as the pleading of appellee alleges, she cannot now convincingly claim that it was intended they must accept the land at a higher price or pay her something additional because the land at the end of the trust was worth more than the cost price at which she insisted they take the land when the contract was made. Logically that is a perfect example of non sequitur. The paragraph of the pleadings from which the part of a sentence was selected states one proposition. It may not be fragmentized and a part of a sentence made to say something not intended by the pleader and which by reasonable understanding he has not said. In McCaskill v. Walker, 147 N. C. 195, 61 S. E. 46, it is said: "While it is not always easy to draw the line by which portions of a pleading may be separated from other portions and introduced, we think it clear that, where there is but one proposition stated, it should not be separated so that the pleader is made to say something which he never intended, and which by reasonable construction he has not said." See, also, 31 C. J. S., Evidence, § 301, p. 1072. The only admission that can legitimately be exacted from the language used by appellants in the paragraph referred to is precisely that the full amount of the trust funds invested in the land would be accounted for in the same amount in the final computation for distribution without diminution because of the investment.

The instruments of September 22, 1937, and November 26, 1937, are clear, complete, and unambiguous. They do not require construction or interpretation. The intention of the parties who made them and their effect must be found and deduced from their contents. Mason v. Mason, 156 Neb. 478, 56 N. W. 2d 614, states: "A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used." See, also, Platte Valley P. P. & I. Dist. v. Cover, 155 Neb. 479, 52 N. W. 2d 243; Smith v. United States Fidelity

& Guaranty Co., 142 Neb. 321, 6 N. W. 2d 81; Hompes v. Goodrich Co., 137 Neb. 84, 288 N. W. 367.

The judgment of the district court rendered and entered in this cause on January 20, 1955, as stated and contained in paragraphs numbered and identified as I, II, III, VI, and VIII thereof should be and it is affirmed. The judgment described above as stated and contained in paragraphs numbered and identified as IV, V, VII, and IX thereof should be and it is reversed with directions to the district court for Cuming County to render and enter a judgment in this cause as follows:

1. Instructing and directing the trustee, in the disposition and distribution of the assets of the trust, to convey the east half of the southwest quarter and the west half of the southeast quarter of Section 16, Township 29 North, Range 3 East of the 6th P. M., in Cedar County, Nebraska, to Leland M. Hansen, Ardis Hastings, Harold L. Hansen, Ivan L. Hansen, Raymond Hansen, Kenneth Hansen, Delma Erlenbusch, and Alice Halthus, free and clear of encumbrance, at the valuation of $11,250 to apply in that amount upon the value of their beneficial interest in the trust property of the trust involved in this case and represented by the trustee upon payment by them to the trustee, upon his demand, any amount that he determines to be the difference, if any, between the said amount of $11,250 and the value of said beneficial interest of the grantees to be named in the deed and adjudging that said valuation of $11,250 is the amount of the value of said land to be used in arriving at the value of the assets of the trust for distribution and in the settlement of the trust.

2. Instructing and directing the trustee, in the disposition and distribution of the assets of the trust, to convey the south half of the southeast quarter of Section 25 and the northeast quarter of the northeast quarter of Section 36, Township 24 North, Range 4 East of the 6th P. M., in Cuming County, Nebraska, to Leota B. Lemke, Dolores M. Lemke, and Faye Y. Froehlich, free

and clear of encumbrance, at the valuation of $12,000 to apply in that amount upon the value of their beneficial interest in the trust property of the trust involved in this case and represented by the trustee upon payment by them to the trustee, upon his demand, any amount that he determines to be the difference, if any, between the said amount of $12,000 and the value of said beneficial interest of the grantees to be named in the deed and adjudging that said valuation of $12,000 is the amount of the value of said land to be used in arriving at the value of the assets of the trust for distribution and in the settlement of the trust.

3. Taxing the costs of this proceeding in the district court and this court to the trustee and authorizing and directing him to pay the costs from the funds of the trust.

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

JAMES BRUNSON, APPELLANT, V. RANKS ARMY STORE, APPELLEE.

73 N. W. 2d 803

Filed December 23, 1955. No. 33809.

1. **Pleading.** A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded; but does not admit the conclusions of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, as to the effect of the facts, nor allegations of what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law.
2. **Common Law.** So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska.

3. **Right of Privacy.** The doctrine of the right of privacy was not recognized or enforced in the ancient English common law.
4. ———. There is no statutory provision in this state with reference to the doctrine of the right of privacy.
5. **Damages: Contracts.** Mental anguish is not considered as an element of recovery in an action on an ordinary contract.
6. ———: ———. Damages for mental anguish for breach of contract are not generally recoverable for the reason that they are too remote and could not have been in the contemplation of the parties when the contract was made.
7. **Pleading.** The amended petition of plaintiff examined and the separate demurrers thereto on the ground that the petition did not state a cause of action held to be properly sustained.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Victoria & Sloma, for appellant.

Levin & Brodkey, for appellee.

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

MESSMORE, J.

This is an action brought by James Brunson as plaintiff against Ranks Army Store as defendant in the district court for Douglas County to recover damages. The first cause of action is for breach of contract entered into by and between the plaintiff and defendant. The second cause of action is based on a violation of an alleged right of privacy. The defendant demurred separately to each cause of action on the ground that the facts set forth in plaintiff's amended petition on each cause of action failed to state facts sufficient to constitute a cause of action. The trial court sustained the defendant's demurrers. The plaintiff having elected to stand on his petition and not plead further, the trial court dismissed the cause at plaintiff's costs. Plaintiff perfected appeal to this court.

To determine whether or not the plaintiff's amended petition states a cause of action in the first and second

counts thereof, it becomes necessary to set forth in substance certain parts of the amended petition.

The plaintiff's amended petition alleged that the plaintiff is a resident of Omaha, Douglas County, Nebraska, and the defendant is a company engaged in the sale of goods of every kind and nature with its place of business in Omaha; that the plaintiff is an actor, specializing in portrayals and characterizations; that on or about February 1, 1950, the defendant, by oral contract, hired the plaintiff to portray and to head and lead seven of defendant's employees in portraying the notorious payroll robbers of Brinks, a money-delivery firm of Boston, Massachusetts; that the plaintiff, knowing and realizing the realism of his portrayal and characterization, accepted the employment under the express promise of the defendant that defendant would secure the permission of the Omaha police department for the portrayal of said robbers of Brinks; that the said portrayal was to be an advertising scheme and stunt for and in behalf of the defendant and for defendant's benefit; that on or about February 4, 1950, in the morning, just before the plaintiff and said defendant's employees left for the downtown section of Omaha in their disguises as the robbers of Brinks, upon inquiry by the plaintiff he was told by the defendant that the Omaha police department's permission for the said portrayal had been obtained by the defendant; that as a matter of fact, however, defendant failed and neglected to obtain and secure the permission of the Omaha police department; that as a direct result of this breach of contract by the defendant the plaintiff and his seven companions were arrested, detained, incarcerated for about an hour and a half, and then released on bond by the Omaha police department; that the Omaha World Herald, a daily newspaper with a very large circulation, carried in prominent places and in large headings the news of the arrest, incarceration, and the police appearance of the plaintiff and his seven companions, in fact through the

able handling of the news by the newspaper these news items became of national importance and interest and were carried by a great many newspapers throughout the country; that this arrest and incarceration of the plaintiff and the publicity received have made the plaintiff the object of shame, severe, cruel, and most annoying, and disturbing criticism, abuse, and ridicule; that the knowledge of the plaintiff's arrest and incarceration by his many friends, his wide acquaintance, and by strangers as well, has brought disrepute to the plaintiff by marring his good name and by destroying his long-enjoyed good standing and good reputation in the community; that since the arrest and incarceration of the plaintiff and the publishing of the same in the World Herald and the shame, abuse, and ridicule, the loss of plaintiff's good standing and good reputation in the community, the plaintiff has suffered and will continue to suffer great and severe mental pain and anguish, shame, humiliation, and disrepute; that the loss of plaintiff's good reputation and standing has made it undesirable for reputable business firms and reputable businessmen to employ the plaintiff for their legitimate advertising; that the plaintiff was not employed for about 8 months immediately following the arrest, incarceration, and publication of the same; and that by the subsequent shame, abuse, ridicule, humiliation, pain, and mental anguish, and the loss of good standing, good reputation, and employment, the plaintiff has suffered damages,

In the second cause of action the plaintiff incorporates the allegations contained in paragraphs I, which designates the parties, and II of the first cause of action. Paragraph II relates that the plaintiff is an actor specializing in portrayals and characterization. The petition then alleges in substance that the defendant, willfully disregarding the plaintiff's rights and without the permission and consent of the plaintiff, ran an ad in the Omaha World Herald, a newspaper of large circula-

tion, on the morning of February 7, 1950, as follows: "Jim Brunson, professional stunt man of 38 years, put on such a sensational stunt that the whole crew were thrown in the clink"; that on the afternoon of the same day in said paper, the defendant ran another ad as follows: "Ranks Gang Captured. The public can sigh in relief now because the Ranks gang led by Omaha's leading desperado, Jim Brunson, was captured Saturday"; that the plaintiff has never in any manner waived the protection of his right of privacy or consented in any manner to such invasion of his private life by the defendant as aforesaid; and that as a direct and proximate result of the wrongful and willful acts of the defendant and the attendant reading by many of plaintiff's friends, acquaintances, relatives, and strangers, the plaintiff has been subjected to and has become the subject of severe, constant, and cruel ridicule and abuse, has been greatly embarrassed from the date of the publication of the afore-mentioned articles to the present time, and as a result plaintiff has suffered and will continue to suffer severe mental pain and anguish, shame, and humiliation, and his reputation and prestige has been diminished and lowered, and by reason of all the above, the plaintiff has been damaged. Then appears a general prayer for damages on both causes of action.

The plaintiff assigns as error that the trial court erred in sustaining the defendant's demurrer to the plaintiff's amended petition and in dismissing plaintiff's action.

The plaintiff cites Alexander v. Thacker, 30 Neb. 614, 46 N. W. 825, as follows: Where a petition contains more than one count and a general demurrer is directed against the entire pleading, and is not limited to a particular cause of action, if either count is sufficient the demurrer must be overruled.

In the instant case the defendant filed a separate demurrer to each cause of action and not a general demurrer against the entire pleading. Obviously the rule stated above is not applicable.

In considering the effect of a general demurrer, in the instant case to each cause of action as filed by the defendant, the following rule is applicable: A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded; but does not admit the conclusion of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expression of opinion, nor theories of the pleader, as to the effect of the facts, nor allegations of what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law. See, Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593; 6 Standard Ency. of Procedure, pp. 943-952; Salsbury v. City of Lincoln, 117 Neb. 465, 220 N. W. 827; Markey v. School District No. 18, 58 Neb. 479, 78 N. W. 932.

We will consider the plaintiff's second cause of action first because it bears relation to the first cause of action and ties in with it.

It will be observed that the plaintiff's second cause of action is based on the doctrine of the right of privacy which is defined in 77 C. J. S., Right of Privacy, § 1, p. 396, as follows: "The 'right of privacy,' as the term is employed with respect to the determination of whether a cause of action in damages exists for an unwarranted invasion of such right or whether it may be protected by injunctive relief, may be defined as the right of an individual * * * to be free from unwarranted publicity, or to live without unwarranted inteference (interference) by the public about matters with which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."

Section 49-101, R. R. S. 1943, provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

The doctrine of the right of privacy was not recognized or enforced in the ancient English common law. See, Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, 89 Am. S. R. 828, 59 L. R. A. 478; Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N. W. 295, 106 A. L. R. 1443; Milner v. Red River Valley Pub. Co. (Tex. Civ. App.), 249 S. W. 2d 227; Wilson v. Brown, 189 Misc. 79, 73 N. Y. S. 2d 587. There are numerous cases to the same effect.

Our research develops no Nebraska case holding that this court has in any form or manner adopted the doctrine of the right of privacy, and there is no precedent in this state establishing the doctrine. Nor has the Legislature of this state conferred such a right of action by statute. We submit that if such a right is deemed necessary or desirable, such right should be provided for by action of our Legislature and not by judicial legislation on the part of our courts. This is especially true in view of the nature of the right under discussion, under which right not even the truth of the allegations is a defense. We therefore hold that the action of the trial court in sustaining the defendant's demurrer to plaintiff's action based on the right of privacy was correct and needs no further comment.

With reference to the plaintiff's first cause of action based on the breach of contract by the defendant wherein the plaintiff states that as a result of said breach of contract he suffered damages largely in the form of mental suffering, anguish, and embarrassment, it is apparent that in this cause of action on the alleged breach of contract the plaintiff again makes reference to the

doctrine of the right of privacy of the plaintiff as heretofore set out.

The amended petition alleges that the plaintiff is an actor specializing in portrayals and characterizations; that he was hired to portray the notorious Brink payroll robbers; and that said portrayal of the said robbers was to be an advertising scheme and stunt. Not only was the plaintiff actually engaged as an actor and portrayer of characters, as such he was also in such capacity acting as the leading figure which was sufficiently realistic to result in his arrest and subsequent brief incarceration. Generally, actors and actresses seek publicity and often adopt various and sundry ways of securing such notoriety as will attract attention to them. This is considered their stock in trade.

Damages for mental anguish are not, as a general rule, recoverable in actions for breach of contract unless the breach amounts in substance to willful or independent tort. According to the weight of authority, mental anguish is not considered as an element of recovery in an action on an ordinary contract. See 15 Am. Jur., Damages, § 182, p. 599.

The reason why such damages are not generally recoverable is that they are too remote and could not have been in the contemplation of the parties when the contract was made. See Annotation, 23 A. L. R. 372.

To authorize a recovery in any case the damage must have been within the contemplation of the parties, and the defendant must have had notice when the contract was made that mental anguish might result from a default or negligence in his performance. See 15 Am. Jur., Damages, § 182, p. 602.

Where a recovery of damages for mental suffering is denied, it is usually denied upon the ground that the breach of the contract is not such as will naturally cause mental anguish. See Westesen v. Olathe State Bank, 78 Colo. 217, 240 P. 689, 44 A. L. R. 1484.

It is obvious that the plaintiff failed to plead in his

amended petition a cause of action that could in any manner be considered as one for the recovery of damages for mental anguish.

We conclude that the trial court correctly sustained the separate demurrers of the defendant to the first and second causes of action pleaded in the plaintiff's amended petition, and the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

E. L. UPTEGROVE, APPELLEE, V. JOHN C. ELSASSER, APPELLANT.
74 N. W. 2d 61

Filed December 23, 1955. No. 33830.

1. **Appeal and Error.** In an equity suit 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.
2. ———. In the consideration of an equity suit on appeal, if there is an irreconcilable conflict in the testimony on a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying, and must have accepted one version of the facts rather than the other.
3. **Limitations of Actions.** An action upon an oral agreement for the feeding and caring of livestock on shares, which is continuing in its nature without a fixed termination date, is barred in 4 years from the date the action accrues.
4. ———. Where the nature of the contract and the situation of the parties require that it be adjudged that the obligation is a continuing one which is not violated or broken until there is a refusal to honor a demand, the demand creates the liability and the statute of limitations runs from such demand.
5. **Equity.** Laches does not, like limitation, grow out of the mere passage of time, but is founded upon the inequity of permitting claims to be enforced where there have been changes of condition resulting from delay which operate to the prejudice of the party asserting it as a defense.
6. ———. Laches is not a defense in an equity case where there has been no material change in defendant's position.

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

Heaton & Heaton and *Martin, Davis & Mattoon,* for appellant.

Clinton & McNish, for appellee.

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

CARTER, J.

This is a suit in equity for an accounting instituted by E. L. Uptegrove as plaintiff against John C. Elsasser, defendant, under the terms of a lease of real estate and an oral contract for the care and keep of a herd of cattle and their increase. The trial court found that defendant should be required to account. An accounting was had and thereafter plaintiff was awarded a judgment against the defendant for $14,844.32 and costs. The defendant appeals.

The record shows that plaintiff was the owner of certain farm and pasture lands and a herd of 180 head of cattle in 1934. During the years 1932 and 1933 defendant was employed by the plaintiff as farm manager in farming the tillable lands and in feeding and caring for the cattle. In 1934 plaintiff leased the lands to the defendant and entered into an oral agreement with him with reference to the cattle on the place. By the oral agreement defendant was to select from the herd 40 cows, 60 calves, and a bull. The balance was to be sold by the defendant and the proceeds delivered to the plaintiff. The base herd thus selected was to be kept intact with stock raised or purchased, and the parties to the agreement were to share the increase equally. Plaintiff was to furnish the pasture and other land upon which to raise feed for the cattle, and defendant was to bear all other expense with reference to the feeding and caring for the cattle. The record shows that defendant selected 81 head of cattle for ship-

ment, 3 of which died. The remaining 78 head were sold and the proceeds delivered to plaintiff. The defendant contends that the herd consisted of 155 head, and that 78 were sold, leaving 77 head in the base herd. Defendant states that prior to his taking over the base herd there were 140 head of cattle and 30 calves, and that 15 head died because of their poor condition, as a result of a lack of sufficient feed and pasture. Defendant also testifies that he lost 34 calves and 7 cows in one blizzard, a fact he does not appear to have reported to the plaintiff. The defendant was to have full charge of the sale, replacement, and purchase of cattle, and was to keep the base herd intact except for losses of livestock from natural causes. The record shows, more or less regularly, the sales of cattle raised until 1946. Plaintiff received checks from the defendant from time to time for his share of the increase, the last one bearing the date of December 31, 1946. Defendant states that the last of the original base herd was sold in 1943, plaintiff providing a bill of sale for this purpose. The record shows purchases of other cattle by the defendant, some of which he claimed as his own. In any event, he continued to pay plaintiff for his share of the increase until December 31, 1946. These payments were accepted by plaintiff and found to be in full settlement of plaintiff's one-half interest in the increase each year. For the years 1946, 1947, and 1948, the evidence of defendant is fragmentary and indefinite concerning the purchase or sale of cattle. He contends that plaintiff's cattle were sold and accounted for, and he states that he owed pasture rent for his own cattle. Plaintiff states that there was never any conversation about pasture rent and that no change had been made in the original oral agreement. Defendant's income tax returns for 1947, 1948, and 1949 show cattle sales in the amounts of $4,677.63, $3,565.50, and $5,400.33, respectively, for cattle raised. Defendant's 1948 income tax return shows a sale of 116 head of cattle purchased and not raised in the amount

of $20,032.05. His 1949 income tax return shows a sale of 88 head of cattle, purchased and not raised, in the amount of $10,189.14.

The defendant contends that he fed and cared for the cattle the year previous to the cattle agreement on the basis that he should have one-half the calf crop for so doing. He testifies that the pasture was inadequate and that he was compelled to purchase feed in the amount of $1,800 for which he was not reimbursed by the plaintiff. Plaintiff testifies that he gave defendant the farm machinery and equipment on the farm in payment of this item, which the defendant accepted. Defendant further alleges that plaintiff gave him the base herd in payment for the feed. The title to the original herd remained in plaintiff until it was sold in 1943. The trial court found against the defendant on this contention, and the evidence clearly supports this finding.

The record further shows that the plaintiff leased certain wheat land to the defendant for an agreed crop rental of one-third of the small grain delivered to market free of all cost to the plaintiff. Plaintiff alleges that in 1950 defendant raised 11,500 bushels of wheat and that he has received 3,463 bushels and 20 pounds thereof and that there is due him 370 bushels and 40 pounds. Plaintiff also alleges that defendant failed to deliver the 1950 crop to market and that plaintiff expended $249.68 to have the wheat delivered. Defendant admits this item as owing to the plaintiff. Plaintiff alleges as a second cause of action that he assigned certain dividends of the value of $473.05 due from the Farmers Union Cooperative Association at Gurley, Nebraska, to the defendant to be used by him in trade. Defendant used $346.67 of such dividends and has failed to account for the balance. Defendant admits using the $346.67 and tendered the balance to the plaintiff by his answer.

Defendant denies that there was any increase from the cattle after January 1, 1947, and denies that plaintiff had any interest in any cattle in the possession of de-

fendant at that time. Defendant alleges that he harvested 350 acres of wheat for the plaintiff in 1934 at a fair and reasonable cost of $1,050, which has not been paid. He testifies, also, that he hauled 6,000 bushels of wheat to market for plaintiff in 1934, the fair and reasonable value of which was $300. He testifies, also, that he hauled 6,000 bushels of wheat for plaintiff in 1935 which was of the fair and reasonable value of $300. He testifies that he hauled grain for plaintiff raised by other tenants at various times for which he was not paid. A failure of proof clearly existed as to the last item mentioned. The evidence of the defendant is that he retained 37 cows, 30 calves, and 1 bull as the base herd and that 7 cows and 34 calves died in the spring of 1935, leaving a base herd of 30 cows and 1 bull. With reference to the 1950 wheat, defendant testifies that plaintiff's share was 3,575.91 bushels, that plaintiff sold 3,475.25 bushels, and that 30 bushels were left in the bin as spoiled wheat. The defendant accounts for the shortage of 70.66 bushels as shrinkage before the wheat was sold.

The trial court found against the defendant on his claim for harvesting wheat for the plaintiff in 1934 and for hauling wheat for the plaintiff in 1934 and 1935. They were not obligations growing out of the oral agreement which was the basis of the accounting suit before us. They were incurred according to the defendant's own testimony before the agreement was made. These claims are no part of or incidental to the oral agreement which is the basis of this accounting action. Such claims were properly disallowed in the accounting.

Upon the foregoing evidence the trial court found that the oral agreement was made as alleged and that the least number of cattle in the herd for which the defendant should account was 30 head, it being the smallest number to which the base herd was reduced by natural causes. The court found that defendant confused and commingled the base herd and the increase therefrom with other cattle claimed by him, all under the same

brand, and that upon termination of the agreement in 1948 defendant sold 116 head for the sum of $20,032.05 and that he should account to plaintiff for 30/116 of said cattle as being the base herd, the value of same being $8,180.70. The court further found that one-half of the balance of the cattle sold in 1948 should be accounted for as increase, the value thereof being $5,-925.67. The trial court also found that plaintiff was entitled to $141.60 for the undelivered portion of his one-third share of the 1950 wheat crop, $249.68 for hauling the 1950 crop of wheat which defendant was obligated to haul, and $346.67 of plaintiff's dividends at the Farmers Union Co-operative Association at Gurley, Nebraska, which were used by the defendant and ordered the reassignment of the unused balance. A judgment was entered for the total of these amounts in the sum of $14,844.32.

We think the evidence sustains the findings of fact made by the trial court. Any and all disputes in the evidence were conflicting and irreconcilable statements, which were made by the two parties to the litigation. The trial court determined them generally in favor of the plaintiff. There was evidence to support the findings made with which this court will not interfere. The applicable rule is that in an equity suit 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. However, if there is an irreconcilable conflict therein on a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying and must have accepted one version of the facts rather than the other. Brown v. Brown, 146 Neb. 908, 22 N. W. 2d 148; McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543.

We think the method used by the trial court in fixing the value of the base herd, and the increase to which

plaintiff is entitled, is correct under the evidence in this case. A correct calculation of the amounts reveals, however, that the amount allowed for the base herd should be $5,180.70 and not $8,180.70 as shown by the decree. The amount to be allowed for increase under the method used is $7,425.67 and not $5,925.67 as shown by the decree. The judgment awarded the plaintiff therefore should be $13,344.32 instead of $14,844.32.

The defendant relies primarily on the defenses of laches and the statute of limitations. The present action was commenced on June 16, 1952.

The action was based upon an oral agreement and must be brought within 4 years. § 25-206, R. R. S. 1943. It is the contention of the defendant that the last of the base herd was sold in 1943 and that an action for the return of the base herd was required to be commenced within 4 years from that date. The record in this case shows that the lease of the lands and the cattle agreement were integrated as one transaction. We point out that the evidence shows that the lease of the pasture land and sufficient farm lands to produce necessary feed for the cattle was a part of the contribution the plaintiff made when the cattle agreement was entered into. The agreement contemplated the sale and replacement of the base herd by retaining increase or the purchase of new cattle in order that the base herd would be maintained in substantially the same condition as when defendant received it, except for losses from natural causes. There was no termination of the agreement because of the sale of the last of the original base herd in 1943. Such sale was within the terms of the agreement. No cause of action accrued at that time. The defendant further contends that if the payment to the plaintiff of his share of the increase through the years until December 31, 1946, when the last of such payments was made, had the effect of tolling the statute, the statute of limitations was still a bar to the action because 4 years expired thereafter before the suit was

commenced. It is not contended that any of the cattle, including the base herd, were sold in violation of the agreement. It is not disputed that defendant had a right to sell the base herd and make replacements by purchase, or retaining increase, in order to keep the base herd at a productive age. Consequently, the receipt of a check by plaintiff on December 31, 1946, did not cause an action to accrue. According to the evidence, plaintiff did not discover that there was any disagreement about the base herd until defendant came to his home in 1948 for the purpose of making settlement after the sale of the 116 head of cattle in August of that year. It was at this time, the plaintiff testifies and the trial court found, that plaintiff terminated the agreement and demanded the return of the base herd, or payment therefor. The finding of the trial court that the cause of action accrued at that time is sustained by evidence and will not be disturbed by this court, although it was disputed by the defendant. We conclude therefore that the action accrued in August 1948, or later, and that the commencement of this suit on June 16, 1952, was within the statutory period and not barred by the 4-year limitation period.

The controlling rule is: Where the nature of the contract and the situation of the parties require that it be adjudged that the obligation is a continuing one which is not violated or broken until there is a refusal to honor a demand, the demand creates the liability and the statute of limitations runs from such demand. 54 C. J. S., Limitations of Actions, § 124b, p. 37.

It is the contention of defendant that plaintiff's claim is barred by laches. "Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations." Hawley v. Von Lanken, 75 Neb. 597, 106 N. W. 456. "Laches does not, like limitation, grow out of the mere passage of time; but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some

change in the condition or relations of the property or the parties." Geiss v. Trinity Lutheran Church Congregation, 119 Neb. 745, 230 N. W. 658. This court has held that, where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation. Laches is not a defense in an equity case where there has been no material change in defendant's position. Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921. In applying the doctrine of laches the true inquiry is whether or not the party asserting it has been prejudiced by the delay. Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618.

Defendant's defense of laches is grounded on the contention that plaintiff failed to commence his action in 1943 when the last of the base herd was sold, and again when he received his last check for his share of the increase on December 31, 1946. It is clear that the oral agreement originally entered into was a continuing one that had no termination date. As we have hereinbefore pointed out, there was no violation of the terms of the oral agreement in 1943 or 1946. The agreement was not terminated until 1948 as the trial court properly found from the evidence. We find nothing in the record indicating that there was any change of condition after 1948 upon which the defense of laches could be based. Defendant states in his brief that records and memory have been destroyed by the passage of time and the death and absence of witnesses. There is nothing in the record to sustain this assertion. No witnesses are named who were not available for any reason. The records relevant to the transaction after the original agreement was made, which the defendant admits was made, were kept or should have been kept by the defendant. The record is devoid of any showing that the delay in filing the action after its accrual was such as to prejudice the rights of the defendant. There is nothing to show

that the result would be inequitable or unconscionable any more than in any other case brought within the statutory period. Defendant admitted that he had no disagreement with the plaintiff until 1948. He describes no material evidence that has been lost or what it would show. He points out no change of condition that would entitle him to invoke laches as a defense. The elements of the defense of laches are not established by the record.

Upon a consideration of the record de novo, we find that plaintiff is entitled to an accounting and, after a consideration of the items accounted for in the record, plaintiff is entitled to a judgment for $13,344.32 with interest at 6 percent per annum from the date of this judgment. The costs of this appeal are taxed to the defendant.

AFFIRMED AS MODIFIED.

RUTH W. BABIN, APPELLEE, V. COUNTY OF MADISON ET AL., APPELLANTS.

73 N. W. 2d 807

Filed December 30, 1955. No. 33832.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. 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.
3. **Taxation.** Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization. The duties of the State Board of Equalization and Assessment are unrelated thereto and have no direct relationship to the duties of a county board of equalization.
4. ———. The provisions of section 77-1315, R. S. Supp., 1953, requiring notice to the landowner of any increase in the assessed

value of his realty over the last previous assessment is mandatory. A tax levied on such increase, made without notice to the owner, is void, and its collection may be enjoined.

APPEAL from the district court for Madison County: LYLE E. JACKSON, JUDGE. *Affirmed.*

James F. Brogan, Hutton & Hutton, and *George W. Dittrick,* for appellants.

Deutsch & Jewell, for appellee.

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

CHAPPELL, J.

Plaintiff Ruth W. Babin brought this action against defendants County of Madison and its treasurer, together with other named subdivisions and their respective treasurers, seeking to enjoin them from collecting or attempting to collect a portion of the taxes levied and assessed for the years 1953 and 1954 against plaintiff's described real estate, a business property in Norfolk. Plaintiff's action was predicated upon the grounds that such portion of the taxes were void because unlawfully assessed upon an increased valuation: (1) Without notice to plaintiff as required by section 77-1315, R. S. Supp., 1953; and (2) after jurisdiction to increase the valuations had expired. The latter contention requires no further discussion in order to dispose of the case upon its merits.

Defendants filed separate essentially general demurrers to plaintiff's petition. After hearing thereon, each and all such demurrers were overruled, whereupon each and all defendants elected to stand upon their demurrers, and the trial court rendered a judgment for plaintiff. Therein it determined the amount of taxes actually due defendants, enjoined collection of that portion of the taxes based upon the increase of values made without notice to plaintiff upon the ground that such taxes were void, quieted her title against them, and ordered the

county treasurer to receive the amount of taxes due based on the 1952 valuation, and to correct her records accordingly. Therefrom defendants appealed to this court, assigning that the trial court erred in overruling their demurrers and finding that plaintiff's petition stated a cause of action, and that the judgment was contrary to law. We conclude that the assignments should not be sustained.

The sole question presented here is whether or not plaintiff's petition as amended by stipulation stated a cause of action for injunctive relief. In that regard: "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." Further, "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." Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692.

Plaintiff's petition was voluminous, with numerous exhibits attached thereto and made a part thereof. Summarized, it alleged the several corporate or representative capacities of each defendant and plaintiff's ownership of the described property. Plaintiff then factually alleged in substance as follows: During the tax years of 1950 to 1952, inclusive, plaintiff's land was valued at $18,330, and her improvements were valued at $32,000, or a total actual and assessed value of $50,330. A photostatic copy of the "Assessment Record" thereof was attached to and made a part of plaintiff's petition.

As a matter of practice and custom, the assessor used a form for a loose-leaf book called "Real Estate Assessment Record 1950-1951-1952-1953-1954," containing a "master list" for the 1950 tax year, showing the description and reflecting the value of the lands, the improvements, and the total value thereof for 1950, and that

such 1950 valuation was used each year thereafter as the valuation for each succeeding year, unless changed by the assessor. Such "master list" sets forth the foregoing values of plaintiff's property.

Such "master list" was used to reflect the valuation of plaintiff's property by the county assessor for 1952 and for 1953 on and prior to March 10, 1953. On or before the third Monday of May 1953, the valuation so made and reflected was filed with the county clerk by the county assessor.

However, during the month of August 1953, the county assessor struck a pencil line through the $18,330 valuation of plaintiff's land and substituted therefor $31,890 as the valuation thereof. He also struck a pencil line through the $32,000 valuation of plaintiff's improvements and substituted therefor $55,680 as the valuation thereof. Further, he struck a pencil line through the total actual valuation of $50,330 and substituted therefor $87,570, which was intended by him to reflect the assessed value, i. e., 50 percent of the total actual value of plaintiff's property. As a result, the total actual value of plaintiff's property was increased from $50,330 to $175,140. A photostatic copy of such list for the years 1950 to 1954, inclusive, as it then existed, was attached to and made a part of plaintiff's petition.

On August 26, 27, or 28, 1953, the county board of equalization pretended to equalize the value of plaintiff's property and to make all levies for taxes based on such increased valuation.

On or about August 25, 1953, the county assessor sent a post card to plaintiff at Norfolk pretending to advise and inform her of such increases in valuation. However, plaintiff never was a resident of Norfolk but at all times involved was a resident of Cleveland, Ohio, all of which was well known by all officers of the county, and plaintiff never received said post card and never had any notice or knowledge of any such attempted increase in either the actual value or the assessed value of her

property, and the county board of equalization, without notice to or knowledge of plaintiff with regard to their action or the action of the county assessor, and without authority of law, levied all taxes for 1953 and 1954 based upon such increased values, to wit: An assessed value of $87,570 and an actual value of $175,140.

The combined and consolidated levy for all purposes upon plaintiff's property was 63.8 mills for 1952, 50.0 mills for 1953, and 55.2 mills for 1954. Further, for the 1954 tax year the county assessor placed an assessed valuation of $78,810 and a total actual valuation of $157,620 on plaintiff's property without any notice whatsoever to and without any knowledge of plaintiff. Such change from the 1953 valuation was based solely upon a uniform percentage change made by the county assessor in the valuation of all real estate in the city of Norfolk.

No improvements had been made upon plaintiff's property, and plaintiff alleged that the increased valuations aforesaid were unlawful; and that the assessed value of her property for 1953 and 1954 should have been $25,165, resulting in a tax of $1,258.25 for 1953, and a tax of $1,389.11 for 1954, which sums, together with interest thereon as provided by law, plaintiff tendered to defendant county treasurer, but such payments were declined by such treasurer in writing.

Plaintiff further alleged that defendants were attempting to collect taxes for 1953 and 1954 based on such increased valuations and thereby cast a cloud on plaintiff's title and take her property without due process of law; that she had no adequate remedy at law; and that defendants should be enjoined. She prayed for an injunction restraining defendants and each of them from collecting or attempting to collect so much of the taxes assessed against her property as were assessed and levied upon the increased valuations aforesaid; that such excess taxes should be adjudged illegal, null, and void; that defendant county treasurer should be required to

receive the amount of taxes based upon valuations for the year 1952 in payment of her taxes and cancel any and all the balance of such alleged taxes; and for general equitable relief.

By stipulation, other facts with relation to actions taken and final orders made by the State Board of Equalization and Assessment in June of 1952, 1953, and 1954, were attached to and made a part of plaintiff's petition. However, under circumstances presented here, they have no application or controlling force with relation to the vital issues presented by plaintiff's petition and defendants' demurrers. In that regard, none of such actions taken by the State Board of Equalization and Assessment ordered any percentage increase in Madison County valuations for the years 1952, 1953, or 1954, which could be binding upon plaintiff, as was the situation in Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650, wherein plaintiff had appealed to the district court from the valuation fixed by the county board of equalization for tax purposes, and the county board of equalization had appealed therefrom to this court.

Herein, defendants contend that the State Board of Equalization and Assessment fixed the valuations of plaintiff's property because it approved the county assessor's abstracts showing the total actual valuation of all lands, lots, and improvements in Madison County for 1952 and 1953, and ordered same reduced 10 percent in 1954. Such contention has no merit.

In that connection, we said in Homan v. Board of Equalization, *supra:* "It is urged that the action of the state board of equalization fixes the valuations of the property involved for tax purposes and that a failure to appeal from such order makes the actual value fixed by the state board of equalization final for all purposes. With this we cannot agree. In Hacker v. Howe, 72 Neb. 385, 101 N. W. 255, this court said: 'The state board does not deal with individual assessments but with the property of a county as a whole, and if it appears to them

to be assessed at a valuation relatively lower or higher than the property in all other counties, the whole is affected by the order of equalization, and not the different items or classes.' " Therein we also held: "Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization. The duties of the state board of equalization are unrelated thereto and have no direct relationship to the duties of a county board of equalization." Also, contrary to defendants' contention, plaintiff's property did not come within any classification of omitted property. Radium Hospital v. Greenleaf, 118 Neb. 136, 223 N. W. 667.

Defendants argued that the remedy of injunction was not available to enjoin the collection of any tax or any part thereof, except such tax or the part thereof enjoined in case of injunction is levied or assessed for an illegal or unauthorized purpose. In so arguing, defendants relied upon sections 77-1727 to 77-1736, R. R. S. 1943, and numerous authorities from this jurisdiction which generally were concerned with voidable as distinguished from void taxes, or are distinguishable upon the facts and applicable law. In other words, defendants argued that a failure to give notice to the owner of real estate of an increase in valuation of his real estate for tax purposes in the manner required by section 77-1315, R. S. Supp., 1953, was simply an irregularity from which a voidable tax resulted. Such is not the law in this jurisdiction.

Section 77-1315, R. S. Supp., 1953, now provides: "The county assessor or county clerk where he is ex officio county assessor shall complete his revision of the assessment rolls, schedules, lists, and returns and file them with the county clerk on or before the third Monday in May of each year. The county assessor shall before such filing, notify the record owner of every piece of real estate which has been valued at a higher figure than at the last previous assessment. Such notice may be given by post card, addressed to such owner's last-known

address. It shall describe said real estate, and state the old and new valuation thereof and the date of the convening of the board of equalization."

In Rosenbery v. Douglas County, 123 Neb. 803, 244 N. W. 398, this court first construed that part of such section providing for notice to the landowner of any increase in the assessed valuation of his real estate over the previous valuation thereof. It is a case comparable in every material respect with that at bar. After citing and quoting from numerous authorities from this and other jurisdictions, this court held: "The provision of section 77-1612, Comp. St. 1929, requiring notice to the landowner of any increase in assessed value of his realty over the last previous assessment is mandatory. A tax levied on such increase, made without notice to the owner, is void, and its collection may be enjoined." Section 77-1612, Comp. St. 1929, as amended in respects not important here, is now section 77-1315, R. S. Supp., 1953.

As recently as Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489, this court, after citing and quoting with approval from numerous authorities from this and other jurisdictions, held: "If a tax or assessment is levied without authority of law, it is void.

"When taxes are levied on property without authority of law a court of equity may enjoin collection thereof.

"The provision of section 77-1315, R. R. S. 1943, requiring notice to the landowner of any increase in assessed value of his realty over the last previous assessment is mandatory. A tax levied on such increase, made without notice to the owner, is void.

"What has been said of the notice required by section 77-1315, R. R. S. 1943, being mandatory is equally applicable to what the Legislature has said shall be contained therein."

Such authorities aforesaid are applicable and controlling in the case at bar. We therefore conclude that plaintiff's petition did state a cause of action for injunctive relief; that defendants' several demurrers thereto were

properly overruled; and that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to the county of Madison.

AFFIRMED.

REUBEN L. CLOUSE, APPELLEE, V. COUNTY OF DAWSON, APPELLANT.
74 N. W. 2d 67

Filed December 30, 1955. No. 33838.

1. **Counties: Highways.** At common law there was no right of action against a county for the recovery of damages resulting from a defective or insufficient highway or bridge. Any liability for such in this state is statutory.
2. ———: ———. A county is not an insurer of the safety of a user of its roads and bridges or of the safety of the roads and bridges maintained by it for the use of the public.
3. ———: ———. A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions such as curves, turns, location of bridges, and similar situations that may be hazardous, unless the duty to exercise reasonable and ordinary care in the maintenance of its highways requires it to do so at a particular location.
4. ———: ———. It is the duty of a county to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary care.
5. **Highways: Negligence.** When the source of danger, although situated outside the limits of the highway, is of itself so direct a menace to travel over the road, and susceptible to protection or remedial measures which can be reasonably applied within the boundaries of the road, the failure to employ such measures will be regarded as an insufficiency or a want of repair, or a want of reasonable care for the safety of travelers.
6. **Counties: Highways.** The duty of the county in reference to marginal and external hazards does not extend beyond the requirement that the highway shall be kept in a reasonably safe condition as against such incidents as are likely to and actually do occur in the use of the highway for purposes of travel by persons using it while in the exercise of reasonable care.
7. ———: ———. The duty of a county to warn against hazards beyond the limits of the highway exists only where such hazards

are adjacent to the highway, or in such close proximity thereto as to be in themselves dangerous, under ordinary circumstances, to travelers thereon who are using reasonable care.

8. ———: ———. It is the duty of the county to keep a highway safe for such use as should reasonably be anticipated. There is no duty to warn of dangers that cannot reasonably be foreseen.

9. **Negligence.** A reasonable anticipation of consequences is a necessary element in determining whether a particular act or omission is actionable negligence. If the danger was one not reasonably to be anticipated, no duty on the part of the county to warn arises.

10. **Highways.** The duty to keep roads safe for ordinary travel does not include a duty to warn of dangers which arise from unusual and extraordinary occurrences.

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

Edward A. Cook, III, for appellant.

Smith Brothers, for appellee.

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

CARTER, J.

Plaintiff brings this action to recover for personal injuries and property damage sustained by him in an automobile accident which he alleges was caused by a defective condition of a road maintained by the defendant, the County of Dawson. Judgment was entered on the verdict of the jury for $1,080. The defendant appeals.

On the morning of July 6, 1954, at about 4:25 o'clock, plaintiff was driving his automobile in a westerly direction on the county road on which the accident occurred. He states that he was probably driving from 45 to 50 miles an hour. The automobile was in good mechanical condition. The road was 24 feet wide and graveled. The road was dry and the day was clear. It was not light enough to see by daylight but light enough that his car lights "didn't do a great deal of good." The road was uphill as it approached the turn

where the accident occurred. The grade was shown to be 3 percent. The turn was to the left about 45 degrees. The turn to the left was the beginning of a curve which skirted the south end of a canyon and returned to its westerly course. The road was banked at the turn. There was a grassy shoulder about 10 feet in width on the right side of the road where it turned to the southwest. Beyond the grassy shoulder was a canyon which was about 20 feet deep at the spot where plaintiff went into it, and deeper to the north. There was no warning sign apprising the public that a turn in the road was being approached.

The plaintiff testifies that the accident happened in the following manner: He was driving west at a speed of 30 to 50 miles an hour. He usually drove at a speed of 45 to 50 miles an hour, and was probably driving that fast. He was not familiar with the road. It was an ordinary graveled road. The day was clear, but at that time of day his car lights did not do much good. It was too dark to drive without lights. He was watching the road but went into the curve before he realized there was a turn to the left. He applied his brakes and turned to his left, but could not avoid going off the road. He went some distance southwest on the grassy shoulder before he went into the canyon which was 20 feet deep at that point. He says his wheels slid a distance of 15 steps before he struck the grassy shoulder of the road, the marks beginning right at the beginning of the curve. He says he could not see the turn in the road as he came up the hill, although the turn might have been seen in daylight. He says that there was an electric light line which went straight west across the canyon. The grassy shoulder "fit in with the road enough so that I didn't see any obstruction there of any kind." There was no sign or marking as he approached the turn to indicate a turn or dead end there. He says he could not have made the turn at the speed he was traveling had he known that the turn was there,

but that he would have slowed down had he known it. He says that previous turns on the road were marked, although the evidence shows that all of them were not marked with safety warning signs at that time. He says that he had no vision in his right eye and that his vision without glasses was not too good. He says that as he entered the turn, a bug or miller got on the left lens of his glasses. He pawed at the insect and accidentally pulled his glasses off. He says that he was then in the turn and that the insect and loss of his glasses had nothing to do with the accident. He suffered some personal injuries, and his automobile was seriously damaged. There was evidence of contributory negligence and conflicting statements by the plaintiff that we do not deem important in view of the findings of the jury. The defendant contends that the foregoing evidence is insufficient to sustain a verdict for the plaintiff, and assigns as error the failure of the trial court to sustain its motion for a directed verdict at the close of all the evidence. We shall first determine the correctness of the court's ruling in denying defendant's motion for a directed verdict.

At common law there was no right of action against a county for the recovery of damages resulting from a defective highway or bridge. The extent of the liability of a county in this state for damages of this character is prescribed by statute. Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400, and cases therein cited. The applicable statute provides: "If special damage happens to any person, his team, carriage or other property by means of insufficiency or want of repair of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in an action against the county, * * *; Provided, however, such action is commenced within thirty days of the time of the injury or damage occurring; * * *." § 39-834, R. R. S. 1943. Under this statute the county is not an insurer of the safety of the users

of its roads and bridges or of the safety of the roads and bridges maintained by it for the use of the public. The duty of the county in this respect will not be extended beyond the words and fair implications of the statutory liability. Olson v. County of Wayne, *supra.*

The liability of the county in the present case is based upon the failure of the county to erect and maintain a safety warning sign to the east of the curve where the accident occurred. The rule governing the duty of a county to erect and maintain safety warning signs was announced in Olson v. County of Wayne, *supra,* as follows: "A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions such as curves, turns, location of bridges, and similar situations that may be hazardous, unless the duty to exercise reasonable and ordinary care in the maintenance of its highways requires it to do so at a particular location."

The record in this case shows that the highway was 24 feet wide. The road was level and smooth. It was an ordinary graveled highway. The turn was approximately a half turn to the left as distinguished from a full right angle turn. The turn was banked in the ordinary and usual way. Clearly there was no duty on the part of the county to erect and maintain a safety warning sign under the foregoing rule if these were all the facts involved. It is the contention of the plaintiff, however, that there was a canyon approximately 10 feet beyond the right edge of the road that made the turn so hazardous that a duty arose on the part of the county to erect and maintain a safety warning sign east of the turn for the safety of users of the road.

In Tomjack v. Chicago & N. W. Ry. Co., 116 Neb. 413, 217 N. W. 944, the facts, briefly stated, were: The highway was a well-graded and graveled road located in the main on a section line, but, in order to accommodate it to the Elkhorn River, the road for some distance lies west of the section line. The railroad was north of

the river. The road where it crossed the railroad track was constructed with a sharp turn to the right in order to cross the highway bridge across the river. A few feet south of the railroad crossing the railroad built a culvert across the highway to carry the water collected on its right-of-way. The car in which the plaintiff was riding was driven over the railroad crossing and into the ditch at the west end of the culvert. Plaintiff alleged that the railroad company failed to place the bridge in the line of travel and that the culvert was not guarded by a light, sign, or warning of any kind. In denying a recovery as a matter of law, the court said: "If the car in which the plaintiff was riding had followed the traveled line of the road and had crossed the railroad track in the proper place, it would have found itself on the bridge or culvert. The evidence shows that the car went so far to the right that it missed the culvert or bridge entirely. Where a culvert, adjacent to its tracks and on its right of way across a public highway, is built by a railroad company in accordance with the general plans of highway and has been adopted as a part of the highway, negligence will not be predicated upon it merely by reason of its location and dimensions.

"The second claim of negligence, as to the lack of guard or warning, is, it seems to us, equally as untenable as the first. If we hold that a 31-feet wide culvert is not sufficient crossing for a stream or ditch and that it must be guarded, or hold that every turn in the road is ground for actionable negligence, unless some one is stationed there with cap and bells to warn the wild and reckless, then we shall lay upon those who build and maintain roads a greater burden than we feel the law justifies. But that is exactly what the plaintiff asks us to do in this case. It was the duty of the driver of the car after dark on this road to proceed so that his headlights would mark out the traveled road, and if he proceeded faster than he was able to see the road ahead

of him, or, if he failed to keep a lookout, he was guilty of negligence."

In Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559, plaintiff proceeded downhill on a foggy morning at about 4:30 a. m. into a dead-end road which required him to turn either east or west, and crashed into the far side of a borrow pit. There were no signs to warn users of the turn. Plaintiff claimed he never saw the turn until he was right in it. In reversing the judgment and dismissing the case the court said: "In addition to the repair of the highways, the only other provision in this statutory limitation placed upon recovery of damages against a county is in the clause providing that if any special damage happens to any person 'by means of insufficiency' of the highway. This important word 'insufficiency,' as used in this section, may be defined as being inadequate to the need, use, or purpose of the highway. The plaintiff charges that it was insufficient by reason of not having some kind of warning signs installed either along the road, before one reached the dead end, or across the dead end itself. * * *

"We cannot believe that the failure to put up a sign showing that the road turns, which turn can easily be seen 400 to 750 feet back, is such an omission as would charge the county officers with negligence in their duty in that regard."

The case of Olson v. County of Wayne, *supra*, involved the following factual situation: The county constructed and maintained a bridge on an angle across the highway that required a sharp turn immediately before and at the entrance to the bridge. There were no warning signs or devices to inform users of the road of the alleged dangerous situation, nor any guardrails or barriers to protect travelers from the asserted hazardous condition of the bridge. The car in which plaintiff was riding struck the bridge and went into the ditch on the right side of the bridge. The trial court directed a verdict for the defendant, and in affirming the

judgment this court said: "Generally negligence may not be predicated on a curve or variation in a dirt or county road or the location or dimensions of a bridge placed therein or adjacent thereto according to road plans unless it is so obviously dangerous that no reasonable or prudent man would approve the plans. The crookedness of a road duly located does not usually render a county liable for injuries resulting therefrom. * * *

"It is alleged as negligence that appellee failed to maintain signs or devices to apprise the traveling public of the dangerous situation at the bridge. There was nothing of this nature west of the bridge to give warning of it or that there was any unusual situation which should be approached by a traveler with alertness and caution. * * * If he had followed the road there would have been no accident. There is no requirement of law that a county erect and maintain safety warning signs of conditions such as curves, turns, locations of bridges, and the like, unless the duty to do so at a particular location is dictated by reasonable and ordinary care in the maintenance of its highway."

We point out that the alleged dangers set forth in Tomjack v. Chicago & N. W. Ry. Co., *supra*, and Olson v. County of Wayne, *supra*, involved situations in the traveled portion of the highways. In those cases it was held that the failure to erect and maintain safety warning signs was not required and did not constitute negligence. In Dickenson v. County of Cheyenne, *supra*, the danger alleged was the existence of a borrow pit at the road's dead end and it was there held that the failure to erect and maintain safety warning signs did not constitute negligence on the part of the county. While these cases are not strictly in point on the facts, they point the way to the result required in the present case.

There is no evidence in this case, nor is it contended, that there was a defect within the limits of the highway itself. The danger complained about, and which the plaintiff contends required the erection and maintenance

of a safety warning, was an external hazard existing outside the limits of the highway. There may be situations where the source of danger, although situated outside the limits of the highway, is of itself so direct a menace to travel over the road, and susceptible to protection or remedial measures which can be reasonably applied within the boundaries of the road, that the failure to employ such measures will be regarded as a lack of reasonable repair, or of reasonable care for the safety of travelers. The duty of a county in reference to marginal and external hazards has not been extended beyond the requirement that the highways shall be kept in a reasonably safe condition as against such incidents as are likely to and actually do occur in using the highway for purposes of travel by persons using them while in the exercise of reasonable care. 25 Am. Jur., Highways, § 529, p. 810. The duty of a county to warn against dangerous places or hazards beyond the limits of the highway exists only where such places are substantially joining the highway, or in such close proximity thereto as to be in themselves dangerous, under ordinary circumstances, to travelers thereon who are using reasonable care. Warning signs are intended to make the highway safe, and not to make or define its limits so as to warn travelers not to go outside them. 25 Am. Jur., Highways, § 411, p. 704.

In the instant case the road was well graded and graveled. It was of adequate width for ordinary use. The turn was rounded and banked. The roadside where the turn commenced was several feet higher than the road and could be seen at a distance in daylight. From the side of the road to the canyon was approximately 10 feet, all of which was covered with native grass. These facts are borne out by photographs contained in the record.

We think the general rule is that the liability of a county to warn users of a highway does not extend to hazards beyond the boundaries of the highway except

as they may endanger travelers within its boundaries who are using ordinary care. The highway must be kept safe for such use as should reasonably be anticipated. Actual anticipation is not the true test, but is what one should under the circumstances reasonably anticipate as the consequences of his conduct. The county should be charged with the duty to anticipate only those consequences which in the ordinary course of human experience might reasonably be expected to result from the ordinary use of the highway in the exercise of due care. There is no duty to warn of dangers that cannot be foreseen and, under such circumstances, the duty of foresight should not be arbitrarily imputed.

The condition of the road, the nature of the curve, and the 10 feet of ground between the highway and the canyon, the latter being beyond the boundary of the highway, do not create a foreseeable hazard to one using the highway in the exercise of due care. Consequently there is no duty on the part of a county to warn persons using the road of the existence of the canyon located outside the limits of the highway. The canyon is not a hazard that was foreseeable. As a hazard, it is beyond the scope of the deviations from the traveled portion of the road which reasonably can be foreseen by those using the highway in the exercise of ordinary care. The duty to keep roads reasonably safe for ordinary travel does not include liability for those consequences which arise from unusual or extraordinary occurrences. To hold that the county owed a duty to the public to warn against such a hazard as we have before us would in effect make the county an insurer of the traveler's safety. This exceeds the duty imposed upon a county in relation to the construction and maintenance of its highways and the duty it owes to users of the highway. The location of the canyon with reference to the road as herein described was not a hazard reasonably to be foreseen and creates no duty on the part of the county to warn of its existence.

We fail to see how the canyon can have any reasonable relation to the use of the highway by one traveling on it in the exercise of ordinary care.

In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party. Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. After applying this rule, we conclude that it is insufficient as a matter of law to sustain the judgment. The trial court erred in failing to sustain defendant's motion for a directed verdict. The judgment of the trial court is reversed and the action dismissed.

REVERSED AND DISMISSED.

SARAH G. NORTON, APPELLEE AND CROSS-APPELLANT, V. EDWARD A. DOSEK, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH PHILOMENA DOSEK ET AL., APPELLEES.
74 N. W. 2d 56

Filed December 30, 1955. No. 33847.

1. **Deeds: Mortgages.** An instrument in the form of an absolute deed will be construed as a mortgage if it was intended and made as security for the payment of a debt of the maker thereof.
2. ———: ———. Whether a deed, absolute in form, is a sale or a mortgage depends upon the intention of the parties, and their intention must be ascertained from their declarations, their conduct, and from any papers they or either of them subscribed.
3. **Deeds: Evidence.** If it is sought to vary the effect of a conveyance, absolute in form, by parol testimony to establish it as a mortgage, the evidence must be clear, convincing, and satisfactory to justify a court in granting the relief sought.
4. **Deeds: Mortgages.** In determining if a deed, absolute in form, was given as security for the payment of a debt of the maker, inadequacy of consideration is an important indication that the parties did not consider the conveyance absolute.
5. **Bills and Notes.** In a contest between the parties to a promissory note a partial failure of consideration may cause a pro tanto avoidance or discharge of an undertaking on the note.

6. ———. A note may be supported by valuable consideration and to that extent be valid, but void as to any excessive amount for which it was drawn.

APPEAL from the district court for Garfield County: WILLIAM F. SPIKES, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Manasil & Erickson, for appellant.

Davis & Vogeltanz and *Wellensiek & Weaver,* for appellee.

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

BOSLAUGH, J.

The object of this litigation is to have it determined that a conveyance made by appellee to Edward A. Dosek, although absolute in form, was intended to be and was in substance and legal effect a mortgage; to have the amount due upon the indebtedness evidenced by the note and secured by the conveyance and the person to whom it should be paid decided and to permit appellee to redeem the land by payment of the amount thereof; to have the mortgages placed on the land by Edward A. Dosek adjudged not to be liens on it; and to quiet the title to the land in appellee.

The contesting parties to this controversy in this court are the appellee and Edward A. Dosek who will be referred to as appellant. The land involved is correctly described in the record. Its lengthy description will not be repeated. The land consists of 800 acres located in the northeasterly part of Garfield County.

Appellee bought the land in the early part of the year 1947 for the sum of $4,000 and she was then required to pay $1,500 of the purchase price. The sellers retained the legal title until the balance thereof was paid. They executed a deed for the land in which appellee was named grantee on February 8, 1947, and it was sent to a bank in Burwell with information of the amount required

to be paid as a condition of the surrender of it to appellee. A contract in writing was entered into by appellee as first party and Eldridge L. Killion as second party, bearing date of March 8, 1948, by the terms of which appellee obligated herself to sell and convey the land to second party for $14,400. He paid appellee $1,500 on the purchase price when the contract was made and this entitled him to possession of the land. The balance of the purchase price was to be paid by second party as the contract required and he was entitled to a deed of the land when it was fully satisfied.

The deferred part of the purchase price of the land had not been paid by appellee and the persons who sold it to her were claiming the right to and were threatening to cancel the contract. She knew appellant and had business relations with him. She was at his office to pay an insurance premium in March or April of 1948. She talked with him about borrowing money to pay the unpaid part of the purchase price of the land. She told him she had some deals but no money and if he could help her she would pay a good commission or bonus; that the sellers of the land were intending to cancel her out if she did not get the money soon; that she had the land sold and she showed him the contract she had with Eldridge L. Killion, hereafter called Killion, for the sale of the land; and that appellant asked what she would pay and she said as much as $1 per acre or $800 and he said, "all right," and he would see what he could do. Appellee called on appellant several times and he advised her that he was trying to get the amount required. Later he assured her he had a promise of it. She told him to make out a note for $3,400. He prepared a note for that amount due in 6 months with interest at 6 percent and she signed and delivered it to him. She then told him she would rather use a deed of the land as security for the note and she suggested they should have a contract to this effect but he said he was in a hurry then but when she paid the note he would deed it back to her.

The deed for the land and accompanying papers that the sellers had placed in the bank at Burwell were sent to the First National Bank of Lincoln. Appellee executed a conveyance of the land, in form a warranty deed, to appellant that bears date of July 9, 1948, and it was delivered to him. He gave the First National Bank of Lincoln a check payable to its order dated July 10, 1948, drawn and signed by him for the sum of $2,905 and he received from the bank the deed of the land executed by the sellers thereof to appellee. The deeds were recorded, at the request of appellant, in the office of the register of deeds of Garfield County on July 20, 1948. The deed from appellee to appellant recites a consideration of $3,300.

Killion had possession of the land for about 4 years by virtue of his contract for the purchase of the land. The contract was terminated in July 1951. He paid rent to appellee. He paid no rent to appellant. Appellant took no action to recover possession of the land from Killion during that time. Appellant advised Killion in July 1948 by letter that title to the land had been conveyed to appellant and that he would recognize the Killion contract of purchase but no other effort was made to secure performance of the contract. The record is silent concerning any request by appellant for payment to be made to him of the amount required to be paid by the contract.

Appellee gave notice by recording an affidavit made by her in the office of the register of deeds to the effect that the deed she made to appellant was only a mortgage securing a debt she owed him. Thereafter appellant rented the land and collected rental for the years 1952, 1953, and 1954.

Appellant paid no taxes on the land for the years 1948 to 1951, inclusive. Appellee paid the taxes. He gave no understandable explanation of his failure in this respect if he was owner of the land and not merely a well secured creditor. There were no improvements

of any kind or extent made or contemplated by appellant.

There is testimony that appellant told Killion about September or October 1948 that he wanted to bring suit against appellee but did not want to involve Killion in it, that appellant wanted to foreclose his note and mortgage, and that Killion then saw the note and deed appellee had given appellant. Killion also saw the $3,400 note at a conference had later in the home of Frank B. Clark when appellant exhibited it to Mr. Clark who was then attorney for Killion.

The amount of money actually paid by appellant for appellee was $2,905. He took a note from her for $3,400 and she conveyed appellant the land to secure its payment. There is substantial evidence that at the time of the conveyance of the land to appellant it had a value of from $12.50 to $16 per acre. Appellee bought it in 1947 for $5 per acre and Killion bought it on an advancing market from her in March of 1948 for $18 per acre. The value of the land as compared with the amount paid is an important factor to be considered in deciding the true nature of the instrument in issue. Inadequacy of consideration is an indication that the parties did not consider the conveyance absolute. In Johnson v. Shuler, 134 Neb. 25, 277 N. W. 807, this court said: "The value of land as compared with the consideration paid for it is an important factor to be considered in construing the true nature of the transaction." See, also, Snoke v. Beach, 105 Neb. 127, 179 N. W. 389; Sanders v. Ayres, 63 Neb. 271, 88 N. W. 526; Annotation, 90 A. L. R. 953.

Appellant testified that if appellee had completed the sale of the land to Killion according to the contract between them and if she had paid appellant what he had advanced for her and his share of the profit on the sale of the land to Killion, appellant would have deeded the land back to appellee.

The district court found that appellee borrowed from appellant $3,400 on or about April 1, 1948, and secured the payment thereof by conveyance to appellant of the

land involved herein; that the conveyance was a mortgage to secure the indebtedness and was a lien on the land; that the amount due on the indebtedness from appellee to appellant on March 16, 1955, was the sum of $3,422.56; and that the indebtedness and the conveyance securing it was a lien on the premises and that it should be foreclosed. The court adjudicated that the deed given by appellee to appellant was a mortgage; that appellee was the owner of the premises; that if she paid the amount found due with interest thereon within 20 days the appellant should be barred of any right, title, or interest in and to the premises; and that if payment was not made of the amount found due within the time fixed an order of sale should issue and the land should be sold as upon execution to satisfy the indebtedness. This appeal is prosecuted from that judgment by Edward A. Dosek. There is no appearance in this court by any other party named as defendant in the district court.

The claim of appellant is that he bought the land from appellee for a consideration of $2,905 upon the understanding that if the sale of the land to Killion was completed appellant should receive $2,905 and the balance of what Killion paid should be divided equally between him and appellee, that the deed given by her to appellant was an absolute conveyance of the land to him in fee, that there was no indebtedness because of the transaction from appellee to appellant, and that he did not receive a note executed by appellee. The evidence is in many respects irreconcilably conflicting. Appellant denies substantially all that is said in the evidence produced by appellee concerning the transaction they had relative to the land.

This is an equity case. The trial court saw, observed, and heard the witnesses. The manner of a trial de novo of such an action in this court has been too frequently stated to permit its repetition. Shepardson v. Chicago, B. & Q. R. R. Co., 160 Neb. 127, 69 N. W. 2d 376.

The doctrine is quite uniformly established and en-

forced that regardless of the characterization given an instrument a deed of conveyance of land, absolute and unconditional on its face but intended and understood by the parties to be security for the payment of a debt or the performance of some other condition, will be regarded and treated in equity as a mortgage giving to the parties the relative rights and remedies of a mortgagor and mortgagee.

It is said in Snoke v. Beach, *supra:* "When it is established that a deed was in fact given as security only, the grantor therein stands in the relationship to the premises as mortgagor, and is entitled to redeem."

It is stated in Doran v. Farmers State Bank, 120 Neb. 655, 234 N. W. 633: "A deed, absolute on its face, but which, in fact, was given as security for certain obligations, and by which grantors were to receive any sum over and above such obligations for which the land conveyed should be sold, is, in nature and effect, a mortgage." See, also, Shagool v. Young, 132 Neb. 745, 273 N. W. 13; State Bank of O'Neill v. Mathews, 45 Neb. 659, 63 N. W. 930, 50 Am. S. R. 565.

There is no definite rule by which it can be determined in all cases whether a deed, absolute on its face, is a sale or a mortgage. The solution of the problem depends primarily upon the intention of the parties as ascertained from their declarations, their conduct, and the documents involved. In Sanders v. Ayres, *supra,* this court said: "Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from their declarations and conduct, as well as from the papers which they subscribed." See, also, Shagool v. Young, *supra;* Cox v. Young, 109 Neb. 472, 191 N. W. 647; Snoke v. Beach, *supra.*

The quality of the evidence to justify a finding based on parol testimony that a conveyance absolute in form is in fact a mortgage has often been defined by the decisions of this court. O'Hanlon v. Barry, 87 Neb. 522,

127 N. W. 860, states the rule: "Where it is sought to vary the effect of a deed of conveyance by parol testimony so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory in its nature in order to warrant a court to grant the relief prayed." See, also, Winkelmann v. Luebbe, 151 Neb. 543, 38 N. W. 2d 334; Snoke v. Beach, *supra;* Cox v. Young, *supra.*

Appellee has in this case satisfied the exactions of the law and it is concluded by this court that the warranty deed dated July 9, 1948, in issue in this case, was intended by the parties to it to be security for the payment of an indebtedness of appellee to appellant evidenced by note of the former payable to the order of the latter.

The amount which appellant expended for appellee at her request was $2,905. This was done on July 10, 1948. The note made by appellee payable to the order of appellant was for $3,400 with interest at 6 percent per annum but there was no consideration for any amount in excess of $2,905. In a contest between parties to a promissory note a partial failure of consideration may cause a pro tanto avoidance or discharge of an undertaking on the note. A note may be supported by sufficient consideration and to that extent be valid, but void as to any excessive amount for which it was drawn. § 62-128, R. R. S. 1943; Nordeen v. Nelson, 134 Neb. 707, 279 N. W. 323; Elmcreek Ditch Co. v. St. John, 127 Neb. 253, 255 N. W. 16; 7 Am. Jur., Bills and Notes, § 249, p. 943.

Appellant paid taxes on the land for 1 year on September 17, 1953, in the sum of $50.20. He rented the land and received rental of $500 for each of 3 years.

The amount of the indebtedness secured by the conveyance to appellant is the sum of $2,905 with interest thereon at 6 percent per annum from July 10, 1948, plus $50.20 with interest thereon at 6 percent per annum from September 17, 1953, less the sum of $1,500 with interest on one-third thereof at 6 percent per annum from November 1, 1952, on one-third thereof at the same rate

from November 1, 1953, and on one-third thereof at the same rate from March 1, 1955.

The findings and judgment of the district court should be modified and changed to conform to the foregoing as to the amount of the indebtedness due from appellee to appellant and secured on the land by the deed to him from appellee and the judgment in that respect and to that extent is reversed and the cause is remanded with directions to the district court to render and enter a judgment in the cause in conformity with the foregoing. In all other respects the findings and judgment are affirmed. Costs in this case are taxed to appellant.

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

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1956

WILLIAM S. BAILEY, ADMINISTRATOR OF THE ESTATE OF GORDON D. BAILEY, DECEASED, APPELLEE, V. DEXTER E. SPINDLER ET AL., APPELLANTS.
74 N. W. 2d 344

Filed January 13, 1956. No. 33835.

1. **Negligence.** In a negligence case where there is evidence upon which the minds of reasonable men may differ as to whether or not a party was guilty of negligence which caused or proximately contributed to the death of a person killed in an accident the question of negligence is one for a jury.
2. **Automobiles: Negligence.** The violation of a statute relating to the operation of a motor vehicle on a public highway is evidence of negligence.
3. **Negligence.** In the absence of evidence of the conduct of a person killed in an accident a presumption obtains that he, prompted by a natural instinct, was in the exercise of due care for his own safety.
4. **Trial.** Where the court properly instructs upon an issue presented by the pleadings or evidence it is not error to refuse to give a tendered instruction covering the same subject matter.
5. ———. It is not error for the court to refuse to instruct upon issues pleaded but which find no support in the evidence.
6. **Negligence: Trial.** In a negligence case wherein it is pleaded as an affirmative defense that a party other than the defendant was guilty of negligence which was the proximate cause of the accident and there is evidence to support the pleading it is error for the court to refuse to instruct on such issue.
7. **Trial.** It is error for the court to instruct upon the provisions of a statute on a subject neither in issue nor proper to be pre-

sented to a jury, but the error is without prejudice if the issues on the trial are clearly defined and the embodiment of the provisions could not in any way mislead the jury.

8. ———. It is error without prejudice to instruct on questions not raised by pleadings or applicable evidence when the instructions do not have a tendency to mislead the jury.

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

Kirkpatrick & Dougherty and *Chambers, Holland & Groth, for* appellants.

Kelly & Kelly and *Kenneth H. Elson,* for appellee.

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

YEAGER, J.

This is an action by William S. Bailey, administrator of the estate of Gordon D. Bailey, deceased, plaintiff and appellee, against Dexter E. Spindler and C. James Holm, doing business as Grand Island Dairy Products Co., and Donald L. Larson, defendants and appellants. There were other defendants at the time the action was instituted but they have been dismissed. Therefore no further mention of them is required. The action is one for the recovery of damages for the wrongful death in favor of the next of kin of Gordon D. Bailey, under authority of sections 30-809 and 30-810, R. R. S. 1943.

The case was tried to a jury. The jury returned a verdict in favor of the plaintiff and against the defendants in the amount of $4,703. Judgment was rendered on the verdict. Motions for new trial or in the alternative for judgment notwithstanding the verdict were filed. These motions were duly overruled. From the judgment and the order overruling the motions the defendants have appealed and are here seeking a reversal of the judgment.

As grounds for reversal the brief contains numerous assignments of error. Before considering the assign-

ments, or such of them as require consideration, it appears expedient to state the salient facts to which the assignments refer and the theory on which the case was presented to the court by the pleadings and the evidence.

On March 17, 1951, Gordon D. Bailey was a passenger in an automobile which arrived at a point on U. S. Highway No. 34 a short distance east of Aurora, Nebraska, at about 1 a. m. Bailey was in the front seat with the driver who was Raymond R. Kiolbasa. In the rear seat were two boys and a girl. The automobile was traveling westward. The party had left Lincoln, Nebraska, at about 10 p. m. on March 16, 1951, and the destination was Grand Island, Nebraska. At the location in question the front end of the automobile in which Bailey was riding came into collision with the front end of the tractor which was attached to and was conveying in an easterly direction a semi-trailer loaded with eggs. The exact point of the collision was either on the north edge of the concrete paving which is about 20 feet wide or just off of it to the north on a graveled area about even with a line running north and south past the east end of a filling station and restaurant. As a result of the collision the tractor and the automobile in which Bailey was riding were demolished and all of the occupants of the automobile were killed except the girl.

The operator of the tractor was the defendant Donald L. Larson and at the time he was operating it for and on behalf of the other defendants named herein.

The plaintiff pleaded that Gordon D. Bailey came to his death as the result of the negligence of Larson in consequence of which he is entitled to recover damages in this action for and on behalf of the next of kin of Gordon D. Bailey. The plaintiff was the father and Mildred E. Bailey was the mother of Gordon D. Bailey. They are the next of kin.

The grounds of negligence charged by plaintiff and submitted to the jury by the court for consideration were

substantially as follows: (1) That Larson failed to keep a proper lookout; (2) that he turned the tractor from a direct course on the highway when the movement could not be made with reasonable safety, and without signaling his intention to do so; (3) that he failed to remain on the south or right-hand side of the highway or to stop and allow the automobile in which Gordon D. Bailey was riding to pass; (4) that he failed to drive on his right half of the highway; and (5) that he failed to yield the right-of-way.

By the answer on which the case was presented for trial the defendants generally denied the allegations of the petition. The answer also contained allegations that the accident was caused and contributed to by the negligence of the driver of the automobile in which Bailey was riding which negligence was the proximate cause of the accident. Specific grounds of negligence are alleged. Also the answer charges that the negligence of the driver was imputable to Bailey. And further the answer alleges that Bailey was guilty of contributory negligence. Specific grounds of contributory negligence are alleged.

The court submitted to the jury by instructions only the defense embraced in the general denial.

The first five assignments of error collectively challenge the sufficiency of the evidence under law to justify the submission of the question of negligence of Larson to the jury. There is but little dispute as to the disclosed facts bearing upon the question.

The evidence discloses without dispute that before reaching the point of the accident Larson who was operating his truck behind and in convoy with another truck saw the other truck pull across and off the highway from the south to the north and stop on a graveled area in the vicinity of the filling station which has been mentioned. Having observed this he proceeded to move over to the north with the purpose of moving off the paving to the east of the point where the truck with

which he was traveling in convoy stopped. From a point 100 to 150 feet west of the point of collision the tractor and trailer were in whole or in part on the north side of the center line of the paving. At the time of the collision the right rear wheel of the trailer was on the center line. After the collision all of the tractor with the possible exception of the right rear wheel was off the paving and on gravel. It was pointed northeast. The truck was properly and sufficiently lighted before the collision. There were no living eyewitnesses to the collision except Larson. The four boys were killed. The girl was asleep at the time and was rendered unconscious by the collision. It is inferable, conclusively so, that the automobile in which Bailey was riding was moving in its proper lane of traffic as it approached the scene. Larson gave no signal at any time of his intention to move to or off the north side of the highway.

The substance of the contention of the defendants is that the automobile in which Bailey was riding came to the scene without lights on account of which it could not be seen and that because thereof the movement of the truck to the north side of the highway and the failure to signal were not the proximate cause of the collision, but that on the contrary the failure of the driver of the automobile in which Bailey was riding to have his automobile lighted was the proximate cause.

In this connection the defendants contend substantially for a rule as applied to this case that Larson had the right to assume that the driver of the automobile in which Bailey was riding had complied with statutory requirements respecting lights; that if he looked up the road and saw no lights he had the right to proceed onto the left side of the highway and to assume that no vehicle was immediately in front of him on its right side of the highway until that presence became known; and that if he proceeded accordingly and never saw any lights and a collision occurred he could not be held to be guilty of negligence but on the contrary the operator of

the other car would be guilty of negligence which was the proximate cause of the collision.

Cited in support of the contention is 21 A. L. R. 2d 1. At this place appears Snook v. Long, 241 Iowa 665, 42 N. W. 2d 76, 21 A. L. R. 2d 1. The case does not sustain the contention. It holds that ordinarily the question of negligence of the party failing to see the lights is one for a jury.

The true rule applicable here is that if there was evidence upon which the minds of reasonable men could differ as to whether or not Larson was guilty of negligence which caused or proximately contributed to the death of Bailey the question of negligence was one for the jury. See, Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678; Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610.

The case of Davis v. Spindler, *supra,* is a companion to this one. In that case on the evidence of the plaintiff we held that the question of the negligence of Larson was one for the jury. Whether or not the evidence in that case was the same as here does not appear. The fact that the two are mentioned as companion cases is but incidental.

The only evidence as to whether or not the automobile was lighted and thus furnished an excuse, or measure of excuse, for Larson's actions in driving on the north side of the highway and not seeing the automobile approaching from the east came from Larson and the driver of the truck moving in convoy.

Larson's testimony is equivocal. The evidence discloses that there is a clear and unobstructed view to the east for a distance of six-tenths of a mile. Larson said that he looked to the east but saw no lights until the automobile was within 10 feet of the front end of his tractor. It could be inferred from his statements that he looked constantly from the time that he started movement into the north lane until, as he says, he saw the

lights 10 feet away. On the other hand it could be inferred that he did not keep a constant lookout in that direction. His last statement came in response to questions on redirect examination by his attorney. The questions and answer are: "Q. Had you been looking down the highway to the east all during that time you were going down? * * * Q. What was your answer? A. Yes, I was looking off and on." The driver of the other truck said he saw no lights coming from the east. As a conclusion he said that if there had been lights he would have seen them. This evidence is subject to question since it is certain that during a part of the time the tractor or trailer or both of them were between him and the oncoming automobile.

Section 39-7,115, R. R. S. 1943, provides: "(a) 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. (b) A signal of intention to turn right or left shall be given continuously during not less than the last fifty feet traveled by the vehicle before turning."

Larson, by his own admission, gave no signal of any kind. This court has said the violation of the provision of the statute constitutes evidence of negligence. Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355.

He also testified that his truck was lighted and that there were no obstructions of view to the east, yet the automobile in which Bailey was riding was not seen by him until it was but about 10 feet away. Under these circumstances a question of his negligence independent of statute was presented. In Petersen v. Schneider, *supra,* it is said: "In other words, the giving of a statutory signal is not enough, one must exercise reasonable care under all the circumstances. * * * He must take reasonable precautions for his own safety and the safety of others before he undertakes a left turn between in-

tersections where such movements are not anticipated."

Clearly under the facts of this case and statements of legal principle contained in Petersen v. Schneider, *supra,* and other decisions of this court, which statements will not be repeated herein, the question of whether or not Larson was guilty of negligence which was the proximate cause of this collision or proximately contributed to it was one for determination by a jury.

The defendants contend that Bailey was guilty of contributory negligence in a degree requiring a determination as a matter of law that the plaintiff cannot recover in this action against the defendants.

This contention is without any merit whatever. There was no eyewitness to any conduct of Bailey and no circumstance indicating that he did or did not do anything inconsistent with a reasonable regard for his own safety. The plaintiff was therefore entitled to the benefit of the presumption, in the absence of any obtainable evidence as to what a deceased did or failed to do by way of precaution at the time, that he, prompted by a natural instinct, was in the exercise of due care for his own safety. See, Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523; Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182, on rehearing 153 Neb. 329, 44 N. W. 2d 518; Edwards v. Perley, 223 Iowa 1119, 274 N. W. 910.

There was, as is hereinbefore pointed out, evidence sufficient to submit the question of whether or not Larson was guilty of negligence which was the proximate cause or proximately contributed to the collision. It may not therefore be said that the court should have decided the case as a matter of law in favor of defendants on the ground that the driver of the automobile in which Bailey was riding was guilty of negligence which was the sole and proximate cause.

This disposes of the challenge of the first five assignments of error adversely to the defendants to the extent that they present the question of whether or not

the court erred in submitting the question of negligence of defendants to the jury.

By the sixth and seventh assignments of error, which are identical, it is contended that the trial court erred in refusing to give instruction No. 1 requested by the defendants. By the proposed instruction the defendants sought to have the court declare the duty and obligation of the driver of the automobile in which Bailey was riding with regard to the defendants at and immediately prior to the collision.

Whether or not it was a proper exposition of the duty and obligation we do not need to decide. The duty and obligation of this driver and also of Larson in this regard was fully and properly set out in instruction No. 9 given by the court of its own motion.

The ninth assignment of error challenges the sufficiency of instruction No. 1 given by the court of its own motion. The challenge as we interpret it is that the court failed to submit that part of the theory of the defense the effect of which was to say that negligence of the driver of the automobile in which Bailey was riding was the proximate cause of the collision.

It is true that in the instructions only the general denial was submitted, whereas the answer charged under specifications negligence on the part of the driver of the automobile in which Bailey was riding.

If there was evidence to sustain one or more of these specifications then it was error to fail to submit the question of that driver's negligence to the jury. In Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315, a case wherein there was a collision between two automobiles and the action was for damages by a guest in one against the driver of the other and a defense was interposed that the collision was caused by the negligence of the driver of the host car, it was said: "Sandoz (the host driver) was the driver of one of the cars involved in this accident. Whether or not his negligence was the sole proximate cause was an issue. * * * Contrary to

plaintiff's contention, it was the court's duty to instruct as to the duties of Sandoz." See, also, McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923; Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578; Wright v. Lincoln City Lines, 160 Neb. 714, 71 N. W. 2d 182.

There were five specific charges of negligence against the host driver in this case. There is no evidence whatever to sustain at least four of them. The four relate to conduct of the driver. There is no direct evidence as to this conduct and no circumstantial evidence to support a reasonable inference that in any of the respects named he was negligent. Therefore, the presumption prevails that in the absence of any obtainable evidence as to what a deceased did or failed to do by way of precaution, at the time of and immediately before an injury, that he, prompted by a natural instinct, was in the exercise of due care for his own safety.

The other specification is that this host driver's car was without lights to give warning of its approach in consequence of which the driver was guilty of negligence which was the proximate cause of the collision.

Conclusively the automobile lights were on at the time of the collision. Before that Larson did not see them. We think however, in the light of the presumption of exercise of due care available in favor of a deceased person and the other facts and circumstances disclosed by the record, that there was nothing to justify a submission of this question to the jury. The only reasonable conclusion to be reached is that the host driver was driving on his own right side of the highway. He had no reason to anticipate that a motor vehicle would move over into his path going in the opposite direction. Larson had the duty to have headlights throwing a beam at least 200 feet to the front. (§ 39-780, R. R. S. 1943.) If he had such lights, and apparently he did have, and looked as he was required legally to do, he would have seen the approaching automobile at least 200 feet away

whether it did or did not have lights. Presuming that the host driver was driving at a lawful rate of speed with lights Larson had as much as 43 seconds, the unobstructed distance to the east being six-tenths of a mile, to observe it. In this view it appears reasonable to say that presumptively the host driver was not driving without lights but was also in this connection exercising due care for his own safety.

The trial court did not err in failing to submit negligence on the part of the driver of the car in which Bailey was riding.

This treatment of the ninth assignment of error effectually disposes of assignments of error No. 11 and No. 13.

The twelfth assignment of error is a challenge to the tenth instruction given by the court of its own motion. The only objection is that the court along with the instruction as to the statutory duty of the operator of a motor vehicle making a left turn on a highway from a direct course included the legal provision in that connection wherein a pedestrian may be affected, whereas the rights of or duties to pedestrians were not in this case involved.

While it may well be said that this inclusion was erroneous, it may not reasonably be said that it was prejudicial. In the syllabus in Henkel v. Boudreau, 88 Neb. 784, 130 N. W. 753, it was said: "It is error for the court, in instructing a jury, to copy sections of the statute, where the section contains subjects not in issue nor proper to be presented to the jury, but the error is without prejudice if the issues on trial are clearly defined, and the embodying of the immaterial portion of the section could not in any way mislead the jury."

We fail to see how the jury could have been misled by the inclusion of this subject matter in the instruction.

By assignment of error No. 15 it is contended that the court erred in giving instruction No. 11 of its own motion. The particular objection is that in its instruction

as to the manner of giving signals for left turn there was included an optional effective signal not at the time of the accident legally recognizable. This was true but the instruction was more favorable to the defendants than they were entitled to. This being true they may not be heard to complain.

By assignment of error No. 14 the defendants contend that it was error for the court to give instruction No. 19 of its own motion. The instruction purports to generally define the ordinary duties of the operators of automobiles in straight-away operation on highways except one-way streets. There is no contention that the definition is not correct. The objection is that it submits matters not in controversy. The contention is without merit. The jury was entitled to know what the rights and obligations of the drivers of the two vehicles were at the time in question. This instruction did nothing more than to impart a portion of that knowledge.

By assignment of error No. 8 the defendants contend that the giving of instruction No. 23 was erroneous. The point of the objection is that by the instruction the court informed the jury as to the law relating to the right of recovery in behalf of parents on account of the death of a child for probable contributions which would have been made after the child attained his majority. The objection is not that the instruction does not contain a correct exposition of legal principle. The objection is that there was no evidence from which a reasonable inference could flow that Bailey would have contributed to his parents after attaining his majority, hence the giving of that part of the instruction was prejudicially erroneous.

It is true that there was no such evidence and the part of the instruction submitting the question was erroneously included. This court has said: "The court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon

which the verdict must depend." Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423.

While this portion of the instruction was erroneous we conclude that it was not prejudicially so. An instruction may not be regarded as prejudicially erroneous unless it might mislead a jury. The appropriate rule is that it is reversible error to instruct on a question not raised by pleadings nor applicable to the evidence when the instructions have a tendency to mislead the jury. See, Esterly & Son v. Van Slyke, 21 Neb. 611, 33 N. W. 209; Sabin v. Cameron, 82 Neb. 106, 117 N. W. 95; Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19; In re Estate of Steininger, 139 Neb. 284, 297 N. W. 159; Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; Myers v. Willmeroth, *supra*.

The terms of the instruction are in nowise uncertain or ambiguous. The instruction clearly in substance told the jury that no legal obligation rests upon a son to support his parents after marriage or after becoming of legal age. It was then told that there are situations where, if it be shown with reasonable certainty that a son would have contributed to his parents after marriage or after attaining legal age, a recovery could be had for the benefit of the parents in an action for the wrongful death of the son. It was then specifically cautioned that no recovery could be had in this respect unless the evidence showed preponderantly and with reasonable certainty that such contributions would have been made.

In the light of the manner in which the instruction was drawn and the clear and specific caution therein contained it does not appear that a jury could have been misled.

Assignment of error No. 10 has been heretofore effectually disposed of adversely to the defendants.

The conclusion reached after a consideration of all of the assignments of error is that the record presents no ground for reversal.

The judgment is affirmed.

AFFIRMED.

JOSEPH CARMAN, APPELLANT, V. DANIEL HARTNETT ET AL., APPELLEES.
74 N. W. 2d 352

Filed January 13, 1956. No. 33850.

1. **Negligence.** In an action to recover damages caused by alleged negligence, the burden of proof is on the plaintiff to prove defendant's negligence and that such negligence was the proximate cause of the injury of which complaint is made.
2. **Automobiles: Negligence.** Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection is required by section 39-751, R. R. S. 1943, to yield the right-of-way to vehicles upon the highway.
3. ———: ———. One who crosses a street at any point other than a pedestrian crossing, crosswalk, or intersection is required to keep a constant lookout for his own safety in all directions of anticipated danger.
4. ———: ———. Where a person crossing a street at a point other than a pedestrian crossing, crosswalk, or intersection fails to look to his right for approaching traffic and is struck by an automobile coming from that direction, he is guilty of negligence sufficient to bar a recovery of damages as a matter of law.

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

Margolin & Goldblatt, Norris G. Leamer, and *Leamer & Graham,* for appellant.

Mark J. Ryan and *Richard E. Twohig,* for appellees.

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

CARTER, J.

This is an action for the recovery of damages for personal injuries resulting to plaintiff when he was struck by an automobile driven by the defendant Mar-

garet Hartnett and owned by the defendant Daniel Hartnett. The trial court sustained defendants' motion for a directed verdict and plaintiff appeals.

The accident occurred on the main street of the village of Emerson, Nebraska, on June 27, 1953, at approximately 8:45 p. m. It was almost dark and the lights were on in the village. It was a warm evening and the pavement was dry. Plaintiff was riding on the right-hand side of the front seat of his automobile which was being driven by his son. The car was driven up the street from the north. Plaintiff had business to transact with the Mattison Implement Company, which was located on the east side of the street. His son stopped the car in front of and across the street from the company store and plaintiff got out on the right-hand side. Due to the fact that automobiles were parked on the west side of the street, plaintiff was approximately 10 feet from the west curb of the street when he alighted. He watched his son drive the car on south for some distance and then proceeded to cross the street for the purpose of entering the implement store. The street was from 28 to 30 feet wide at the point where plaintiff attempted to cross. The point of crossing was in the middle of the block between intersections. There was no pedestrian crosswalk where the accident occurred. The street sloped from south to north. Because of this condition, plaintiff says, he could see 2 or 3 blocks to the north and only one-quarter of a block to the south. There was no center line marked on the pavement. According to plaintiff's testimony he was standing about 5 feet from the center of the street when he alighted from his automobile.

Plaintiff testifies that before starting to cross the street he looked to the north and saw no car approaching. He then looked south and saw no traffic. He again looked north, saw nothing, and proceeded across the street. He did not again look south after starting across the street and was looking north when struck by the

Hartnett automobile, which came from the south. He says he was hit 3 feet west of the center line of the street. After the accident he was lying on the pavement about 40 feet north of the place where he was struck and 2 feet east of the center of the street. Plaintiff did not see the car before the accident. He remembers nothing that occurred immediately following the accident. One witness testifies that a few minutes after the accident the Hartnett car was parked about 40 feet north of the point where plaintiff was lying on the pavement. It is not questioned that plaintiff received serious injuries to his person.

The petition filed alleges the following acts of negligence on the part of Margaret Hartnett, the driver of the automobile that struck the plaintiff: That the automobile was being operated in a careless and reckless manner at an excessive rate of speed with poor and improper lights in the nighttime; that she was negligent in operating said motor vehicle at a speed that was greater than reasonable and prudent under the conditions then existing, in operating a motor vehicle with insufficient lights, in failing to keep a proper lookout, in failing to have her car under control so as to stop within the area lighted by her headlights, in failing to warn of her approach, and in failing to have her automobile under proper control so as to be able to apply the brakes and prevent striking objects in her pathway; that she failed to look, or if she did look, failed to see the plaintiff in said roadway; that she failed to change her course after seeing the plaintiff, if she saw him, and failed to stop said automobile before striking the plaintiff; and that she operated her automobile at a speed that was in excess of the limits provided in the ordinances of the village of Emerson.

There is no evidence in the record to support any one of the foregoing allegations, except that which might be inferred from the testimony of the plaintiff as hereinbefore set out. The speed of the car or the manner in

which it was being driven is not shown by any evidence. There is no evidence of a want of adequate lights or brakes, or of other mechanical defects preventing a proper operation and control of the car. The alleged negligence of the operator of the automobile rests solely on speculation and conjecture. It is fundamental that in an action to recover damages caused by alleged negligence plaintiff must prove defendant's negligence and that such negligence was the proximate cause of the injury of which complaint is made. Danielsen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913.

But in any event, we think the evidence adduced by the plaintiff shows as a matter of law that the proximate cause of the accident was the negligence of the plaintiff. In this respect, the evidence shows that after plaintiff alighted from his car, he looked to the north, then to the south, and again to the north, and then proceeded to cross the street without again looking to the south. Plaintiff's testimony is that he was walking across the street looking to the north, where he could see for 2 or 3 blocks and a single glance would have shown him that no cars were approaching from that direction. After starting across the street plaintiff never again looked to the south where he could see for only one-quarter of a block. Plaintiff testifies that he took about two steps before he was struck. He was necessarily close to the center of the street. With no cars approaching within 2 or 3 blocks from the north, any danger was necessarily from the south. He never looked south after starting across the street. After giving plaintiff's evidence the most favorable conclusion to be drawn therefrom, as we are required to do in determining the correctness of a directed verdict, it clearly appears that the proximate cause of the accident was the negligence of the plaintiff in not keeping a proper lookout.

Every pedestrian crossing a highway within a business or residence district at any point other than a

pedestrian crossing, crosswalk, or intersection is required by statute to yield the right-of-way to vehicles upon the highway. § 39-751, R. R. S. 1943. A business street is a highway within the meaning of this section of the statute. § 39-741, R. R. S. 1943. Consequently, the rule governing the right-of-way of pedestrians is the same whether or not there is an applicable ordinance declaratory of the existing statute.

In Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613, this court in a similar case said: "This court has held many times and is committed to the rule that the violation of a statute or ordinance regulating traffic does not constitute negligence as a matter of law, but is evidence of negligence to be considered by the jury in connection with all the circumstances shown by the evidence. Consequently, the mere fact that a pedestrian walks across a street between intersections contrary to ordinance or statute is not of itself negligence sufficient to defeat a recovery. But one who does so is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. * * * But one who crosses a street between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. Where such person crosses the street between intersections without looking at all, * * * the situation usually presents a question for the court."

In the instant case the plaintiff, according to his own testimony, looked in both directions before he started across the street. After he started across, he says, he continued to look north but never again looked to the south. As he approached the center of the street, he should have looked to the south, particularly where it was the more likely source of danger. It was negligence of such a character as will bar a recovery as a matter of law. The proximate cause of the accident was his failure to keep a constant lookout for his own safety

in all directions of anticipated danger. The trial court so found and directed a verdict for the defendants. The judgment entered was correct and it is affirmed.

AFFIRMED.

WILLIAM BIRDSLEY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
74 N. W. 2d 377

Filed January 13, 1956. No. 33851.

1. **Evidence: Trial.** Physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. If they fall short of this test or are reasonably in dispute, then they are to be considered by the jury along with all the other facts and circumstances proved.
2. **Criminal Law: Trial.** In criminal cases, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.
3. **Criminal Law: Appeal and Error.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
4. **Criminal Law: Witnesses.** The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury should not be disturbed unless it is clearly wrong.
5. **Homicide.** Section 28-403.01, R. S. Supp., 1953, provides that whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of motor vehicle homicide.
6. ———. In a prosecution under said section, it is required that the unlawful operation of the motor vehicle shall be a proximate cause of the death of another.

ERROR to the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Dwight Griffiths and *Robert S. Finn,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for defendant in error.

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

CHAPPELL, J.

Plaintiff in error, William Birdsley, hereinafter called defendant, was charged with motor vehicle homicide under the provisions of section 28-403.01, R. S. Supp., 1953, which became effective August 27, 1949. The information charged that on September 19, 1953, defendant caused the death of Alvin Carl Steffens and Dale Bize without malice while he was engaged in the unlawful operation of a motor vehicle, and he was thereby guilty of motor vehicle homicide contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

Upon a plea of not guilty, defendant was tried to a jury, and it returned a verdict finding him guilty as charged. Subsequently, defendant's motion for dismissal or for judgment of not guilty notwithstanding the verdict or in the alternative for new trial, was overruled, and defendant was sentenced to pay a fine of $200 and costs of prosecution. Therefrom defendant prosecuted error to this court, assigning some 14 alleged errors, all of which concededly present only the basic question of whether or not the evidence was sufficient to sustain the verdict. We conclude that the evidence was sufficient.

Section 28-403.01, R. S. Supp., 1953, provides in part: "Whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of a crime to be known as motor vehicle homicide and, upon conviction thereof, shall be * * *" punished as provided therein.

An examination of the record discloses competent evidence adduced by the State from which the jury could have found beyond a reasonable doubt as follows: On the evening of September 19, 1953, defendant, then 21 years of age, drove a blue 1950 Ford two-door car from Auburn to Falls City. The car belonged to his father and mother. Three young men who were friends of defendant went with him. The weather was favorable, clear, and dry. They left Falls City to return to Auburn about 11 p. m., and on the outskirts thereof they picked up Dale Bize, a soldier in uniform and on leave, who was hitchhiking to his home in Lincoln. About 11:30 p. m., one Robert G. Bantz, 18 years old, who was driving his own 1950 green Ford, saw defendant get in the car he was driving and leave a drive-in on the outskirts of Falls City. Bantz also left soon thereafter and drove north on highway No. 73 toward Auburn. Several miles north of Falls City he again saw defendant driving north toward Auburn on the same highway. Bantz, while driving his car 80 miles an hour, passed defendant. Thereafter, while Bantz was driving 90 miles an hour, defendant passed him. Later, Bantz, driving better than 95 miles an hour, again passed defendant, who thereafter followed about one-half or one car length behind Bantz as they so continued down cemetery hill at the south end of an "S" curve and entered a straightaway between the south and north curves of the "S" located on paved highway Nos. 73-75 about 3 miles south of Auburn. The pavement was 20 feet wide with a curb on the east side but none on the west side. There defendant started to turn out to the left and pass Bantz again, but a 1946 Chevrolet two-door sedan was approaching from the north toward the south on its right side of the highway at 40 or 45 miles an hour. The Chevrolet safely passed Bantz and attempted to swerve and avoid defendant who was attempting to swerve back into his own lane again, but the left side of defendant's car struck the left front bumper, fender, and wheel of

the Chevrolet and scraped along the entire left side thereof. The county sheriff investigated the accident within a few moments after it happened and then and later made necessary measurements.

After the impact the Chevrolet, so damaged and with its left front wheel bent back and inward, the tire thereon blown out, and the hood up, stopped within 25 or 30 feet south of the point of impact where there were some dirt and refuse about 3 feet wide and a car length long located on the pavement about equidistant on each side of the center thereof. Whether such dirt and refuse came from the Chevrolet or defendant's car or both of them is disputed. When the Chevrolet stopped, its left front wheel was about 2 feet over the center line headed southeast, with its left rear wheel about on the center line. There were no tracks on the pavement north of the Chevrolet.

After the impact defendant kept his foot down on the accelerator and never applied his brakes. Thus his car skidded at an angle to the east and north until its right wheels were off the east side of the pavement 10 or 15 feet north of the dirt and refuse. From that point its right wheels went north and east along the right shoulder of the highway with its left wheels on the pavement for some 296 feet until the car struck a cement flume which had a cement wall 11 inches high on each side thereof. From that point defendant's car veered to the left, back on the pavement, and after making a 50 to 60 foot oval or loop thereon with its left front wheel dragging, defendant's car angled back again over on the right shoulder. Thereafter, it traveled to and along a so-called first ditch and then went off into another deep ditch clear off the highway where it hit a high bank, scooped up dirt about 2 or 3 feet, and stopped 777 feet from the point of impact. There were no tracks or marks during the last 112 feet thereof except the stripping of the tops of brush and bushes as defendant's car went through the air and over the tops of them.

When found, defendant's car was lying on its right side facing east, with its wheels to the north. Carl Alvin Steffens and Dale Bize were found in the car, but they were both dead. Another young man, found pinned in the car, was living and survived. Another was found sitting on the ground close to the car, and survived. Defendant was found lying on the bank about 10 feet south of his car. He was conscious but injured, and there admitted that he was driving the car. Numerous photographs of the place where the accident occurred and of the cars involved appear in the record.

Evidence adduced by defendant and in his behalf conflicted in material respects with that adduced by the State. In that connection, however, defendant admitted that he was driving 60 or 80 miles an hour at the time of the accident near midnight, in violation of law, and that he had theretofore been racing with Bantz for several miles. However, defendant testified that he was 100 or more feet behind the Bantz car when the Chevrolet, coming from the north, went off on the west shoulder of the highway, then turned back left over the center line thereof directly into defendant's path, when the right wheels of his car had been run off on the east shoulder by defendant in an effort to avoid collision. Defendant argued here that the evidence and physical facts conclusively supported that theory and that judgment of acquittal should have been rendered by the trial court because as a matter of law his unlawful acts were not the proximate cause of the accident and deaths. Such contention should not be sustained.

Section 39-723, R. R. S. 1943, provides in part: "No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case * * * at a rate of speed exceeding sixty miles per hour between the hours

of sunrise and sunset, and fifty miles per hour between the hours of sunset and sunrise." See, also, § 39-7,108, R. R. S. 1943. Further, section 39-748, R. R. S. 1943, provides that: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one half of the main traveled portion of the roadway as nearly as possible."

In Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407, this court held: "Physical facts may not be accepted as a matter of law or as ground for refusal to submit a case to a jury as against the testimony of witnesses on a controverted question of fact unless they are demonstrable to a degree that reasonable minds cannot disagree as to their existence and unless the results flowing therefrom are demonstrable to the same degree agreeable to the known and immutable laws of physics, mechanics, or mathematics. If they fall short of this test, then they are to be considered by the jury along with all the other facts and circumstances proved.

"When there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury." See, also, Jones v. Union Pacific R. R. Co., 141 Neb. 112, 2 N. W. 2d 624. With regard to physical facts, such rules are controlling in the case at bar.

In Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349, this court held: "The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury cannot be disturbed unless it is clearly wrong." We reaffirmed such rule as recently as Hoffman v. State, 160 Neb. 375, 70 N. W. 2d 314.

Also, in Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761, we held that: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausi-

bility of explanations, or weigh the evidence. Those matters are for the jury."

Further, in Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873, we held that: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Such rules are also controlling here.

In Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588, this court said: "The operation of motor vehicles is governed by many legal restrictions and requirements which are designed and intended to secure reasonable safety of persons upon the highways of the state. They were adopted because experience had established that a disregard thereof was likely to result in serious bodily harm or death. It has been considered in this state that a negligent violation of any of these by the operator of a motor vehicle on a public highway directly resulting in death of another person may render the operator guilty of manslaughter." See, also, Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328; Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111.

In that connection, when the Legislature enacted section 28-403.01, R. S. Supp., 1953, it simply created and defined the crime of motor vehicle homicide in amelioration of the crime of manslaughter.

In manslaughter cases, this court has generally held that the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, is not a defense if the evidence is sufficient to sustain the conclusion beyond a reasonable doubt that defendant's negligence or unlawful acts were also a proximate cause of the death of another. Schultz v. State, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. N. S. 403, Ann. Cas. 1912C 495; Benton v. State, 124 Neb. 485, 247 N. W. 21; Vaca v. State, *supra*.

Likewise, also, we conclude that in a prosecution for motor vehicle homicide under the provisions of section 28-403.01, R. S. Supp., 1953, it is simply required that the unlawful operation of the motor vehicle by the accused shall be a proximate cause of the death of another.

Without doubt, in the case at bar the accident was the proximate cause of the deaths, and we conclude that there was ample competent evidence from which the jury could have found beyond a reasonable doubt that except for the unlawful operation by defendant of his motor vehicle there would have been no accident and that defendant's unlawful acts were a proximate cause of the deaths.

Other matters were presented and argued in briefs of counsel, but they require no discussion in order to dispose of the case upon its merits.

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

AFFIRMED.

JOHN PEETZ, JR., ADMINISTRATOR OF THE ESTATE OF MARVIN L. HAGLER, DECEASED, APPELLEE, V. MASEK AUTO SUPPLY COMPANY, INC., A CORPORATION, APPELLANT, IMPLEADED WITH BEKINS VAN LINES COMPANY, A CORPORATION, APPELLEE.

74 N. W. 2d 474

Filed January 20, 1956. No. 33632.

1. **Master and Servant: Trial.** Where the inference is clear that there is, or is not, a master and servant relationship, the determination is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered.
2. **Children Born Out of Wedlock.** Under the statutory law of this state a child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child.

3. ———. In order to establish a child born out of wedlock as an heir it is necessary to establish (1) that such child was born out of wedlock, (2) that a particular person was the father, and (3) that the father recognized the child agreeable to the requirements of statute.
4. ———. A writing sufficient as an acknowledgment to establish heirship of a child born out of wedlock must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged.
5. ———. The statement in former opinions of this court that "the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity," is overruled.
6. Statutes. Where a statute is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed or proper.
7. Courts. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification.
8. Trial. A verdict will be set aside as excessive if it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law.

APPEAL from the district court for Cheyenne County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Neighbors & Danielson, Chambers, Holland & Groth, and *Orie C. Adcock,* for appellant.

Maupin & Dent, Martin, Davis & Mattoon, and *Richard W. Satterfield,* for appellee.

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

YEAGER, J.

This case was presented to this court and after hearing an opinion was adopted. The opinion was reported as Peetz v. Masek Auto Supply Co., 160 Neb. 410, 70 N. W. 2d 482. The case was later considered on motion for rehearing. In the light of this later consideration the conclusion has been reached that the opinion adopted

is erroneous in some of its material aspects. Accordingly it is withdrawn and the following adopted as the opinion of the court.

It appears proper to point out here that the statement of facts in the former opinion accurately and fully reflects the evidence as it appears in the record to the extent of its pertinence to the theory on which the previous opinion was written. Since, however, the present opinion adopts a view opposite to the one announced in the former opinion it becomes necessary to consider facts not considered or necessary to be considered previously. In this light it appears advisable and expedient to cause this opinion to contain its own statement of facts rather than to adopt a statement from the former opinion.

This is an action for damages in three causes of action commenced in the district court by John Peetz, Jr., administrator of the estate of Marvin L. Hagler, deceased, plaintiff and appellee, against Masek Auto Supply Company, Inc., a corporation, defendant and appellant. The Bekins Van Lines Company, a corporation, was a defendant in the district court and is an appellee here. Apparently Bekins Van Lines Company and Bekins Van and Storage Company are one entity. They have been so treated by all parties throughout these proceedings. They will therefore be so treated herein and will be hereinafter referred to as Bekins. There was not and is not now any claim that damages may be recovered against Bekins in this action. Its only interest is to protect its legal right of subrogation. It therefore will not be further referred to as a party to the action.

The salient facts of which the action is an outgrowth are that on June 11, 1953, at about 5 p. m. on U. S. Highway No. 30, a few miles west of Sidney, Nebraska, Marvin L. Hagler was operating a tractor truck with a trailer in an easterly direction. The truck belonged to him and the trailer belonged to Bekins. He was at the time employed by this company and was engaged in

the performance of service for it. At that time Kenneth J. Conner was operating an automobile in a westerly direction on this highway. The automobile was his own. The two vehicles collided practically head-on and both drivers were killed.

John Peetz, Jr., was appointed administrator of the estate of Marvin L. Hagler and in that capacity he instituted this action. By his petition the plaintiff alleged that the death of Hagler was caused by the negligence of Conner. He alleged further that at the time Conner was employed by the defendant and engaged in the performance of service in its behalf and that thus the negligence of Conner was attributable to it.

By the first cause of action the plaintiff sought a recovery for the benefit of the next of kin of Hagler, by the second he sought to recover for funeral expenses, and by the third he sought to recover for damages to Hagler's truck.

Insofar as necessary to denominate here the alleged next of kin were Michael Dennis Hagler and David Lee Hagler, two minor children of Marvin L. Hagler, born out of wedlock, which children the plaintiff contends were legitimated in such manner as to permit action to be maintained for their benefit.

Issues were joined and a trial was had to a jury. No general verdict was returned. Pursuant to instructions by the court a special verdict was returned on a form prepared and presented by the court. The form contained some questions propounded without answers. The jury answered all questions requiring answer. The form contained other questions with answers thereto by the court. The form with the answers of the jury and those of the court was returned as the verdict of the jury.

The propriety of this manner of submission or this type of verdict is not attacked by assignment of error, hence it will not be considered herein.

Pursuant to this submission the jury found by its

answers that Conner was an employee of the defendant; that at the time of this occurrence he was acting within the scope of his employment; that Conner was guilty of negligence which was the proximate cause of the collision; that Hagler was not guilty of any negligence which was the cause or proximately contributed to the collision; that Michael Dennis Hagler and David Lee Hagler were dependent upon Marvin L. Hagler for contributions to their support; that Marvin L. Hagler would have contributed on the average each year for 19 years to Michael Dennis Hagler $1,136 and to David Lee Hagler for 17 years $1,165; and that the reasonable value of the damage to the truck was $925. By adoption of the answers to questions made by the court the jury found that Michael Dennis Hagler and David Lee Hagler were the next of kin of Marvin L. Hagler; that the reasonable rate of return upon investments in Cheyenne County, Nebraska, was 4 percent; and that the reasonable value of the funeral expense was $928.30.

Following the rendition of verdict a motion for judgment notwithstanding the verdict or in the alternative for new trial was filed by the defendant. This motion was overruled after which judgment was rendered on the first cause of action for $29,093.15, on the second cause of action for $928.30, and on the third cause of action for $925, with the total of the three amounting to $30,946.45. The appeal here is from this judgment.

As grounds for reversal the brief of defendant contains six assignments of error. The first is that the court erred in not holding as a matter of law that Conner was an independent contractor. The second is that the court erred in admitting exhibit 15 in evidence. The third is that the court erred in holding that Marvin L. Hagler had legitimated Michael Dennis Hagler and David Lee Hagler and in failing to hold that they had not been legitimated. The fourth is that the court erred in failing to hold that the verdict was the product of passion, prejudice, mistake, or some other means not

apparent in the record, or that the jury disregarded the evidence or rules of law. The fifth is that the court erred in requiring the jury to find specially as to the damage, if any, sustained severally by Michael Dennis Hagler and David Lee Hagler. The sixth is that the court erred in failing to sustain defendant's motion for judgment notwithstanding the verdict.

The subject of the first assignment of error was considered at length in the former opinion and the conclusion reached therein was adverse to the defendant. We have found no basis for a departure from that conclusion.

By this assignment of error the defendant substantially contended that the evidence was insufficient upon which to submit to the jury the question of whether or not Conner was an employee of the defendant and at the time was in pursuit of its business rather than an independent contractor.

In the former opinion it was said: "Where the inference is clear that there is, or is not, a master and servant relationship, the determination is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered. Restatement, Agency, § 220, p. 483. See, also, Thurn v. La Crosse Liquor Co., 258 Wis. 448, 46 N. W. 2d 212."

The following was also stated therein: "Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment, and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury. See, Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488; LaFleur v. Poesch, 126 Neb. 263, 252 N. W. 902; 35 Am. Jur., Master and Servant, § 553, p. 986."

Following these statements of principle and a review of the evidence relating to this subject, which review we deem unnecessary to repeat herein, the conclusion

reached was that the question presented was one for determination by the jury. Nothing has been presented here which convinces that the conclusion there reached was wrong. Accordingly it must be said that the assignment of error is without merit.

The second and third assignments of error require consideration together. As already pointed out Michael Dennis Hagler and David Lee Hagler are claimed to be next of kin of Marvin L. Hagler. This claim is based upon the contention that they are children of Marvin L. Hagler born out of wedlock but who have acquired the right to be considered heirs by reason of action of Marvin L. Hagler in his lifetime as prescribed by section 30-109, R. R. S. 1943. The pertinent portion of the section is as follows: "Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, * * *."

In the state of the record herein the plaintiff is not entitled to prevail on the first cause of action unless the evidence is sufficient to entitle Michael Dennis Hagler and David Lee Hagler to be considered heirs within the meaning of the quoted statutory provision. There appears to be no dispute about this.

The burden therefore devolves upon the plaintiff to establish that (1) the children were born out of wedlock, (2) that Marvin L. Hagler is their father, and (3) that the father recognized them as his children agreeable to the requirements of the statute. In re Estate of Oakley, 149 Neb. 556, 31 N. W. 2d 557.

The first and second of these elements of proof have been established clearly and distinctly without contradiction. Exhibit 15 is an instrument which the plaintiff asserts establishes the third element. The exhibit is an application by Marvin L. Hagler for employment by Bekins. It contains a statement of the personal record of Hagler in his handwriting on a form furnished by Bekins.

In response to the following in print on the form: "Names, ages, relationship and address of any persons dependent on you for support or to whose support you are contributing" he wrote: "Ruby Hagler - Wife age 26. 2 Sons. David Lee & Michel Dennis Hagler. age 2 - 1 yr." The instrument was signed by him "Lee Hagler." It is made clear that the person signing as Lee Hagler was the same person as the Marvin Lee Hagler who was killed in the accident involved in this case. The signing of the instrument was in the presence of R. Lowell Johnson.

The question presented by the second and third assignments of error is that of whether or not this exhibit is sufficiently an acknowledgment by Marvin L. Hagler of the fatherhood of Michael Dennis Hagler and David Lee Hagler to entitle them to be considered as his heirs.

The formal insufficiency of the instrument is not stressed on this appeal and therefore it will not be considered herein. The only question to be considered is the substance of the declaration by Marvin L. Hagler.

A principle declared applicable in reference to an acknowledgment of the father of a child born out of wedlock is that it must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged. Lind v. Burke, 56 Neb. 785, 77 N. W. 444. See, also, Moore v. Flack, 77 Neb. 52, 108 N. W. 143.

In Lind v. Burke, *supra*, it was said: "* * * the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity." This statement was approved in Moore v. Flack, *supra*. Thus according to the pronouncement in these cases the office of the statutory provision is dual.

The former of these two statements has never been disapproved by this court. The latter may be said to have been disapproved although not by reference thereto in Thomas v. Estate of Thomas, 64 Neb. 581, 90 N. W. 630. In that case we think it was indicated that the office of the statute is single and not dual and involves only the

sufficiency of a writing in acknowledgment of paternity of a child born out of wedlock. In the opinion it is said as to the office of the statute: "If no more is asked of this son than the statute by its terms requires, he is entitled to a share of his father's estate if the evidence given and offered on his behalf is true. * * * Such we conclude it is."

The court, in the case of In re Estate of Winslow, 115 Neb. 553, 213 N. W. 819, without citation of earlier cases, effectually accepted the statute literally and substantially concluded that it was satisfied if there was a statement by a father, in writing, signed in the presence of a competent witness, acknowledging paternity. In the opinion it was said: "The evidence fully justifies the finding of the district court that Winslow did, in writing, in the presence of a competent witness, acknowledge himself to be the father of Mrs. Warriner. He thereby legitimated her as his daughter, and she is entitled to inherit his estate."

There cannot be said to be any ambiguity in the statute or the instrument here involved. The terms of both are clear and specific. The applicable rule as to statutes in such circumstances is that where a law is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed or proper. See, State ex rel. School Dist. v. Moore, 45 Neb. 12, 63 N. W. 130; Shamp v. Landy Clark Co., 134 Neb. 73, 277 N. W. 802; Cross v. Theobald, 135 Neb. 199, 280 N. W. 841; City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457; State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N. W. 2d 297; Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; City of Wayne v. Adams, 156 Neb. 297, 56 N. W. 2d 117.

As to written documents the rule appears to be that when construing a writing it is the duty of the court ordinarily to give to the words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. This is the rule with reference to instruments constituting a contract. See O'Shea v. Smith, 142

Neb. 231, 5 N. W. 2d 348. It is also the rule to be applied in the interpretation of wills. See Brandeis v. Brandeis, 150 Neb. 222, 34 N. W. 2d 159. No reason is apparent as to why any other rule should apply to a writing such as is involved here.

The conclusion in this connection therefore is that to the extent that Lind v. Burke, *supra,* and Moore v. Flack, *supra,* hold that a writing in order to satisfy the requirements of section 30-109, R. R. S. 1943, must be in and of itself sufficient, unaided by extrinsic evidence, to establish paternity, they are overruled.

It is concluded that, as was declared in Lind v. Burke, *supra,* a writing to satisfy the requirements of the statute should be one in which the paternity is directly, unequivocally, and unquestionably acknowledged.

Exhibit 15 in this case appears to meet the test of the statute and the decisions. The inescapable purport of the exhibit is: Dependent upon me for support are two sons. Their names are David Lee and Michael Dennis Hagler. Their ages are respectively 2 years and 1 year. The exhibit was signed in the presence of a competent witness.

It is difficult to perceive how paternity could be acknowledged more directly. It is difficult to see wherein equivocation may be attributed to the acknowledgment. It is likewise difficult to see how the acknowledgment may be regarded as questionable. We conclude that exhibit 15 did satisfy the requirements of the statute.

It may well be said that this decision on the facts is not consistent with similar facts involved in Lind v. Burke, *supra,* but that ought not to deter a proper decision in this case.

It may also be said that it conflicts with certain statements contained in the case of In re Estate of Oakley, *supra.* In the opinion in that case it was stated that insurance applications signed in the presence of a witness were insufficient as acknowledgment of paternity under the statute.

In view of the clear proof of illegitimacy and paternity

here and the conclusion as to the quality of exhibit 15 it must be said that assignments of error 2 and 3 are without merit.

The fourth assignment of error challenges the sufficiency of the evidence to sustain the amount of damage awarded as to the first cause of action. The substantial contention is that the verdict is excessive and exorbitant and that this is apparent on the face of the record, and accordingly it should be vacated and set aside.

The rule to be applied in the determination upon this assignment is the following: "A verdict may be set aside as excessive by the trial court or on appeal only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612. See, also, Banta v. McChesney, 127 Neb. 764, 257 N. W. 68; Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186; Dunn v. Safeway Cabs, Inc., 156 Neb. 554, 57 N. W. 2d 75.

From an examination of the evidence in the light of this rule it becomes clear that this assignment must be sustained and a new trial granted on the first cause of action. Neither the special findings of the jury as to the probable contributions of Marvin Lee Hagler to Michael Dennis Hagler and David Lee Hagler nor the judgment entered thereon find support in the evidence.

As already pointed out the jury by its verdict found that Marvin Lee Hagler, had he lived, would have contributed an average annual amount for the two children of $2,301 for 17 years and $1,136 for one for an additional 2 years.

Hagler was first employed by Bekins about December 27, 1952. He continued in that employment until the time of his death. The information as to his employment theretofore is meager. There is none as to his earning capacity except for a period of 1 year when he

was engaged in farming. He appears to have closed out the operation at which time he had $900. For the period he worked for Bekins he received $4,867.52 mileage earnings. This was paid on the basis of 18.8 cents a mile while on the road and $12 a day for any full 24-hour layover period. In addition he received $521.54 as hourly pay for loading and unloading. According to studies made by Bekins about two-thirds of the mileage paid was used up by Hagler in expense of operation. This was a burden he was required to bear.

On the basis of this evidence Hagler had received a total net income for the period from about December 27, 1952, to June 11, 1953, of approximately $2,150. There is no evidence justifying a reasonable inference that he would in the future succeed to a substantially higher rate of compensation.

As to the actual contributions Ruby Hagler, the mother of the two children and the person in charge of the household, testified that Hagler's contribution to the support of the household was about $250 a month. This was for four people when Hagler was away and five when he was at home. She further testified that his contribution for the two boys was about $50 each.

It was in the light of this evidence that the jury returned its verdict.

It is reasonably inferable that after the verdict was returned the court computed the total for the period or periods involved and then ascertained its present value in conformity with a formula stipulated and agreed to by the parties as disclosed by the bill of exceptions, and rendered judgment in that amount.

It appears obvious that a verdict and judgment based on a theory that Hagler probably would have contributed any such amounts as indicated finds no support in the evidence. It clearly appears that the evidence and appropriate rules of law were disregarded.

By the fifth assignment of error it is urged that it was improper to require the jury to separately find

specially the damage, if any, sustained by Michael Dennis Hagler and David Lee Hagler.

The theory is not that a special finding should not have been made, nor is it the theory that damage separately for the two was not proper to be considered by the jury, but only that there should not have been a separated finding in the verdict. The cases cited in support of the contention are In re Estate of Lucht, 139 Neb. 139, 296 N. W. 749, and Tate v. Barry, 144 Neb. 517, 13 N. W. 2d 879.

The argument in support of the theory as we interpret it is that in a case such as this, prosecuted pursuant to authority of section 30-810, R. R. S. 1943, the ultimate distribution of a judgment recovered is made by the county court, therefore it is improper to require a jury in the district court to specifically find the amount of damage to individuals.

Neither the cases cited nor the statute supports the contention. It is true that the distribution in cases such as this is made through the county court but it is a function of the district court to ascertain the amount to be distributed. In the statutory provision (section 30-810, R. R. S. 1943) the following appears: "The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons."

It is a contradiction to the specific terms of the statute to say that the verdict should be for the amount of damages which the persons in whose behalf the action is brought have sustained and at the same time to say that the jury may not ascertain specifically under proper instructions the amounts of damage to particular persons.

We conclude therefore that the fifth assignment of error is without merit.

By the sixth and last assignment of error the defendant urges that a judgment notwithstanding the verdict should have been rendered in its favor.

In the light of what has been said herein it is clear that our conclusion is that as to the first cause of action defendant is not entitled to a judgment in its favor notwithstanding the verdict but is entitled to a new trial.

As to the second and third causes of action the only observable basis for a contention that the defendant is entitled to a judgment notwithstanding the verdict is the contention that the verdict of the jury finding that Conner was employed by the defendant and was at the time in the pursuit of his master's business was not sustained by the evidence. This contention has been decided herein adversely to the defendant. The assignment is therefore without merit.

The decision arrived at is that the judgment on the first cause of action should be and it is reversed and the cause of action remanded for a new trial. The judgment on the second and third causes of action should be and it is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

SIMMONS, C. J., dissenting.

The youngsters involved in this litigation are in no wise responsible for the fact that they were born out of wedlock. Their problem is not new.

As the law has developed, that relates to their situation here, they have no actionable rights save as given by statute.

If this court had legislative powers I would not hesitate to vote for legislation granting children, born as these were, the rights which the majority opinion accords, but we do not have that legislative power.

The rule of construction which the court follows here is expressed in as broad and general language as is the

statute. In its application it also requires construction.

This is not a case of first impression here.

Beginning with Lind v. Burke, 56 Neb. 785, 77 N. W. 444, we stated the rule. In that case and in subsequent decisions we set out the guideposts, factually, that must appear to invoke the benefits of the statute. That rule and its application was followed in Moore v. Flack, 77 Neb. 52, 108 N. W. 143, wherein we recited that it was a "rule of strict construction of writings of this nature." It was followed again in Van Hove v. Van Hove, 94 Neb. 575, 143 N. W. 815. See Van Hove v. Van Hove, 96 Neb. 484, 148 N. W. 152, for additional facts. Those decisions have not heretofore been overruled.

The acknowledgment shown in Thomas v. Estate of Thomas, 64 Neb. 581, 90 N. W. 630, clearly meets the test of the statute and the rule as theretofore applied.

In re Estate of Winslow, 115 Neb. 553, 213 N. W. 819, may be said to be at variance with our other decided cases. The majority point out correctly that this case was decided "without citation of earlier cases." The earlier cases were cited to the court and were ignored. They were not overruled. The court then allowed the "earlier cases" to stand unmentioned. The Winslow decision is one of those rare ones where hard facts were allowed to control over the established construction of the statute.

Lind v. Burke, *supra*, was decided in 1898.

We have 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 government, including the Legislature." Board of Educational Lands & Funds v. Gillett, 158 Neb. 558, 64 N. W. 2d 105.

In Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704, we cited with approval this rule: "The doctrine of stare decisis applies with full force to decisions construing statutes, especially where they have been long acquiesced in."

This statute as construed and applied has been acquiesced in by the Legislature these many years.

The construction, by application which we have placed on the statute, should not be disturbed except by legislative action.

MESSMORE, J., dissenting.

I respectfully dissent from that part of the majority opinion which interprets section 30-109, R. R. S. 1943, specifically the part thereof as follows: "Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, * * *."

The burden devolves upon the plaintiff to establish that (1) the children were born out of wedlock, (2) that Marvin L. Hagler is their father, and (3) that the father recognized them as his children in accordance with the statute. In re Estate of Oakley, 149 Neb. 556, 31 N. W. 2d 557.

The first and second of these elements of proof have been established. Thus, the third element of proof is directly involved in this case.

In Peetz v. Masek Auto Supply Co., 160 Neb. 410, 70 N. W. 2d 482, exhibit No. 15 was received in evidence. It is an application by Marvin L. Hagler for employment by Bekins Van and Storage Company. The following is the pertinent part thereof: "Names, ages, relationship and address of any persons dependent on you for support or to whose support you are contributing." He wrote: "Ruby Hagler - Wife age 26. 2 Sons. David Lee & Michel Dennis Hagler. age 2-1 yr." The instrument was signed "Lee Hagler" in the presence of Bekins' personnel officer.

Ruby Hagler was not the wife of Lee Hagler. David Lee and Michael Dennis Hagler were born out of wedlock.

Under the authority of Lind v. Burke, 56 Neb. 785, 77 N. W. 444, and also Moore v. Flack, 77 Neb. 52, 108 N.

W. 143, we determined that all Hagler signed was an application for employment setting forth whom he deemed to be his dependents, and that exhibit No. 15 was insufficient under section 30-109, R. R. S. 1943, to prove that the alleged father legitimated the two children, the subject of this action, for the reason that exhibit No. 15 was not an express, unequivocal, and unquestionable acknowledgment of the paternity of the illegitimate children that would make proper compliance with the statute.

In the majority opinion this court said: "A principle declared applicable in reference to an acknowledgment of the father of a child born out of wedlock is that it must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged." Lind v. Burke, *supra;* Moore v. Flack, *supra.* The court went on to say: "In Lind v. Burke, *supra,* it was said: '* * * the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity.' This statement was approved in Moore v. Flack, *supra.*" The court concluded: "* * * that to the extent that Lind v. Burke, *supra,* and Moore v. Flack, *supra,* hold that a writing in order to satisfy the requirements of section 30-109, R. R. S. 1943, must be in and of itself sufficient, unaided by extrinsic evidence, to establish paternity, they are overruled."

It is apparent that primarily to arrive at this conclusion the majority opinion relies on the case of In re Estate of Winslow, 115 Neb. 553, 213 N. W. 819.

Let it be said here that we are dealing with the law as previously determined by this court in interpreting section 30-109, R. R. S. 1943. It cannot be doubted that the principles announced in the cases of Lind v. Burke, *supra,* and Moore v. Flack, *supra,* have been the law in this jurisdiction since December 8, 1898, until now.

I deem it advisable to analyze In re Estate of Winslow, *supra.* This was an action to determine whether the estate of John Woolman Winslow, deceased, who died

intestate, never having been married, should descend to his collateral kindred or to Ida Belle Warriner, who claimed to be an illegitimate daughter of Winslow, and that she had been legitimated by his action so as to be entitled to inherit. Section 1228, Comp. St. 1922, was involved. Insofar as necessary here, it provided as follows: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as an heir of his mother, and shall inherit his or her estate in whole or in part as the case may be, in the same manner as if he had been born in lawful wedlock." The evidence established that Winslow became nearly blind and could not see to write. He procured a Mrs. Peebles to write three letters for him to Mrs. Warriner, dictated by him and written in his presence. They were addressed to Ida Belle Warriner, and therein the salutation was "Dear daughter," or "Dear daughter and children," and the letters ended, "Your loving father, J. W. Winslow." These letters, written by himself, and also the ones written by Mrs. Peebles at his dictation, contain an unequivocal acknowledgment that he was the father of Mrs. Warriner. There was the written acknowledgment. The only question was whether these letters were signed in the presence of a competent witness. This evidence was not as clear as could be desired. The record shows that one William Winslow, a cousin of the deceased and one of his collateral kindred, who would be entitled to inherit unless Mrs. Warriner was properly adjudged to be his sole heir, for a number of years lived in the home of the decedent. He testified, apparently with some reluctance, that several of the letters in question were in the handwriting of John W. Winslow; that Winslow wrote them; that the witness read a number of the letters after they were written; and that they were handed to him by Winslow for him

to read. The court said: "Taking his evidence as a whole, we think a fair inference is that the letters were written and signed by Winslow in his presence. If such be the fact, then there is a compliance with the statute which would legitimate Mrs. Warriner and entitle her to inherit." Mrs. Peebles testified that she was present, and took the dictation of Mr. Winslow, and after she did so, read the letters to him, including the address, the salutation, and the signature above which were the words: "Your loving father." A sister of Mrs. Peebles was also present when one of these letters was written. She heard it read, including the salutation and the signature, and knew that it was read to Mr. Winslow. The letter, as a whole, was written at his instance and request. After it had been written and read to him it was sealed in an envelope and Winslow, himself, took the letter and deposited it in a United States mail box. The court said: "The statute requires the acknowledgment to be signed in the presence of a competent witness, but that does not necessarily mean that the actual writing of the signature shall be made by the father. If one is disabled by reason of crippled hands or defective eye-sight so that he cannot write, no one would contend that it would be impossible for him to comply with the statutory provision. He may direct another to write his name, and when he does so the signature is as much his own as though he had held the pen which wrote his name. 'Where a person's name is signed for him, at his direction and in his presence, by another, the signature becomes his own.' 36 Cyc. 451. (The only authority cited in this case.) Winslow requested Mrs. Peebles to write the letter for him. He intended, as evidenced by his act in depositing the letter in the mail box, that it should be sent to Mrs. Warriner. Inferentially and in effect, Winslow requested Mrs. Peebles to write his name. Moreover, he ratified and adopted her writing as his signature, and did so intentionally. The signature was appended in his presence and, as to one of

the letters, in the presence of both Mrs. Peebles and her sister." He thereby legitimated Mrs. Warriner as his daughter and she was entitled to inherit his estate.

The opinion does not set out the circumstances of the letters written nor the circumstances of those written by Mrs. Peebles. They are, however, set out in the original brief of the appellant on appeal to this court and in the motion for rehearing. I will not state the circumstances of these letters except to say that acknowledgment, if there be such, must be found in the salutation and conclusion. Nowhere in the body of the letters is there even an allusion to the subject of paternity, to say nothing of a direct, unequivocal, and unquestionable acknowledgment thereof. One letter written by the deceased began "Dear daughter" and concluded "Your loving father"; another in his handwriting began "Dear daughter" and concluded "from your uncle"; a third began "Dear daughter" and concluded "your loving granddad"; and the fourth with the salutation "Dear Daughter" and signed simply "J. W. W." I believe it is apparent that had the opinion contained the proper factual situation this court would not have held that it was sufficient compliance with the statute.

In the motion for rehearing in In re Estate of Winslow, *supra,* counsel made a most urgent request of this court to base its opinion on an interpretation of the statute or, in the alternative, to show wherein Lind v. Burke, *supra,* and Moore v. Flack, *supra,* were inapplicable, or at least to distinguish such cases from the case at bar, or overrule the same. This request was ignored. Obviously In re Estate of Winslow, *supra,* constitutes no authority for an interpretation of what is now section 30-109, R. R. S. 1943, and has no applicability to any case involving such section of the statutes.

In Lind v. Burke, *supra,* released December 8, 1898, what is now section 30-109, R. R. S. 1943, was involved. Incidentally, this section of the statute was enacted by the Legislature in 1860, Laws 1860, page 64, the only

change being made therein now appears with reference to children born out of wedlock. This was an action to recover an alleged interest in the estate of August Lind, deceased. The appellee pleaded that he was the illegitimate child of August Lind, born in Sweden prior to the time the latter during his life came to America; and that appellee had been rendered capable of heirship by an acknowledgment in writing, in the presence of a competent witness, by August Lind of his relationship of father of the appellee. From a decree favorable to appellee's contention an appeal was taken. The appellee contended that any writing that is an acknowledgment of the fact of paternity in the presence of any competent person is sufficient to meet the requirements of the law. The court said: "We are satisfied that a writing, to fulfill the requirement of the law * * * must be * * * one in which the paternity is directly, unequivocally, and unquestionably acknowledged." It appeared from the evidence that the appellee was born in Sweden, where August Lind lived. The latter came to the United States and became a resident of Hamilton County, and subsequently the owner of land and considerable personal property. August Lind thought the appellee should come to the United States, and purchased necessary tickets from Mr. McEndree of Lone Tree, now Central City, and forwarded the same to his relatives in Sweden. In compliance with the written directions which accompanied the tickets, his relatives in Sweden started the boy on his journey to the United States. He arrived safely, was met by August Lind, and lived with him for a time apparently as one of the family. McEndree's deposition was taken, and it is in substance as follows: That when August Lind bought the steamship ticket for the transportation of the appellee, he required McEndree to write a letter or statement to be carried by the boy during his trip and shown to people along the route. This letter was written in English and stated from and to where the boy was traveling, and requested that the boy be

assisted in selecting his vessel and railroad trains. This letter was written by McEndree, and attached to it was the signature of August Lind, put there at August Lind's request. As he remembered the letter it was as follows: "To Whom May Make Inquiries of the Bearer, Charles Lind, My Dear Son, who Holds a Steamship Ticket from Sweden to Lone Tree, Nebraska: This Boy is traveling alone under the management of the Cunard Steamship Co., and whose folks reside in Lone Tree, Nebraska. Who will kindly assist the boy in seeing that he gets the right vessel named on his ticket and railroad train through to Lone Tree, Neb., will confer a great favor on his father, the undersigned, August Lind." At the same time a letter was written in Swedish by August Lind to his relatives, which is not relevant.

The court said, in analyzing the above evidence: "It will be noticed that in the latter letter there is nothing which contains a reference to the boy in the character of a child, or even a relative of the writer. * * * The first one quoted contains a reference to the boy as a 'son' of the writer. This expression may be used to mean a male child, issue or offspring, but also may be applied to a distant male descendant, or any young male person may be so designated, as a pupil, a ward, an adopted male child or dependent. (Webster's International Dictionary; Century Dictionary.) In it also appears the words 'his father.' The term 'father' may mean the male parent; a male who has begotten a child. It may also mean the adopted father, or a male ancestor more remote than a parent. (Webster's International Dictionary; Century Dictionary.) It must not be forgotten in this examination that it is not because the person can be shown to be the offspring, or is in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity. With the many concurrent significations which belong to the words used

and modified as they were, even if they are now as they stood in the original writings, * * * the writings cannot be adjudged sufficient to fulfill the statutory requirement."

In Thomas v. Estate of Thomas, 64 Neb. 581, 90 N. W. 630, the dispute related to the construction of section 31, chapter 23, Comp. St. 1901, now section 30-109, R. R. S. 1943. The facts are not too important, except to say that under the same the writing was sufficient to comply with the statutes. It was decided that it was immaterial whether or not the writing was made with intent to constitute heirship by the rule of strict construction of writings of this nature when made as announced in Lind v. Burke, *supra*. The rule of strict construction was not changed or modified.

Lind v. Burke, *supra,* was followed in Moore v. Flack, *supra,* filed June 20, 1906. The facts, in substance, were as follows: Robert Moore, a former resident of Kentucky, died in Kearney County, Nebraska, August 18, 1889, seized of a quarter section of land situated in that county. J. W. Gilman was the administrator of his estate which was closed in January 1891. During the progress of the administration the right of heirship to the estate was contested between John F. Moore, who claimed to be a half brother of the deceased, and Daisy D. Moore, who claimed to be the daughter and sole heir of the deceased, the latter represented by a guardian ad litem who was her attorney in the action. The county court found in favor of the half brother and against the minor Daisy D. Moore. Thereafter the lands in controversy passed by mesne conveyance from John F. Moore to the defendant Henry J. Flack who purchased them on July 12, 1892, and cultivated and occupied the lands as his own. In January 1903, Daisy D. Moore filed a petition in the district court alleging ownership of the lands in dispute as a daughter and sole heir of Robert Moore, deceased, and asked that the former decree of the county court that declared John F. Moore the sole heir at law of

Robert Moore, deceased, be set aside because it was procured by fraud and perjury, and also that the conveyances from John F. Moore to Flack be canceled and held for naught and the title to the lands in controversy be quieted in her. Thomas Moore, an alleged child of Robert Moore, deceased, intervened in the suit, and filed a petition in which he alleged he was the illegitimate child of the deceased; that he had been recognized in writing as such by the deceased in the presence of a competent witness; and that because of such recognition he was entitled to the inheritance as the sole heir of Robert Moore, deceased. He further alleged that he was an infant in Kentucky at the time of the proceeding in the probate court of Kearney County, and had no notice of any kind of proceeding in the county court. He further alleged that John F. Moore, to whom the inheritance had been awarded in the county court, was a bastard and not a legitimate half brother of Robert Moore, deceased. Flack, the defendant, answered these petitions, alleging his ownership of the lands by mesne conveyances from John F. Moore, and pleaded the proceeding in the county court as a bar to the claims of both plaintiff and intervener. There was judgment for the defendant, petitions of the plaintiff and intervener were dismissed, and separate appeals brought to this court by the plaintiff and the intervener. The intervener's evidence was to the effect that the deceased had been adjudged the father of the intervener in a bastardy proceeding instituted against him in the county court of Rowan County, Kentucky. It was the recollection of the presiding judge that the deceased had admitted in court that he was the father of the child. There was no evidence that such admission was made, if at all, in writing. A deposition was introduced by the intervener of a witness who testified that he resided for many years in Rowan County, Kentucky, and had known Robert Moore since 1870; that he last saw him at Farmers, Rowan County, Kentucky, shortly before he went to Nebraska, and had a

conversation with Robert Moore about Omie Oney's bastard child in Farmers, Rowan County, Kentucky, and Robert Moore said he wanted to get the child away from her, as it was his child; that he had had the child adopted by her consent, and wanted the witness to assist him in getting the child away; and that he wrote Omie Oney a note which this witness gave to her. The note said: "I am going to leave. I have to leave you. I bid old Kentucky good bye for a while. I don't just know when I will be back. Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day." This witness read the note to Omie Oney. The witness further stated that he saw Robert Moore with Thomas Moore (intervener) after Omie Oney moved onto witness' place. Robert Moore would come over and stay 2 days at a time with the child, staying at the witness' house at night. On cross-examination the witness said this letter was written and signed in his presence. Omie Oney testified that she could neither read nor write, but that she remembered the contents of the note, just as stated by the witness. She put the note away in a paper box with other papers and it was lost. She was unable to find it. The court said: "It is clear that the evidence with reference to the bastardy proceeding is wholly insufficient to show an acknowledgment within the provisions of section 31, *supra*. So the only question is as to the sufficiency of the testimony of Gearhart (the witness who gave the deposition) and Omie Oney to establish an acknowledgment, in writing, by the deceased of the paternity of the intervener." The question was, was the writing a sufficient recognition to create an heirship within the meaning of the statute? The material portion of this note as testified to was: "Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day." The court said: "In Lind v. Burke, 56 Neb. 785, the sufficiency of an acknowledgment of paternity under this section of the statute was examined into, and, while the question

as to whether the instrument must have been acknowledged with the intent to create a right of heirship was not determined, yet it was there said: 'We are satisfied that a writing, to fulfil the requirement of the law * * * must be at least one in which the paternity is directly, unequivocally, and unquestionably acknowledged.' It is further said in the opinion: 'It must not be forgotten in this examination that it is not because the person can be shown to be the offspring, or is in fact the illegitimate child, that it may assert heirship, but because it has been in writing acknowledged; and hence *the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity.*'" (Emphasis supplied.) The writing was then held to be insufficient under the statute. The court said: "The reference to intervener as 'our boy' in the note is not a clear and unequivocal acknowledgment of the paternity of the boy. Nor is the request that the child be named Thomas Moore equivalent to an acknowledgment that Robert Moore was the natural father of the child. Nor is the promise that 'I will give him a good start some day' inconsistent with any other theory than that the writer of the note was the father of the child. In the later case of Thomas v. Estate of Thomas, 64 Neb. 581, it was decided that it was immaterial whether or not the writing was made with the intent to constitute an heirship, *but the rule of strict construction of writings of this nature, when made, as announced in Lind v. Burke, supra, was not modified.*" (Emphasis supplied.)

In Van Hove v. Van Hove, 94 Neb. 575, 143 N. W. 815, the plaintiff was the illegitimate son of Maria Leonia Audenaert, a citizen of Belgium, who intermarried with August Van Hove in Belgium in 1887. The plaintiff was 7 years of age at that time. The contention was that the plaintiff was an heir of August Van Hove under section 4931, Ann. St. 1911, now section 30-109, R. R. S. 1943. The record of the marriage in Belgium recited that: "The above named husband and wife agreed tak-

ing as their lawful children and to recognize them as such: Engene Audenaert, born at Sinay, the 9th of March, 1880." The record appears to have been signed by August Van Hove, and it is contended that this satisfied the statute. The court said: "Under the laws of Belgium, which are shown in the record, it does not appear easier to establish heirship in such cases than under our statutes." The record was held to be clearly insufficient to meet the requirements of the statute, citing Lind v. Burke, *supra,* and Moore v. Flack, *supra.* In other words, the rule announced in such cases was adhered to.

The interpretation placed by this court on what is now section 30-109, R. R. S. 1943, has stood for a period of nearly 60 years without modification. No case has overruled such interpretation or endeavored to distinguish Lind v. Burke, insofar as the rule announced with reference to said statute is concerned. The Legislature has not seen fit to interfere with the statute as originally enacted, except in the minor detail above mentioned. The majority opinion now overrules Lind v. Burke, *supra,* and Moore v. Flack, *supra,* as stated therein, and now places an entirely different and very liberal interpretation and, in fact, adds to the statute certain elements not contemplated by the Legislature.

I make the further observation that in determining heirship or the right to inherit, strict interpretation of the statutes governing the same should be adhered to. The interpretation now placed on section 30-109, R. R. S. 1943, leads to no other result than to invite and permit questionable litigation. I conclude the majority opinion is wrong in its interpretation of section 30-109, R. R. S. 1943.

GEORGE E. LEDIOYT ET AL., APPELLEES, V. COUNTY OF KEITH ET AL., APPELLANTS.
No. 33724.

ROBERT K. SCOTT ET AL., APPELLEES, V. COUNTY OF KEITH ET AL., APPELLANTS.
No. 33725.

WALDO A. NICHOLS ET AL., APPELLEES, V. COUNTY OF KEITH ET AL., APPELLANTS.
No. 33726.

CARL P. NICHOLS ET AL., APPELLEES, V. COUNTY OF KEITH ET AL., APPELLANTS.
No. 33727.

DAVID A. WELSH ET AL., APPELLEES, V. COUNTY OF KEITH ET AL., APPELLANTS.
No. 33728.
74 N. W. 2d 455

Filed January 20, 1956.

1. **Appeal and Error.** An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court, it is tried de novo.
2. **Taxation.** Individual discrepancies and inequalities in the valuation of real property for tax purposes must be corrected and equalized by the county board of equalization. The duties of the State Board of Equalization and Assessment are unrelated thereto and have no direct relationship to the duties of the county board of equalization. However, the final orders of each must be given effect.
3. ———. A real estate classification and reappraisal committee appointed under the provisions of section 77-1301, R. R. S. 1943, does not put a binding value upon any property. It merely makes recommendations to the county assessor and furnishes evidence for the use of the county board of equalization. Its duties in no manner disturb the requirements as to uniformity of taxation.
4. ———. Approximation both as to value and uniformity is all that can be accomplished, because absolute mathematical equality in the valuation of properties for tax purposes is unattainable. Therefore, substantial compliance with the requirements of equalization and uniformity in taxation laid down by the federal and state constitutions is all that is required, and such provisions are satisfied when designed and manifest departures from the rule are avoided.

5. ———. The sale price of property may be taken into consideration in determining the actual value thereof for tax purposes, together with all other elements pertaining to such issue. However, sale price standing alone is not conclusive of the actual value of property for tax purposes and other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. The true test in all cases is to arrive at actual value, meaning value in the market in the ordinary course of trade.
6. ———. The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment.
7. ———. The burden imposed on the complaining taxpayer is not met merely by showing a difference of opinion between his witnesses and the county assessor or county board of equalization with regard to value unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment.
8. ———. Generally, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained.
9. ———. Mere errors of judgment by tax officials will not support a claim of discrimination. There must be something which in effect amounts to an intentional violation of the essential principles of practical uniformity. The good faith of such officers and the validity of their actions are ordinarily presumed, and when assailed, the burden of proof is upon the complaining party.
10. **Courts: Taxation.** Courts should not usurp the functions of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization.

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

Beatty, Clarke, Murphy & Morgan, for appellants.

McGinley, Lane, Powers & McGinley, for appellees.

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

CHAPPELL, J.

In 1953 the Keith County board of equalization, hereinafter called the county board, placed a valuation for tax purposes upon five separate described properties in Ogallala respectively owned in fee simple by George E. LeDioyt, Robert K. Scott, Waldo A. Nichols, Carl P. Nichols, David A. Welsh, and their respective spouses. All of the latter parties will be hereinafter called plaintiffs, or separately designated by name of the husbands. Each and all of plaintiffs' properties were recently constructed, modernly improved, commodious residence properties, favorably located, and respectively occupied by plaintiffs. Four of such homes were of brick veneer construction, and one was of brick veneer and stone construction. Thereafter each plaintiff filed a complaint, identical in form and character, with the county board. Each complaint alleged in substance that: (1) The separate valuations for tax purposes placed upon their described properties by the county assessor and the county board were arbitrarily made without foundation in fact to establish actual values, and that such properties were each overvalued for tax purposes in excess of their actual values; and (2) there existed a gross inequality between the values placed upon their respective properties and the values placed on other classes of real property assessed in the county, which resulted in a discrimination and an inequitable, unfair tax burden being cast upon plaintiffs, contrary to Article VIII, section 1, Constitution of Nebraska, and the Fourteenth Amendment to the Constitution of the United States.

After a hearing, the county board rendered an order denying each and all of plaintiffs' complaints. There-

from, each and all plaintiffs separately appealed to the district court. There they each filed petitions on appeal which were identical in form and character. The county of Keith, the county board of equalization and its members, including the county assessor, were named as defendants. Collectively they will be called defendants.

Plaintiffs' petitions each alleged in substance that their respective properties had been arbitrarily overvalued in excess of their actual value by defendants for tax purposes. Each then alleged that a gross inequity existed between the values placed by defendants upon their respective brick veneer or brick veneer and stone constructed properties and the values placed by defendants upon comparable wood or frame constructed properties within the county, which resulted in an inequitable and unfair tax burden being cast upon each and all plaintiffs, contrary to the constitutional provisions aforesaid. Plaintiffs prayed that a just value should be placed on their properties for tax purposes in accord with their actual value, and for equitable relief.

In each of such cases, defendants filed an answer, identical in form and character, denying generally, and alleging in substance that in the valuation of each of plaintiffs' properties for tax purposes, they acted in good faith with proper motives and in conformity with laws then applicable, and did value same for such purposes proportionately and uniformly with values placed upon all other tangible property and franchises in the county; that plaintiffs' properties were not assessed for tax purposes at a higher proportion of their actual value than the values for tax purposes placed upon all other tangible property and franchises; and that for 1953 plaintiffs' properties were not assessed at their actual values but were each assessed at much less, although they were assessed by valuation proportionately and uniformly with all other tangible property and franchises whereby plaintiffs were in no manner prejudiced or harmed by

the action of defendants. They prayed for a denial of any relief to plaintiffs, and for dismissal.

By stipulation, all five cases were consolidated for trial in the district court where they were so tried on the merits. However, separate judgments identical in form and character were rendered in each case. Each judgment found and adjudged that during 1953 properties of frame construction comparable with the brick veneer or brick veneer and stone properties belonging to plaintiffs were valued for tax purposes at 50 or 60 percent of their actual value, while plaintiffs' properties were each valued for tax purposes at approximately all of their actual value; that for 1953 and preceding years, the actual value of comparable frame or brick veneer and stone properties in the county was approximately the same; that the system of appraisal used by the county for tax purposes had resulted in a discrimination against plaintiffs and their properties; thus, a proper equalization of tax assessments against plaintiffs' properties required a 30 percent reduction of the valuation thereof as fixed by defendants. In accord therewith, such valuations were ordered reduced 30 percent, and defendants were ordered and directed to comply therewith.

Defendants' motions for new trial filed in each case were overruled, and they separately appealed each case to this court, where they were separately docketed. However, by stipulation of the parties, only one bill of exceptions and one set of briefs were filed, and the five appealed cases were consolidated for argument to and disposition by this court. Therefore, this single opinion will decide each and all five appeals.

Defendants in their brief assigned in substance: (1) That the trial court erred in its judgment rendered in each case by interfering with the values placed upon each of plaintiffs' properties for tax purposes during 1953 and by reducing such values 30 percent or any other amount, and in substituting its judgment for that of defendants in tax matters; (2) that each and all of said

judgments were not sustained by the evidence but were contrary thereto and contrary to law, and will result in unlawful tax discrimination in favor of plaintiffs and against all other owners of tangible property and franchises in Ogallala and Keith County, thereby allowing plaintiffs to escape their fair share and burden of taxation and causing all other owners to bear a greater burden than their fair share; (3) that the trial court erred in finding and adjudging that the system of appraisal for tax purposes used by defendants resulted in any discrimination against plaintiffs and their properties; and (4) that the trial court erred in failing and refusing to uphold the tax assessment values for 1953 placed on plaintiffs' properties by defendants. We sustain the assignments.

At the outset it should be noted that the final order of the State Board of Equalization and Assessment, hereinafter called the state board, directing that the values placed by the county board on all city and town properties in Keith County during 1953 should be raised 139 percent is not a controlling element. The issues involved herein are the valuations placed on plaintiffs' properties by the county board for tax purposes in 1953. In Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650, we held that: "Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization. The duties of the state board of equalization are unrelated thereto and have no direct relationship to the duties of a county board of equalization." We also affirmed that: "The final orders of each must be given effect."

In that respect, section 77-1510, R. R. S. 1943, provides that appeals may be taken from any action of the county board of equalization to the district court, and section 77-510, R. R. S. 1943, provides for an appeal to this court from any final decision of the state board. The 1953 order of the state board, not having been appealed from, was final. In that regard, during 1951 and 1952 plain-

tiffs raised no objection whatever to values placed upon their properties for tax purposes by defendants. They made no objection thereto until after the final order of the state board had been made in 1953. The county board was required to give effect to such final order and it did so by increasing the value of all city and town properties in the county 139 percent for 1953.

Preliminary to a discussion of the evidence, we call attention to well-established laws and rules which are applicable and controlling.

In Weller v. Valley County, 141 Neb. 69, 2 N. W. 2d 606, we concluded that an appeal to the district court from action of a county board of equalization is heard as in equity, and upon appeal therefrom to this court, it is tried de novo.

Article VIII, section 1, Constitution of Nebraska, provides in part: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, * * *. Taxes uniform as to class may be levied by valuation upon all other property."

In Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489, quoting with approval from State ex rel. Morton v. Back, 72 Neb. 402, 100 N. W. 952, 69 L. R. A. 447, this court said: " 'In all schemes of taxation there are generally recognized elements of inequality and the probability of erroneous valuations in the assessment of property by whatever mode the assessment may be made. The evil is usually remedied by the exercise of the authority of a board created for that purpose, whereby the assessment of different properties is brought to a common standard of value.'

"We then went on to say therein: 'The inequalities in values thus returned, if any there be, is a proper subject for consideration by a body or tribunal authorized to discharge the functions of a board of equaliza-

tion.' * * * ' "Whatever directions the law may give to the assessor in valuing the property in the first instance, and whatever result these directions may produce in the assessment of franchises or other property of the taxpayer, the work of the board of equalization is to equalize the valuations made, so that every one, as nearly as that may be attained, shall stand upon an equal footing, and pay an equal proportion of the tax laid, according to the real value of his property. * * * In this way, equality is attained and every interest protected." * * *' "

In State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716, this court said: "The paramount object of the constitution, and the laws relative to taxation, as we conceive the rule to be, is to raise all needful revenues by valuation of the taxable property so that each owner of property taxed will contribute his or its just proportion of the public revenues. The object of the law of uniformity is accomplished if all property within the taxing jurisdiction is assessed at a uniform standard of value, as compared with its actual market value, even though there be great disparity between value as assessed for taxes and the value as fixed in the open markets by barter, exchange, or by buying and selling, and other commercial transactions in which values and prices enter as important factors."

As stated in 51 Am. Jur., Taxation, § 152, p. 202, citing many authorities: "It is frequently recognized by the courts that absolute or perfect equality and uniformity in taxation are impossible. Such a conception has been variously characterized as 'utopian,' 'an unattainable good,' 'a baseless dream,' and 'a dream unrealized.' It has consequently been declared that the tax or revenue system which most nearly approaches perfect equality is the best, and that the most that can be expected is an approximation to this desirable end. Accordingly, substantial compliance with the requirements of equality and uniformity in taxation laid down

by the Federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departures from the rule are avoided."

In that regard, we said in Chicago, R. I. & P. Ry. Co. v. State, 112 Neb. 727, 200 N. W. 996: "The burden of proof is upon the company to establish its contention that the value of its property has been fixed by the board at an amount greater than its actual value, or that its assessed value has not been fairly and properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in an unjust and unfair assessment. * * * Approximation both as to value and uniformity is all that can be reached."

In Daniels v. Board of Review, 243 Iowa 405, 52 N. W. 2d 1, it is said: "A final word should be said as to the taxpayers' burden in these cases. On the claim of assessment in excess of actual valuation something more than a difference of opinion must be shown. Justice Bliss in the recent case of Clark v. Lucas County Board of Review, supra, at page 97 of 242 Iowa, had this to say of the taxpayer's burden on appeal from an assessment:

" 'The burden on the complaining taxpayer is not met merely by showing a difference of opinion between his witnesses and the assessor, unless it is manifest that the assessment is grossly excessive and is a result of the exercise of the will and not of the judgment.' (Citing cases.)

"On the claim of inequality of assessment the taxpayer's burden is not met by testimony that his property is assessed at a higher proportion to its actual value than *some* other property. The claim of inequality requires proof of assessments of similar property. And again this testimony must rise higher than a mere difference of opinion between the witnesses as to values. In short it must be such as to show the assessor and board did not do their duty. Judge Powers summed it all up

in Butler v. City of Des Moines, 219 Iowa 956, at page 961, 258 N. W. 755, at page 758, as follows:

" 'The problem of determining relative values in a situation of this kind is one of the most difficult with which the courts have to contend. There is no such thing as absolute equality in the assessment of property for taxing purposes. What might seem to one qualified person to be the proper difference in valuation between two pieces of property might to another person, equally qualified, seem to be inequitable and unjust. It is the judgment of the assessor which the statute requires in making these assessments. So long as his action is not arbitrary or capricious or so wholly out of line with the actual values as to give rise to the inference that for some reason he has not properly discharged his duty, the assessments made by him and confirmed by the local board of review should not be disturbed by the court.' "

Also, in Alfred J. Sweet, Inc. v. City of Auburn, 134 Me. 28, 180 A. 803, 104 A. L. R. 784, it is said: "Mathematical precision is impossible in dealing with taxable values. Uniformity can only be approximated. The court is not a board of review to correct errors. It is solely where there is evident a systematic purpose on the part of a taxing board to cast a disproportionate share of the public burden on one taxpayer, or one class of taxpayers, that the court will intervene. In Shawmut Manufacturing Co. v. Town of Benton, 123 Me., 121, 130, 122 A., 49, 53, this principle has been definitely enunciated in the following language, quoting with approval the words of Chief Justice Taft in Sioux City Bridge v. Dakota County, supra: 'The proving of a mere error of human judgment, as has been indicated, will not support a claim of overrating; "there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity." ' "

In Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979, quoting with approval from Sunday Lake Iron Co. v. Township

of Wakefield, 247 U. S. 350, 38 S. Ct. 495, 62 L. Ed. 1154, and citing numerous other authorities, it is said: " 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 37.' " Also, in reversing the judgment of this court therein for failure to permit the bridge company to obtain a remedy of percentage reduction if there actually was a discrimination, the court said: "It is therefore just that upon reversal we should remand the case for a further hearing upon the issue of discrimination, inviting attention to the well-established rule in the decisions of this Court, cited above, that mere errors of judgment do not support a claim of discrimination, but that there must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity."

Further, in Sunday Lake Iron Co. v. Township of Wakefield, *supra,* the court, citing many authorities, said: "The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

Section 77-201, R. S. Supp., 1953, requires that all property in the state which is not expressly exempt shall be subject to taxation and shall be valued at its actual value but assessed at 50 percent of such actual value. In that regard, section 77-112, R. R. S. 1943, provides: " 'Actual value' shall mean value in the market in the ordinary course of trade."

Insofar as important here, section 77-1301, R. R. S. 1943, provided in part: "In all counties having a popula-

tion of not more than two hundred thousand population the county board of each county may, at its discretion, employ not more than three residents of the county to be known as a real estate classification and reappraisal committee. The committee may employ such assistants for classifying and reappraising as it deems necessary with the approval of the county board. Such committee shall examine and classify all land and town lots of the county. * * * Such lands shall be classified into as many classes or divisions as such committee believes is necessary. The committee shall then as directed by the county board reappraise all land and town lots of the county including the improvements thereon. The county assessor or county clerk where he is ex officio county assessor shall take into consideration the recommendation of the classification and reappraisement committee and shall value and assess the land, town lots and improvements thereon in accordance with the general rules and regulations to be provided by the Tax Commissioner. * * * The duties of the real estate classification and reappraisal committee shall terminate when its detailed classification and reappraisal report is accepted by the county board of equalization. After the first general classification of lands and town lots by such committee, the authority shall be vested in the county board of equalization to make reclassifications or additional classifications from year to year. When the real estate classification and reappraisal committee has completed the classification and reappraisal, it shall file the tabulation compiled by it with the county clerk for the use of the county board of equalization. The classification and reappraisal committee and its assistants shall have the same authority to examine the property to be classified and reappraised as that of the county assessor."

Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174, involved the constitutionality of section 77-1301, R. R. S. 1943, and other related sections not directly involved here. With regard thereto, this court

said: "There is no merit to this argument. The tax appraisal committee or board does not put a binding value on any property. The committee or board merely makes recommendations to the assessor and furnishes evidence for the use of the board of equalization. The valuation of property and the assessment of taxes is now, as it was prior to the passage of the act before us, the function of the assessor and the board of equalization. No changes have been made as to their duties and the requirements of uniformity. The duties of the tax appraisal committee or board in no manner disturb the requirements as to the uniformity of taxation. It remains as before. Consequently, Article VIII, section 1, is not violated."

Section 77-1311, R. S. Supp., 1953, provides in part that: "The county assessor, in addition to the other duties provided by law, shall * * * annually revise the real estate assessment for the correction of errors * * *. He shall have general supervision over and direction of the assessment of all property in his county. The county assessor shall obey all rules and regulations made under this chapter and the instructions sent out by the State Board of Equalization and Assessment."

Section 77-1501, R. R. S. 1943, now section 77-1501, R. S. Supp., 1953, created the county board of equalization, and section 77-1502, R. S. Supp., 1953, provides: "The county board of equalization shall hold a session of not less than three and not more than forty days, for the purpose contemplated in sections 77-1502 to 77-1507, commencing on the third Monday of May each year. It shall be authorized and empowered to meet at any time upon the call of the chairman or any three members of the board for the purpose of equalizing assessments of any omitted or undervalued property. The board shall maintain a written record of all proceedings and actions taken, which shall be available for inspection in the office of the county assessor." See, also, Ewert

Implement Co. v. Board of Equalization, 160 Neb. 445, 70 N. W. 2d 397.

In Novak v. Board of Equalization, 145 Neb. 664, 17 N. W. 2d 882, this court said: "Plaintiffs rely on the purchase price as constituting the actual value and cite authority from foreign jurisdictions and texts, to the effect that purchase price constitutes the fair market value of property. It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes, and many other matters relevant to the actual value of property appear in the record and must be considered in connection with the purchase price to determine the actual value."

Also, in Sioux City Bridge Co. v. Dakota County, 110 Neb. 597, 194 N. W. 729, this court said: "The consideration named in certain deeds was taken as indicative of the value of the real estate. The assessed value of the same property was then taken, and from a large number of such comparisons a percentage was worked out which indicated to the mind of the witness that the real estate in the county was assessed at 55.70 per cent. of its value. The witness admitted that in making his calculations he did not take into consideration all of the deeds, but only those which in his judgment presented a reasonable proportion between the consideration named and the assessed value. While this method, no doubt, is entitled to probative force, it is manifest that it is not conclusive and is subject to many imperfections. It is a matter of common knowledge that many sales are based on trades in which the consideration is inflated. The true test in all cases is to arrive at the fair value of the property."

As applicable here, Gamboni v. County of Otoe, *supra*,

held: "The valuation of property made by the proper assessing officer is presumed to be correct.

"The presumption is that, when an officer or assessing body values property for assessment purposes, he acts fairly and impartially in fixing such valuation.

"The presumption obtains that a board of equalization has faithfully performed its official duties, and that in making an assessment it acted upon sufficient competent evidence to justify its action."

Also, in Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307, this court reaffirmed that: "The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the party complaining."

In Novak v. Board of Equalization, *supra*, quoting with approval from First National Bank of Blue Hill v. Webster County, 77 Neb. 815, 113 N. W. 190, this court said: " 'The assessment of property for the purpose of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless it appears from clear and convincing proof that it is erroneous.' "

In Woods v. Lincoln Gas & Electric Light Co., 74 Neb. 526, 104 N. W. 931, this court said: "At the outset of the discussion we deem it advisable to say that this court will not usurp the functions of the tribunals created by law for ascertaining the fair cash value of property for taxation, and will not constitute itself a taxing board or board of equalization." Such case also affirmed generally that the values of property made by the proper assessing officials are presumed to be correct and the burden of proof is on those attacking the same to show that it should be assessed at a different rate.

As a general rule the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained.

In State ex rel. Bee Building Co. v. Savage, *supra*, quoting with approval from Maish v. Arizona, 164 U. S. 599, 17 S. Ct. 193, 41 L. Ed. 567, this court said: " '* * * it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown, something indicating fraud or misconduct. * * * It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment can not be overthrown. Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 435.' "

A comparable situation appeared in Minneapolis Dredging Co. v. Reikat, 141 Neb. 470, 3 N. W. 2d 889, wherein we said: "Testimony of this nature did not necessarily disprove the valuation fixed by the county board of equalization nor conclude the district court on that issue."

In Reynolds v. Crudgington (Tex. Civ. App.), 266 S. W. 2d 430, citing numerous authorities and quoting with approval from Hinkson v. Lorenzo Independent School Dist. (Tex. Civ. App.), 109 S. W. 2d 1008, it is said: " 'The general rule is that an attack of the character here made by appellant upon assessment valuations made by a board

of equalization cannot be justified in the absence of allegations and proof of fraud, or something equivalent thereto, such as lack of jurisdiction, an obvious violation of the law, or the adoption of a principle or method of establishing valuations or making assessments that is fundamentally wrong and which results in a substantial injury to the complainant. Mere differences of opinion, honestly entertained, though erroneous, will not warrant the interference of the courts.' "

In the light of the foregoing applicable and controlling rules we have examined the voluminous record which contains many exhibits, including photographs of all plaintiffs' properties and others involved. We can only summarize pertinent parts thereof. In doing so, we find no competent evidence which could sustain the conclusion of the trial court that properties of frame construction, comparable with plaintiffs' brick veneer or brick veneer and stone properties, were valued by defendants during 1953 at 50 or 60 percent of their actual value while plaintiffs' properties were valued at approximately all of their actual value. As a matter of fact, all of such properties were valued at an almost equivalent average small percent of their actual value. The values were so low that the state board's final order raised all values upon all city and town properties in the county by 139 percent above that fixed by defendants.

The record discloses that in 1950, pursuant to section 77-1301, R. R. S. 1943, defendants employed three residents of the county as a real estate classification and reappraisal committee to examine, classify, and appraise all rural lands and city and town lots in Keith County. The county assessor, who had been such since January 1948, was a member thereof. Another member was a property owner concededly "held very highly" in the county. The other member was a farmer and a property owner in the county of Keith and city of Ogallala. Such committee concededly inspected inside and outside all but a very few of the properties in Ogallala and

other cities and towns in the county. In doing so, they measured and examined the lots and the kind and type of improvements, including houses, garages, and other buildings thereon. They took into consideration the size, age, location, type of building, type of construction, i. e., whether brick, stone, frame, concrete, stucco, or combinations thereof, the type of foundation and joists, roof and electric system, the size and type of basement construction, the kind and quality of heating, plumbing, bathrooms, floors, interior and exterior finish, number of stories and rooms, and the number and type of fireplaces, if any. They separately valued each lot or lots and the improvements thereon. In arriving at the valuation of each property, their primary purpose clearly was to honestly and fairly equalize valuations so that each property would bear its proportionate share of taxation rather than to determine the actual value of each separate property.

In the light of the foregoing elements and others sometimes applicable to particular properties as shown by added remarks and other evidence, the committee made a separate dated written work sheet or report upon each piece of property, which contained a designation and diagnosis of each and all such considered elements aforesaid, together with a sketch or plat describing the lots and buildings thereon and correctly reflecting the dimensions and classifications thereof. Many such work sheets, including those relating to plaintiffs' properties, appear in the record. As shown thereon and otherwise, such committee appropriately classified all property and improvements as class A, B, C, or D, dependent upon all the aforesaid elements considered by them which appear in each separate work sheet. Generally, class A would mean brick or stone improvements valued within a radius of from $6 to $4 a square foot. Class B would generally be frame improvements valued within a radius of from $4 to $2.70 a square foot. Class C would generally be frame improvements valued within

a radius of $2.70 to $1.70 a square foot; and class D would generally be small improvements or those almost worthless, valued within a radius of $1 or less a square foot.

Some such classifications overlapped on particular properties or parts thereof, or in other cases, upon classification and reappraisal, credit would be given because of certain elements or the lack thereof. For example, after the Carl P. Nichols' property had been designated as class A at $5 a square foot, credit for an $800 deduction was given for the type of floor and pine window and door trims which were not quite as good as in some other class A properties.

The committee reports and compilations were returned, filed, and approved as required by law, and thereafter the county assessor, upon the basis thereof and other considerations, generally fixed the valuations of all properties for tax purposes in 1951 at 48.5 percent of the appraisal committee's valuations.

Therefore, as shown by the committee's reports and other evidence, the LeDioyt brick veneer property was classified by the committee as class A at $5 a square foot and was appraised at $9,020, but the assessor fixed its valuation at only $4,475 for tax purposes in 1951. In the same manner, the Scott property was classified as class A at $5 a square foot and was appraised at $13,294, but the county assessor fixed its valuation at only $6,550 for tax purposes in 1951. The Waldo A. Nichols property was classified as class A at $5 a square foot and appraised at $15,206, but the county assessor fixed its valuation at only $7,575 for tax purposes in 1951. The Carl P. Nichols' property was classified as class A at $5 a square foot and appraised at $15,161, but the county assessor fixed its valuation at only $7,455 for tax purposes in 1951. The Welsh property was classified as class A at $6 a square foot and appraised at $16,332, but the county assessor fixed its valuation at only $8,035 for tax purposes in 1951.

With few exceptions unimportant here, such 1951 valuations for tax purposes were carried through 1952 until 1953, when the state board, doubtless having in mind Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469, insisted upon a reappraisal of all real property for tax purposes in Keith and certain other counties in the state. The county assessor as a witness for plaintiffs testified that he then fixed the "actual value" of all such properties. Admittedly in so doing he valued the LeDioyt property at $25,630, but the county board reduced that valuation to $8,950, which the judgment of the trial court rendered herein reduced to $6,265. He valued the Scott property at $37,610, but the county board reduced it to $13,100, which such judgment reduced to $9,170. He valued the Waldo A. Nichols property at $43,860, but the county board reduced it to $15,150, which such judgment reduced to $10,605. He valued the Carl P. Nichols property at $42,740, but the county board reduced it to $14,910, which such judgment reduced to $10,437. He valued the Welsh property at $46,100, but the county board reduced it to $16,070, which such judgment reduced to $11,249.

It will be noted that in each instance the county board in 1953 simply doubled the 1951 valuations, so that in 1953 plaintiffs herein, as well as all other taxpayers, would pay taxes on only 50 percent thereof. They would thus pay taxes based on the same assessed valuation as they did in 1951 and 1952. In such a situation the state board, by its 1953 order, increased all city and town property valuations in Keith County 139 percent above those fixed by the county board, and for the first time these plaintiffs then complained about valuations and discrimination by the county board when it originally fixed their valuations for 1953.

Plaintiffs were all prominent businessmen. They all lived in their own homes in Ogallala. Their homes were the properties directly involved. Each home was re-

cently constructed of brick veneer or brick veneer and stone. They were all located on pavement in more favorable sections of the city. Each home was commodious, generally modern, and expensively finished in every material respect. Plaintiff George E. LeDioyt who was engaged in the real estate, insurance, and loan service business, was the only witness, except the county assessor, who testified for plaintiffs with regard to the actual value of the properties belonging to plaintiffs. All other plaintiffs testified, but ventured no opinion whatever with regard to the actual value of their own or any other taxpayer's property. In doing so, George E. LeDioyt frankly admitted that the valuations of each and all of plaintiffs' properties placed thereon by the county board in 1953 were way below their actual value. Plaintiff George E. LeDioyt admitted that the actual value of the LeDioyt property was $23,000. He admitted that it cost $22,423.60, not including landscaping. One qualified witness estimated that its reconstruction would cost $17,783 without the lot, carpets, or shrubs; another estimated $20,752.33; and another estimated $22,500.

George E. LeDioyt testified that the actual value of the Scott property was $33,000. Plaintiff Robert K. Scott admitted that it cost $37,136.89 not including carpets. One qualified witness estimated that its reconstruction would cost $35,361.15, giving no consideration to fancy finish; another estimated $40,357 without lot, carpets, or shrubs; and another estimated $48,140 including the lot.

George E. LeDioyt testified that the actual value of the Waldo A. Nichols property was $35,000. Plaintiff Waldo A. Nichols admitted that it cost $39,555.95. One qualified witness estimated that its reconstruction would cost $33,997, giving no consideration to fancy finish; another estimated $42,093 without lot, carpet, or shrubs; and another estimated $49,250 including the lot.

George E. LeDioyt testified that the actual value of

the Carl P. Nichols property was $32,000. Plaintiff Carl P. Nichols admitted that it cost him $30,835.94, and he himself performed a substantial part of the labor. One qualified witness estimated that its reconstruction would cost $48,750 including the lot; and another estimated $55,244 without lot or carpets.

George E. LeDioyt testified that the actual value of the Welsh property was $40,000. Plaintiff David A. Welsh admitted that it cost $38,650.90. One qualified witness gave his estimate that its reconstruction would cost $58,616 without lot or carpets; another estimated $51,600 including the lot.

None of the plaintiffs who testified about the cost of their respective properties could produce complete competent records to support their conclusions. The qualified witnesses aforesaid had inspected each of plaintiffs' properties inside and out. They generally classified plaintiffs' properties as grade A or AA, and estimated that the first-class, well-constructed, grade A LeDioyt property would cost $12 a square foot; that the more excellently constructed grade AA Scott property would cost $20 a square foot; that the better grade AA Waldo A. Nichols property would cost $16 a square foot; that the better grade AA Carl P. Nichols property would cost $16 a square foot; and that the best grade AA Welsh property would cost $22 a square foot. Concededly, the construction of such brick veneer or brick veneer and stone properties would cost from 5 to 15 percent more with less upkeep than frame properties, and loan companies would loan about 10 percent more on such properties than on frame properties. However, a witness for plaintiffs testified that identical frame and brick properties in Ogallala would then sell at about the same price.

We conclude that the values placed upon plaintiffs' properties by the county board in 1953 were in fact but little if any more than one-third of their actual values, whether measured by the actual values placed thereon

by plaintiffs' witness George E. LeDioyt or their witness the county assessor or by other witnesses who testified with relation to the construction or reconstruction cost. The trial judge's judgment herein reduced such values to little if any more than one-fourth of their actual values.

The related question remaining then is whether or not plaintiffs and their brick veneer or brick veneer and stone properties were arbitrarily and intentionally discriminated against by the county taxing officials, because, as claimed by plaintiffs, the tax values placed upon their properties were higher than those placed upon certain other allegedly comparable frame properties, and they were thus required to bear an unequal proportion of tax burdens. We conclude that they were not.

Plaintiffs, in attempting to establish that they and their brick properties were so discriminated against, also offered evidence with reference to 10 other alleged comparable brick veneer properties in Ogallala. Photographs of all such properties appear in the record. George E. LeDioyt, who was a greatly interested witness and as the only witness for plaintiffs with reference thereto, gave his own opinion with regard to the actual value of each such properties on March 10, 1953, and compared that value with each valuation placed thereon by the county board in 1953. Thereby, as was done with relation to plaintiffs' properties, he attempted to theoretically establish that a high percentage of value for tax purposes had been placed upon brick veneer properties when compared with the witnesses' own opinion of their value. George E. LeDioyt's valuation of two such properties was predicated upon sales thereof in 1951. One such valuation was predicated upon a sale in 1952, and one was predicated upon a sale in 1953. In that regard, LeDioyt conceded that sale prices did not always fix actual value, and one sale made in 1951 upon which he relied graphically illustrated that fact. LeDioyt admitted also that he had not examined all the county records, but knew that many properties, includ-

ing frame buildings in Ogallala and Keith County, were assessed at actual value, or for approximately 100 percent or more of their sale value in 1953.

Likewise, George E. LeDioyt gave his opinion with regard to the actual value of some 17 frame properties out of approximately 1,000 in Ogallala which he claimed were comparable with plaintiffs, in order to theoretically arrive at a percentage of assessed value when compared with his own opinion of value. Based upon LeDioyt's opinion with regard to actual values thereof when compared with the respective values placed thereon by the county board for tax purposes, he attempted to establish that the percentage relationship was lower than that arrived at by use of the same process with regard to brick veneer or brick veneer and stone properties. In other words, he apparently fixed the actual value of brick veneer or brick veneer and stone properties low enough so that the percentage relationship would be high, and fixed the value of frame properties high enough so that the resulting percentage would be lower. Some of his values of frame properties were based on sale prices for the years 1945, 1946, 1948, 1951, and 1953. Only four of such sales were in 1953, the year involved. The unreliability of such comparisons are illustrated by the value placed by LeDioyt upon the so-called Saathoff property located across the street from his own property. His valuation placed thereon was $35,000, which was $12,000 greater than that placed by him upon the LeDioyt property, $2,000 greater than that placed by him upon the Scott property, and $3,000 greater than that placed by him upon the Carl P. Nichols property. His valuation placed upon the Saathoff property was identical with that placed by him upon the Waldo A. Nichols property, and only $5,000 less than that placed on the Welsh property. Photographs of all 17 properties aforesaid, together with photographs of plaintiffs' properties, appear in the record. An examination and comparison of such photographs, together with other evi-

dence in the record, clearly refutes the accuracy and credibility of George E. LeDioyt's valuations and computed percentages. Further in that regard, George E. LeDioyt had not been inside some of the frame improvements on such properties for years or for a considerable length of time, and when he had been inside them it was not for the purpose of establishing values thereon, and he was not generally familiar with their manner or type of construction, equipment, or interior finish.

On the other hand, the county assessor testified as a witness for defendants that he made an examination of the county deed records of all sales of real estate, including brick veneer, stucco, metal, and frame constructed properties in Ogallala during 1953. He compiled a description of each such properties and improvements thereon if any together with the consideration paid therefor. Therein he then noted the actual values placed thereon for tax purposes by defendants and compared such values with the sale prices in order to arrive at their percentage relationship. Also, in like manner the assessor compiled a list of all deed record sales of rural property in the county in 1953. Further, a like compilation was made by him with reference to all 1953 sales of property in other towns in the county. We conclude that such compilations and other competent evidence appearing in this record support defendants' contention that they did not intentionally overvalue plaintiffs' properties or discriminate against plaintiffs or their properties as claimed by them.

There is no competent evidence which could sustain a conclusion that any of the defendant tax officials of Keith County acted in bad faith or were animated by any improper, fraudulent, or corrupt intentional violation of law or duty or the essential principles of practical uniformity. They may in some instances have made mere errors of judgment, but that alone will not support a claim of discrimination. On the other hand, we recog-

nize factually and legally that good faith approximation by defendants both as to value and uniformity in assessing real property for tax purposes is all that is constitutionally required.

We conclude that plaintiffs failed to establish, in the manner required, that their properties were overvalued for tax purposes, or that plaintiffs or their properties were discriminated against in violation of their constitutional rights.

Therefore, we conclude that each and all of the respective judgments rendered by the trial court should be and hereby are reversed, and each and all such five actions should be and hereby are dismissed. All costs in the district court and this court are taxed to plaintiffs.

REVERSED AND DISMISSED.

COOK LIVESTOCK COMPANY, INC., A CORPORATION, APPELLEE, V. REUBEN REISIG, APPELLANT.
74 N. W. 2d 370

Filed January 20, 1956. No. 33852.

1. **Trial.** A motion for directed verdict or its equivalent 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. ———. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
3. **Fraud: Pleading.** To maintain an action for damages for false representation the pleader must allege and must prove what representation was made; that it was false and so known to be by the party alleged to have made the representation or else was made without knowledge as a positive statement of known

fact; that the pleader believed the representation to be true; and that he relied on and acted upon it and was thereby injured.

4. Fraud. False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts.
5. ———. Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future.
6. Sales. Evidence examined and held insufficient to prove an express warranty within the contemplation of section 69-412, R. R. S. 1943, or an implied warranty within the contemplation of subsections (1) and (6) of section 69-415, R. R. S. 1943.

APPEAL from the district court for Scotts Bluff County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Robert L. Gilbert, for appellant.

Mothersead, Wright & Simmons, for appellee.

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

MESSMORE, J.

This is an action at law brought by the Cook Livestock Company, plaintiff, in the district court for Scotts Bluff County against Reuben Reisig, defendant, to recover $1,771.42 due for stock feed sold to defendant by plaintiff. The case proceeded to trial before a jury. At the close of all of the evidence the plaintiff moved to dismiss the defendant's cross-petition for want of sufficient evidence to sustain the cause of action pleaded therein. In addition, plaintiff moved for a directed verdict. The trial court sustained both motions. Judgment was entered on the verdict. Defendant filed a motion for new trial. From the overruling of the motion for new trial, the defendant appeals.

The plaintiff is a Nebraska corporation with its principal place of business in Scottsbluff, Nebraska. It alleged in its amended petition that defendant is indebted

to the plaintiff for goods sold and delivered to defendant between September 14, 1953, and January 11, 1954, inclusive, in the sum of $1,771.42 for which amount, with interest and costs, the plaintiff prayed judgment.

Exhibit A, attached to the petition and made a part thereof, sets forth the description of the stock feed as "Alfamix," the price, the debits, credits, delivery dates, and balance due.

The defendant's answer admits the delivery of quantities of Alfamix feed at the dates and in the amounts as alleged by plaintiff, and denies that the feed so delivered was of the nature, quality, and composition as alleged, and that the prices listed and charges made were the fair and reasonable market value or agreed prices for the feed actually delivered.

Defendant's cross-petition alleges in substance that in 1953 the defendant, a farmer and livestock feeder residing near Scottsbluff, owned 77 head of yearling white-faced steers and heifers and approximately 60 tons of hay, but no corn or grain; that he was desirous of feeding said cattle and marketing them as fat cattle in December 1953, or January 1954; that the plaintiff was engaged in the business of mixing, preparing, and selling livestock feed which it marketed under the trade name of Alfamix; that on or about September 1, 1953, the plaintiff orally represented and warranted that it would mix according to its specifications and would sell to the defendant during the feeding period an Alfamix feed mixture which would be a complete feed, and that it would not be necessary for the defendant to supplement it with any other feed, and which would fatten the defendant's cattle in 120 days if it were fed as a complete feed and if the cattle were fed all they would eat; that the defendant, relying upon said representations, commenced on September 14, 1953, to purchase Alfamix feed, believing the same to be a complete feed and would fatten his cattle in 120 days; that the plaintiff represented that the Alfamix feed supplied to the

defendant during the period from September 14 to November 5, 1953, contained 15 percent corn and 30 percent barley; that the defendant, relying upon said representation fed said feed to his cattle for the purpose of fattening them; that the Alfamix feed sold by the plaintiff to the defendant was not such a feed as would fatten the defendant's cattle in 120 days; that the Alfamix feed sold from the latter part of September to the 15th of November did not contain the percentage of corn and barley as represented by the plaintiff; and that as a result thereof the defendant's cattle did not get fat, and on January 16, 1954, the defendant sold his cattle as feeder cattle at a loss, for which he prayed damages.

The plaintiff's answer to the defendant's cross-petition admitted the defendant's occupation and ownership of cattle; that it was in the business of selling stock feed as alleged by defendant in his cross-petition; that the Alfamix feed supplied to the defendant during the period from September 14 to November 5, 1953, contained 50 percent corn and 30 percent barley, and the feed supplied for the period from November 5 to November 15, 1953, contained 30 percent corn and 25 percent barley; and denied all other allegations contained in the defendant's cross-petition.

The defendant assigns as error the trial court's dismissal of his cross-petition and sustaining of the plaintiff's motion for directed verdict.

A motion for directed verdict or its equivalent 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 Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court

to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. See Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603; In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

With the foregoing authorities in mind, we proceed to a summary of the evidence adduced.

The manager of the Alfamix division of the plaintiff, John Cook, Jr., testified that he had known the defendant for 3 years and sold and delivered to the defendant stock feed from September 14, 1953, to January 11, 1954, for which the defendant paid for a part, leaving a balance due of $1,771.42; and that the formula of the feed sold to the defendant to November 2, 1953, consisted of 15 percent corn, 10 percent molasses, no protein supplement, 30 percent barley, 5 percent dehydrated alfalfa, and the remainder of the 100 percent alfalfa. The defendant was furnished a meal type of feed up to about November 1, 1953, and thereafter a pellet type feed.

The defendant testified that in 1953 he lived near Scottsbluff on 700 acres of land of which 500 acres was river-bottom pasture, and that he owned 78 head of white-faced yearling cattle which he purchased in 1952 when they were calves, 7 or 8 months only, of an average weight of 250 pounds. The same year he wintered them, and ran them on grass the next summer. In 1953 they were in the river-bottom pasture and were put on feed in September. These cattle were not even or uniform in weight, some would weigh 800 to 900 pounds and others 500 pounds, and they would average about 680 pounds each. He had engaged in the livestock business for 12 years and was able to judge the weight of cattle very closely. About the fore part of September he had a conversation with John Cook, Jr., plaintiff's agent, in the Alfamix office. An employee of the plaintiff called "Swede" was present part of the time. The defendant

further testified: "* * * I told him (Cook) what kind of feed I would like to have mixed, * * * I asked him to fix the formula the way I wanted it * * * a certain percentage of corn and barley and different ingredients I wanted put in, I wanted either some cotton cake or some supplement in with it, and he said, '* * * We can save you some money. You don't need all of these supplements, you can take dehydrated hay which will do you the same good and save you money.' * * * I mentioned at the present time that by not putting the cattle on too high a ration we could feed a little longer and still get the fat." Cook said "that would be all right, they could be fattened that way, if anytime you want to fatten them up you would have to get up to about 20 pounds grain per day, that is per head, but we didn't feed quite that much." The defendant was asked: "Q Did you say that you wanted the formula the way it was made out? A Well, I had my opinion of making the formula which I used to feed cattle but he thought this one was better which would save me more money and do the job." With reference to feeding the cattle 120 days, the defendant testified that Cook said they "should have been fat in that length of time with the feed we were feeding." Cook also said he "knowed that would do the job in that 120 days." The first load of feed was delivered September 14, 1953. The prepared mixture was to be fed gradually, taking about 10 days to put the cattle on full feed, and thereafter they were to be fed all they could eat. The facilities for feeding and watering were adequate. The feed at first was a meal or bulk mixture which was fed for a month and a half. The first 10 days of feeding there was little difference in the weight of the cattle. In 20 days the cattle were doing better, and still better in 30 days. The defendant fed the cattle for 124 days.

The defendant further testified that he was feeding close to top quality cattle. After the cattle were fed the meal formula for about 45 days, they were then fed

the same type of feed in pellet form. The change of ration was made close to 60 days after the start of the feeding program. The defendant talked to the Alfamix people and told them the cattle were not doing the job they should be doing on the feed. Swede went out to defendant's place and said the cattle should have been on a higher ration of corn; he believed that would do the job. The defendant testified: "* * * I told him they have had them too long on their ration, to go on and do whatever they wanted to, and so they changed the ration on them." The next load of feed was 40 percent corn and 25 percent barley. The cattle were fed on that ration for about 30 days. After the 30 days, Swede went out again. At that time the defendant thought the cattle had obtained their growth, but could see no gain. He testified: "I told him the cattle didn't do the job, and he said, 'I can see it, myself, they are not doing the job, but I can't figure out why they are not doing the job, they are getting the ingredients, and all I can say is they need more corn and less barley.' " The defendant said: " 'Well, if you think that is what it takes, it is up to you guys to change it again,' and so they changed it again." The defendant had Cook come out about 30 days before the cattle were sold, and Cook could not figure out why they were not fat. The defendant testified: "* * * he asked me, 'What do you think causes it?' I said, 'The only thing I can see causes it, I don't think the corn is there.' He said, 'We will put the corn higher and see what they do with it,' * * *." The cattle did not get fat.

The defendant further testified that he sold Maude LeLaCheur, a cafe operator, a heifer on October 21, 1953, which weighed about 800 pounds, and was average. There were other cattle just as good or better that could have been picked out. The LeLaCheurs came back in 30 days for another animal. The testimony of Maude LeLaCheur is to the effect that the cattle were not as fat as they were the month previous when they

were at defendant's place and purchased the heifer.

The cattle were sold in January 1954 to the Scottsbluff Livestock Commission Company. The average price per pound was 18 to 18½ cents. The average price for choice fat heifers was 22 cents per pound.

On cross-examination the defendant testified that the cattle were not weighed when they were put into the feed lot. He estimated that at that time they would vary in weight from 500 to 800 pounds. The cattle ate close to 18 pounds of feed a day. On redirect examination he testified that feeding a ration of this type, the cattle should gain from 2 to 2½ pounds a day.

The cattle were examined by a veterinarian the latter part of December 1953 or the fore part of January 1954. He found no evidence of sickness. The cattle were "quite healthy and bright; there were no depressed animals or gaunt animals." They were "well-warmed up," which means they had just been well started on a fattening ration. He further testified that if cattle do exceptionally well, they will make choice cattle in 120 days. Yearling steers and heifers on full feed would eat 20 to 25 pounds a day. On a 25-pound-a-day ration, 12 or 15 pounds should be grain. He did not know why these cattle were not fat.

One of the operators of the Scottsbluff Livestock Commission Company sales yard who sells a number of cattle each week and also operates a ranch, testified that he runs from 500 to 1,000 head of cattle to feed and fatten out. In his business he has to know good cattle from poor cattle. He sold the 77 head of cattle for the defendant. They were not fat, but a few of the heifers were close to it. He was asked to assume that the cattle weighed 680 pounds in September 1953 and were fed the feeds as the feeds were represented to be by the plaintiff, and was asked whether the cattle would fatten in 120 days. He answered that it would be hard to say whether the cattle would get fat in 120 days as there are a lot of conditions that enter into it.

He further testified that at the weight the cattle were at the start of the feeding program, the heifers might get fat, but the steers would not, it would take 60 days longer for the steers to get fat. On the ration fed, they should have gained from 1½ to 2 pounds a day. He thought the ration was very good. The cattle were of good quality and the price received was comparable with the prices of other feeder cattle. They were not choice fat cattle, but they were "warmed up" cattle.

The witness Grasmick, engaged in the livestock feeding business since 1923 and farming since 1945, testified that he had about 800 head of livestock at that time; that he fed from 1,500 to 2,000 head of cattle a year, and had fed that number for the past 9 years. He was asked substantially the same hypothetical question that was propounded to the preceding witness. His answer was that the cattle should have gotten fat on the ration fed; that the ration was very much a fattening ration; that it was too strong a feed to start cattle on; that on that ration the cattle, at the end of the fattening period, should have been choice fat cattle, except for the fact that perhaps the "hot" rations were too hot a feed; and that the rations should have produced 1.8 to 2.25 pounds gain a day. He further testified that the heifers that sold for $19.10 per hundredweight would be a good grade, and the steers that sold for $20.70 would be a good grade; that a reasonably fat animal will grade good; that many things enter into the cattle feeding business besides the feed, and everyone does not get the same results; that the condition of the cattle when they go into the feed lot has much to do with it; and that in his opinion 30 percent barley in a ration was too much. He testified: "When you get to feeding 30 per cent you are asking for trouble." This condition could have been remedied by feeding some loose hay. In 1953 cattle feeders lost money due to the decrease in prices. The local market for choice heifers in January 1954 was $21 to $22 per hundredweight, and steers

of the same fatness and quality $23 to $24 per hundredweight.

There is other evidence of like effect as the above which we deem unnecessary to set forth.

The defendant contends that the evidence is sufficient to prove an express oral warranty that the Alfamix feed sold him by the plaintiff was a complete feed which would fatten his cattle in 120 days.

The defendant asserts the evidence shows that the plaintiff did not sell to the defendant the kind of feed he asked for, but rather sold him a different mixture which was represented to be as good, but cheaper; that the statements made by the plaintiff's agent were representations that the feed supplied to the defendant would be a complete feed and of such quality as would fatten the defendant's cattle for market within a period of 120 days, which statements induced the defendant to purchase the feed rather than the feed he originally intended to buy; and that he relied upon the representations of the plaintiff's agent to his damage.

Section 69-412, R. R. S. 1943, provides: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

In considering the above section of the statutes, the following is applicable.

To maintain an action for damages for false representation the pleader must allege and must prove what representation was made; that it was false and so known to be by the party alleged to have made the representation or else was made without knowledge as a positive statement of known fact; that the pleader believed the representation to be true; and that he relied on and acted

upon it and was thereby injured. See Campbell v. C & C Motor Co., 146 Neb. 721, 21 N. W. 2d 427. See, also, 37 C. J. S., Fraud, § 3, p. 217; Scovel v. Isham, 113 Neb. 238, 202 N. W. 869; Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275.

In addition to the above, the general rule, which is supported by numerous decisions in almost all American and British jurisdictions, is that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. See 23 Am. Jur., Fraud and Deceit, § 35, p. 794.

It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. See Beltner v. Carlson, 153 Neb. 797, 46 N. W. 2d 153.

False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts. See Esterly Harvesting Machine Co. v. Berg, 52 Neb. 147, 71 N. W. 952.

In the instant case evidence adduced by the defendant disclosed the feed supplied by the plaintiff would fatten cattle in 120 days. Cook's statement that the feed would fatten defendant's cattle could not be considered a statement of fact. Such a statement is nothing more than Cook's opinion that the feed would fatten these particular cattle in that period of time, and under the statutes could not be considered as a warranty, nor under the law as a representation of a present or preexisting fact. At most, the statements made by Cook with reference to the feed were only his opinion and nothing more. The defendant has failed to meet the burden of proof

placed on him. The above contention cannot be sustained.

The defendant contends that there is an implied warranty that the feed supplied to him was reasonably fit for the purpose of fattening his cattle.

Section 69-415, R. R. S. 1943, provides in part: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * * (6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

The evidence shows that the defendant directed the manner in which the feed was to be mixed, except for the dehydrated hay which Cook recommended in place of cotton cake or some other supplement, and which defendant took because of Cook's representation that the dehydrated hay was as good as the cotton cake and would cost less money. There is no evidence in the record that the dehydrated hay was not a proper substitute for cotton cake or other supplement, or had anything to do with the failure of the cattle to fatten. The evidence adduced by the defendant is to the effect that if the feed contained the ingredients which the plaintiff represented it had, and other factors were favorable, the cattle should have fattened in 120 days. The evidence was that the defendant relied on the judgment of Cook only as to the substitution of dehydrated hay for cotton cake or some other supplement to the feed. Under the section of the statutes above set forth and the evi-

dence adduced by the defendant, his contention cannot be sustained.

The defendant next contends that the evidence was sufficient to show a breach of warranty to such extent that the case should have been submitted to the jury.

The defendant asserts there is no direct evidence as to what was actually contained in the feed sold. In this connection the defendant argues that the use of a thing is evidence of the nature of the thing, contending that because there is evidence that his cattle should have gotten fat on the feed supplied them, this is proof that the ration was not as represented. The defendant cites authority to the effect that proof of a breach of warranty may be shown by circumstantial evidence and cites the rule with reference thereto.

The evidence discloses that Cook did warrant the feed contained the various ingredients in the percentages shown upon the invoices of feed furnished. There is no testimony in contradiction to such fact. The defendant alleged in his cross-petition that the Alfamix feed sold from the latter part of September to the 15th day of November did not contain the percentage of corn and barley represented by the plaintiff and that as a result thereof, defendant's cattle did not get fat. There is no allegation in the defendant's cross-petition that the feed sold after November 15th did not contain the percentage of corn and barley and other ingredients as represented, or was defective in any manner. His complaint is only about the feed furnished from September 14 to November 15. The only evidence then as to the cattle failing to gain would be that they failed to gain after November 5th or November 15th. The evidence adduced by the defendant shows that the cattle did quite well from September 14th to November 15th and could furnish no basis for a finding that the feed sold during this period of time was defective or deficient in any manner. There was a change made in the ration November 10th, as shown by the evidence. There is no

allegation in the defendant's cross-petition that this particular feed did not contain the percentage of corn or barley as represented. Nor is there any such allegation as to the feed furnished after that date. If the cattle failed to gain properly, the failure to gain occurred after November 15th and at a time when the defendant in his cross-petition made no allegations as to the defect in the feed. Under such circumstances the authorities cited by the defendant are not applicable.

The defendant also cites cases with reference to the effect of feed fed to livestock which did not contain the proper ingredients in the proportions specified, and under the evidence in the cited cases recovery for damages was had. None of the cited cases are applicable under the factual situation in the instant case and the law applicable thereto, consequently we deem it unnecessary to analyze such cases.

We conclude that the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

RODOLPHY M. CAMPBELL ET AL., APPELLEES AND CROSS-APPELLANTS, V. THE OHIO NATIONAL LIFE INSURANCE COMPANY, APPELLEE, IMPLEADED WITH I. W EBERHART, SUCCESSOR TRUSTEE, REVIVED IN THE NAME OF THE OMAHA NATIONAL BANK OF OMAHA, NEBRASKA, AS SUCCESSOR TRUSTEE, APPELLANT AND CROSS-APPELLEE.

74 N. W. 2d 546

Filed January 27, 1956. No. 33837.

1. **Deeds: Mortgages.** If instruments are made at approximately the same time with reference to a transaction to effectuate an identical purpose they will be construed as though they were one instrument.
2. **Equity.** Equity in interpreting a transaction and determining the rights of the parties to it regards the substance of it and not the form.
3. **Mortgages.** If an instrument is intended by the parties to be

security for a debt it is in equity, without regard to its form or name, a mortgage.

4. **Deeds: Mortgages.** If a deed, absolute in form, is accompanied by a defeasance in writing and is intended as security for the payment of a debt it is a mortgage and the legal title to the real estate does not pass to the grantee named in the deed.
5. **Mortgages.** If an instrument is a mortgage in legal effect when executed and delivered its character as such is not changed by the effluence of time.
6. **Deeds: Mortgages.** A deed, absolute in form, is a mortgage if it is given to secure the payment of a debt notwithstanding the parties to the transaction agreed that upon default of payment the deed should become an absolute conveyance of the real estate described in it.
7. ———: ———. A test to determine if a conveyance, absolute in form, is a sale or a mortgage is whether or not the relation of the parties toward each other as debtor and creditor continues. If it does, the conveyance is in legal effect a mortgage.
8. **Vendor and Purchaser.** The burden of proof is on the litigant who alleges he is an innocent purchaser of property for value and without notice.
9. ———. A good faith purchaser of real estate is one who buys it for a valuable consideration and without notice of a suspicious circumstance which would put a prudent man on inquiry.
10. **Dismissal and Nonsuit.** The final dismissal of a litigant from a pending action with prejudice takes him out of court and his status as to all pending matters in the case is the same as if he had not been a party to the litigation.
11. **Equity.** The defense of laches is not a favored one and it will be sustained only if the litigant has been guilty of inexcusable neglect in protecting a right to the prejudice of his adversary.
12. **Deeds: Mortgages.** If it is established that a deed, absolute in form, was intended as a mortgage the relative rights of the parties are determined by the law governing the relation of mortgagor and mortgagee.
13. **Mortgages: Equity.** A grantor who solicits the aid of equity to declare a deed, absolute in form, a mortgage is subject to the rule that he who seeks equity must do equity and accordingly he must pay the debt secured as a condition of his redemption of the property involved.
14. **Mortgages.** A mortgagee of real estate in possession before foreclosure, in the absence of an agreement upon the subject, is not entitled to credit for permanent improvements made by him but he is liable for the net rents and profits which he has

received or which he might have received by the exercise of reasonable care.

15. ———. A mortgagee in possession who claims ownership hostile to the mortgagor is not entitled in an accounting for rents and profits from the land to credit for compensation for services rendered by him in managing or supervising the real estate encumbered by the mortgage.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Joseph T. Votava and *Armstrong & McKnight,* for appellant.

Albert S. Johnston and *Lee Kelligar,* for appellees.

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

BOSLAUGH, J.

There are two tracts of land involved in this case. One is the east half of the northeast quarter of Section 14, Township 6 North, Range 13 East of the 6th P. M., in Nemaha County. This will be spoken of herein as tract 1. The other is the northeast quarter and the northeast quarter of the northwest quarter of Section 15, Township 6 North, Range 13 East of the 6th P. M., in Nemaha County. This will be referred to herein as tract 2. The land was for many years prior to the early part of 1938, the exact time does not appear, owned by Rodolphy M. Campbell, designated hereafter as Campbell, subject to a mortgage on each tract securing an indebtedness owing by him to the Ohio National Life Insurance Company, which will be herein described as the company. There were defaults in performance of the obligations of the mortgages and the company insisted that the defaults be removed. Campbell in the spring of 1938 had negotiations with the company concerning an extension or renewal of the mortgages and the indebtedness secured by them. The company refused to do either because of the age of the debtor and the length

of time that the loans had existed but it suggested that if the land was conveyed to Albert S. Johnston and his wife the company would consider accepting their notes and mortgages for the amount of the principal and arrearages represented and evidenced by the existing notes and mortgages securing them. On September 30, 1937, the land was conveyed to Albert S. Johnston and Juanita L. Johnston, the son-in-law and daughter of Campbell, who are hereafter designated as appellees. They executed and delivered to the company a note dated June 20, 1938, payable to its order for the sum of $6,800 with interest thereon at 5 percent per annum from May 1, 1938, and secured its payment by mortgage of that date on the land above described as tract 1. The last installment of the note matured May 1, 1948. Appellees also executed and delivered to the company a note dated June 20, 1938, payable to its order for the sum of $16,200 with interest thereon at 5 percent per annum from May 1, 1938, and secured its payment by a mortgage of that date on the land above described as tract 2. The last installment of the note matured May 1, 1948. The aggregate of the principal of the notes given by appellees was the amount of the indebtedness of Campbell to the company and secured by mortgages on the land at the time it was conveyed by Campbell to appellees and the conveyance of the land to them was made subject to it.

Appellees had not satisfied all the requirements of the notes and mortgages they gave the company and about March 1, 1940, it solicited and requested appellees to execute an instrument designated "TENDER OF CONVEYANCE," and an unconditional and absolute warranty deed of each of the tracts of land as prepared and furnished by the company and to deposit them with it. The purposes of these were to satisfy and discharge the indebtedness represented by the notes and secured by the mortgages of appellees to the company and to vest in it an absolute and unconditional title to and pos-

session of the land. Appellees refused to do this.

There were additional conferences and negotiations between them and the company and these culminated in a transaction expressed in and evidenced by a letter written on behalf of the company dated May 21, 1940, signed by O. F. Neal as a manager of the company addressed to Albert S. Johnston, and conveyances of the land in the form of warranty deeds, one for each tract of land, in which O. F. Neal was named grantee, executed and delivered by appellees in reliance upon and because of the terms and conditions expressed in the letter. The contents of the letter are quoted:

"Agreeable with my telephone conversation this morning, I enclose deeds to be executed by you and your wife, to myself, for the above land. These deeds are taken with the understanding that all income received from the land shall be credited to the loans; and if at any time prior to March 1st, 1942 you are able to place the loans in current position, or sell the land and pay them off, I will re-deed the land to you or your order. Also, please assign the present leases to me and return with the deeds.

"Personally, I feel sure this is the best solution for all of us, for if Mr. Campbell is to realize anything from his equity, I think he will have a much better chance doing so if the property is not under foreclosure.

"I have instructed our attorney to hold the papers that were sent out yesterday until further notice. Will appreciate your executing and returning the deeds and assigned leases immediately."

The land and the loans referred to in the letter were identified by the following appearing at the top of it: "M. Ls. Nos. 6142-6149." The deeds were executed, the leases of the land were assigned as the letter requested, and they were on May 24, 1940, transmitted to "Ohio National Life Ins. Co., 19th & Douglas Sts., Omaha, Nebraska." The assignment endorsed on each of the leases was to O. F. Neal of all the rents reserved in the lease to be applied on the loan secured by a mortgage

on the land described in the lease. The letter of Albert S. Johnston that accompanied the deeds and leases when they were sent to the company identified the loans on the land by the numbers given them by it and stated: "Pursuant to our correspondence I enclose herewith the deeds to the property involved in these loans on the forms which you sent me with your letter of May 21, 1940. I also inclose the original of the leases covering this property with assignment to you endorsed on the back of each. * * * We will continue to keep track of the farming operations as heretofore."

Albert S. Johnston continued to manage the land, to collect the rentals from it, and he remitted the amounts collected to the company for a period of about 2 years after the conveyance of the land from appellees to O. F. Neal. He executed and delivered quit claim deeds of the land, in accordance with the intention and expectation of the parties, to the company on May 12, 1942. The deeds from appellees were for the benefit of the company and O. F. Neal was only an intermediary. He had no personal interest in the transaction. The writing of May 21, 1940, quoted above made by the company, the owner and holder of the indebtedness secured on the land, and the conveyance to it of the land and the leases thereon by appellees, the owners of them, in accordance with the terms of the writing of the company, were the transaction.

Instruments made in reference to and as a part of a transaction should be considered and construed together as one instrument in determining their effect and the intention of the parties. Hanks v. Northwestern State Bank, 143 Neb. 204, 9 N. W. 2d 175, declares: "Where two or more instruments are made at the same time with reference to the same transaction and to effectuate the same purpose, they will be construed together to the same extent as though made in one instrument." See, also, Ashbrook v. Briner, 137 Neb. 104, 288 N. W. 374; Northwestern State Bank v. Hanks, 122 Neb. 262, 240 N.

W. 281. It is not important that the instruments were made or dated at different times. They related to, were a part of, and constituted the transaction.

It is quite universally recognized that equity in interpreting a transaction between individuals and determining their rights regards the substance and not the form and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. Ashbrook v. Briner, *supra.* It is also generally accepted that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form or name, it is in equity a mortgage. This doctrine proceeds from the broad equitable principle that equity regards substance and not form. It may be said as a general rule that if an instrument transferring an estate is originally intended between the parties as security for money or for any other encumbrance, whether the intention is exhibited by the same instrument or by any other, it is considered in equity as a mortgage. Northwestern State Bank v. Hanks, *supra;* Annotations, 79 A. L. R. 937, 155 A. L. R. 1104. This jurisdiction adheres to the doctrine alluded to in the foregoing discussion and it has been made the policy of the state by legislative declaration. Section 76-251, R. R. S. 1943, provides: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. * * *" This court has frequently and consistently accepted and applied this doctrine in the decision of cases appropriate for its application. It said in Doran v. Farmers State Bank, 120 Neb. 655, 234 N. W. 633, that: "A deed, absolute on its face, but which, in fact, was given as security for certain obligations, and by which grantors were to receive any sum over and above such obligations for which the land conveyed should be sold, is, in nature and effect, a mortgage."

The writing of the company set out above provides that if the grantors in the deeds in controversy within a period of about 2 years from the date the deeds were made paid on the loans secured on the land sufficient to satisfy any unpaid past due amounts or if they during that period sold the land and paid the whole of the indebtedness the land would be re-deeded to them. The plain and unequivocal effect of the transaction was that the company would not during the period mentioned above take any action to enforce payment of the indebtedness of the grantors. Appellant agrees this conclusion is correct. In either of the contingencies mentioned appellees were to have any value of the land above the indebtedness secured thereon. The decision last quoted is precisely applicable to this litigation in favor of appellees.

The writing of the company was, when its terms were accepted and acted upon by appellees, a contract of defeasance. It and the deeds under the circumstances of this case must be construed together as a single instrument. When that is done the necessary result is that the deeds were not conveyances of absolute title but they were in legal effect mortgages and the grantors retained all the rights in relation to the land of mortgagors. Ashbrook v. Briner, *supra,* asserts: "A deed, absolute in form, given as security for the payment of money, passes the legal title to the grantee. * * * Where such deed is accompanied by defeasance in writing, the legal title does not pass to the grantee, and the transaction constitutes a mere mortgage." The opinion in that case contains the following: "Here we have two instruments executed as a part of the same transaction, to wit, a warranty deed and a contract of defeasance, and it has been held that, where two instruments are made at the same time with reference to the same transaction and to effectuate the same purpose, they will be construed together to the same extent as though made in one instrument. Standard Oil Co. v. O'Hare, 126 Neb. 11, 252 N. W. 398. * * * In this state the usual form of mortgage

differs but slightly from the wording of the two instruments executed in this case, if the same are construed together and treated as one instrument; and so construing them, it is apparent that the parties intended the conveyance as a mortgage and not as a transfer of the legal title with the right of redemption. * * * Particularly is this true in view of the provisions of section 76-228, Comp. St. 1929 * * *." The section referred to is now section 76-251, R. R. S. 1943, the first sentence of which is quoted above. The last sentence of the section is this: "The person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a defeasance, or explaining its effect as a mortgage, or conditional deed, is also recorded therewith and at the same time." The opinion then proceeds: "In the instant case there was such other instrument in writing which clearly shows that the conveyance was intended only as security in the nature of a mortgage, and James W. Price, when he recorded the deed, did not record the defeasance contract. If we were to hold that the deed conveyed the legal title, we would be, in effect, ignoring the above provision of the statute, which states that, under the circumstances existing in this case, 'though it be an absolute conveyance in terms, shall be considered as a mortgage;' and giving James W. Price an advantage from the recording thereof in violation of the statute just quoted."

The trustee of the trust created by Owen Fletcher Neal, who was the same person as O. F. Neal mentioned above, and others for the benefit of the child or children of William R. Neal by a trust agreement of October 9, 1941, is referred to hereafter as appellant or by name.

Appellant grudgingly and with impressive indefiniteness concedes that during the time from the giving of the deeds in May 1940 until March 1, 1942, "* * * it is recognized that the Johnstons still had some equitable interest in the land." It is indubitably true then that the

deeds when made and delivered did not convey and were not intended to transfer the absolute fee title of the land to the company and that the literal terms of the deeds may not be accepted as expressing the true intention and contract of the parties. Appellant does not claim that the parties had any understanding or made any agreement after May 1940 that changed or modified the effect of their transaction had at that time. Whatever "equitable interest" the grantors had in the land by virtue of the transaction of May 1940 they have continued to have. The record shows nothing to take it from them. The remark of this court in Riley v. Starr, 48 Neb. 243, 67 N. W. 187, a case of the class of the instant one, is convincingly pertinent. The court there said: "* * * if (the deed was) intended as a mortgage when executed, its character as such will not be changed by the mere effluence of time."

Appellant argues that the letter of the company of May 21, 1940, establishes that the parties understood and intended that upon the expiration of the term granted the mortgagors, that is on March 1, 1942, the deeds were to be an absolute conveyance of the land and that the mortgagors were then to cease having any interest in it. Appellant admits that the deeds made by appellees to the company were executed and delivered in accordance with and because of the letter of the company of May 21, 1940. There is no claim or proof that there was any other or different agreement of the parties concerning the deeds. Appellant has not attempted to specify what language in the letter he claims was intended to provide that on March 1, 1942, if appellees had not put "the loans in current position" or had not paid the loans on the land in full the deeds made by appellees to the company should become and be an absolute conveyance of the land in fee to it. The letter contains no such terms. Appellant has not produced any authority that says that such an agreement would have been valid or binding if made. That argu-

ment has been repudiated by this court. It is unsound and ineffective. First Nat. Bank of David City v. Sargeant, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296, speaks to this point: "A deed absolute in form will be treated as a mortgage when it is given to secure payment of a debt, although the parties may have agreed that upon default of payment the deed should become absolute." In State Bank of O'Neill v. Mathews, 45 Neb. 659, 63 N. W. 930, 50 Am. S. R. 565, this language is used: "As we have said, the conveyance from McLean to Mathews must be treated as a mortgage, and this notwithstanding the fact that McLean testifies that the agreement was that if the first note was not paid the deed should become absolute. This was the understanding and is the legal effect of all mortgages, and the whole doctrine of foreclosure and redemption arose from courts of equity relieving against this understanding and its legal effect." In Snoke v. Beach, 105 Neb. 127, 179 N. W. 389, the court said: "* * * we have become satisfied that the deed was given as security for a debt. What the parties attempted to do was to draft a contract in such form that, in the event Snoke failed to pay the amount with interest, the deed would stand as an absolute conveyance without the necessity of a foreclosure proceeding. Such an agreement, however thoroughly understood between the parties, does not change the legal aspect of the transaction. If in fact the deed was given as security, it became ipso facto in legal effect a mortgage, and the equitable right of redemption which attaches to a mortgage cannot be cut off by contract or understanding of the parties at the time the contract is made. 'Once a mortgage, always a mortgage,' has become one of the axioms of the law."

The status of appellees and the company toward each other as debtors and creditor continued after their transaction on the same basis and to the same extent without change or modification in any respect as it existed immediately before that transaction. The company had and continued to hold and own the same notes. The

mortgages given to secure the notes when they were made continued in force and effect. The letter of the company of May 21, 1940, conclusively establishes that the relationship of the parties toward each other as debtors and creditor was to continue, otherwise the language thereof "that all income received from the land shall be credited to the loans * * * if at any time prior to March 1st, 1942 you are unable to place the loans in current position," or if you "sell the land and pay them (the loans) off" is meaningless and absurd. Copies of the notes placed in evidence on the trial of the case failed to show any endorsement or cancellation of either of the notes or any part of them. In Riley v. Starr, *supra,* it is declared: "The true test in determining whether a conveyance absolute in form should be treated as a sale or as a mortgage is whether the relation of the parties toward each other as debtor and creditor continues. If it does so continue, the transaction will be treated as a mortgage and the conveyance as a security only." See, also, Samuelson v. Mickey, 73 Neb. 852, 103 N. W. 671, on rehearing, 73 Neb. 856, 106 N. W. 461; Harrah v. Smith, 79 Neb. 51, 112 N. W. 337; Fahay v. State Bank of O'Neill, 1 Neb. (Unoff.) 89, 95 N. W. 505.

The essence of the agreement of the parties was that appellees would make conveyance of the land and assignment of the leases thereon to O. F. Neal; that all income from the land should be applied on the loan secured thereon by mortgages made to the company by appellees; that the company would take no action to enforce payment or satisfaction of the indebtedness of appellees prior to March 1, 1942; and that if appellees had before that date placed the "loans in current position" or had paid the loans in full the company would "re-deed the land" to appellees. The company thereby got an assignment of the total income from the land to apply on and reduce the indebtedness of appellees to it and in practical effect gained control of the title of the land until the company was free to take action to enforce payment of the in-

debtedness if appellees failed to perform either of the two contingencies. It is clear that it was the intention and agreement of the parties that the indebtedness of appellees to the company should continue and the relation of the parties to each other as debtors and creditor was not terminated.

It is recognized that grantors in this kind of a case must produce evidence that is clear, convincing, and satisfactory. O'Hanlon v. Barry, 87 Neb. 522, 127 N. W. 860; Snoke v. Beach, *supra;* Cox v. Young, 109 Neb. 472, 191 N. W. 647. Appellees have satisfied this requirement. It must be and is concluded that the deeds of the land from appellees to the company were given and received as security for the indebtedness of appellees and that they are in legal effect and must be considered and treated as mortgages.

The answer of I. W. Eberhart as the trustee who succeeded Carroll Lewis, the original trustee of the Neal trust above described, asserts that he is a bona fide purchaser for full value of the land and that he received title thereto by warranty deed from Carroll Lewis, trustee, without any knowledge of any claims, rights, or equity of redemption of appellees. There is no allegation in the answer that Carroll Lewis, trustee, was a good faith purchaser of the land for value without notice of any existing interest or equity claimed or owned by the appellees. The evidence is that Carroll Lewis, trustee, conveyed the land to I. W. Eberhart as successor trustee but that no consideration for the conveyance passed between the parties to the deed.

Appellant contends that appellees did not prove by the greater weight of the evidence that the trustee was not a good faith purchaser of the land for value without notice of any claim of an outstanding equity in third parties. Appellees were not required to do so. The responsibility of establishing that defense was upon the trustee. The burden of proof is upon the litigant who alleges that he purchased the property for value and

without notice. Pfund v. Valley Loan & Trust Co., 52 Neb. 473, 72 N. W. 480; Dundee Realty Co. v. Leavitt, 87 Neb. 711, 127 N. W. 1057, 30 L. R. A. N. S. 389; Justice v. Shaw, 103 Neb. 423, 172 N. W. 253.

A good faith purchaser of land is one who purchases for valuable consideration paid or parted with without notice of any suspicious circumstances which would put a prudent man on inquiry. Miller v. Vanicek, 106 Neb. 661, 184 N. W. 132; Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749.

I. W. Eberhart, trustee, offered no evidence of his alleged defense that he was an innocent purchaser of the land for value without notice. The original trustee said that O. F. Neal suggested the purchase of the land for the trust and that he directed the purchase of it from the company; that the trust agreement provided that the creators of the trust reserve a right to make changes in investments, to change trustees, "* * * or just about anything they might want to do, except revoking the trust"; that he, the trustee, had no recollection of the amount that was paid the company for the land; that he had known O. F. Neal for a great many years; that Neal was manager of the office of the company at Omaha; that I. W. Eberhart succeeded the original trustee July 1, 1947; that Lloyd Peterson, an attorney at Nebraska City, examined the abstracts of title to the land and rendered an opinion concerning the title; that the trustee had no information about any other transaction affecting the land or of any claim of appellees to or affecting it; that there was no amount passed between them when the original trustee transferred the land to I. W. Eberhart as successor trustee; and that O. F. Neal handled the getting of the abstracts and the correspondence with the company concerning the purchase of the land for the trust up to the time the deed of the land was surrendered to the original trustee.

The company only contracted to furnish the original trustee a special warranty deed conveying its right,

title, and interest in and to the land. The deed the trustee got from the company had no habendum clause and following the description it recites the company covenants to warrant and defend the premises against any acts of the company.

Appellant agrees that notice includes information, knowledge, or possession of facts sufficient to put one on inquiry. A purchaser of real estate is required to take notice of instruments properly placed of record in the office of the register of deeds. If any irregularity or circumstance is exhibited by the record that is unusual a purchaser is charged with notice of the facts which would be disclosed by making proper inquiry. Increased diligence, alertness, and scrutiny in searching for the facts are expected of a purchaser who accepts a deed that is less than a general warranty with full covenants of ownership and title. The public records of the county showed the conveyance of the land to appellees; the mortgages given by them to the company; the conveyances by appellees to O. F. Neal dated May 24, 1940, and recorded August 30, 1940; an oil and gas lease of each of the tracts of land to Harry Mellor executed and acknowledged December 12, 1940, by appellees and executed and acknowledged by O. F. Neal and his wife January 2, 1941, and filed for record respectively on January 8 and January 29, 1941; and a waiver of all rights in the oil and gas lease on tract 2 executed and acknowledged by lessors as above stated and filed for record January 21, 1941. O. F. Neal, the grantee in the deeds from appellees, recognized that they had some interest in the land described in the leases and the waiver. The leases and the waiver were executed more than 6 months after the date of the deeds of appellees to O. F. Neal. He concedes in this litigation that appellees then had an equitable interest in the land. The trustee had for many years been well acquainted with O. F. Neal and knew that he represented the company in charge of its western division with offices in Omaha.

The foregoing facts were sufficient to advise a prospective purchaser of the land that O. F. Neal recognized that the grantors had more than 6 months after the deeds to him an interest in the land of a character and extent that it was necessary and proper that they be joint lessors of the land with him. An ordinarily prudent person would have been put on inquiry as to what interest appellees claimed or had or what interest O. F. Neal considered they had in the land. The trustee was obligated to make such an inquiry in a proper manner. A proper inquiry would have developed the facts upon which appellees prosecute this litigation.

The trustee says he relied upon Lloyd Peterson, the attorney who reported on the abstracts of title to the land. The attorney made several exceptions to the record title and required corrections including in one instance a suit to quiet title. The one requirement made by the examiner that was complied with was a release of the mortgages on the land held by the company and this was not done until more than 6 months after the sale of the land to the trustee had been completed. The deed from the company to the trustee was dated July 9, 1943, and was recorded September 28, 1943. The releases of the mortgages were dated January 18, 1944, and were filed February 4, 1944. It was O. F. Neal and not the trustee who disregarded the title opinion of counsel. This is confirmed by a letter from Lloyd Peterson to the trustee to the effect that O. F. Neal asked the attorney to write to the trustee "that you may proceed with the closing of the deal." I. W. Eberhart, trustee, did not sustain his defense that he was an innocent purchaser of the land for value without notice.

The district court conducted two trials in disposing of this case. The issue as to whether or not the deeds made by appellees to O. F. Neal were given as security and were in legal effect mortgages was tried and determined first with the acquiescence of all parties to the litigation. The court found and adjudicated that the

deeds referred to above were for security only although they were absolute in form and that the trustee was not a good faith purchaser of the land from the company for value without notice. The court ordered that a trial be had at a later date to determine the amount that appellees should pay to redeem the land. The company and the trustee filed a motion for a new trial. The company also filed a motion requesting that it be dismissed from the case because of the determination that had been made by the court. The court ordered a dismissal of the case with prejudice as to the company. That order has become final.

The judgment that the deeds from appellees to the company were mortgages, that the trustee was not an innocent purchaser from the company, and that appellees were entitled to redeem the land was rendered February 3, 1953. The company and appellant filed a joint motion for a new trial February 11, 1953. It was not considered by the court until April 19, 1955, when it was denied. The notice of appeal was filed April 28, 1955. Appellees claim that the motion for a new trial could not have been sustained as to both of the parties to the motion since the company was by the court dismissed with prejudice from the case on June 1, 1954, and the order of dismissal became final. Appellees conclude that the judgment of February 3, 1953, is not before this court for review. A dismissal in effect is equivalent to a nonsuit, and, in practice, also imports the same thing as a discontinuance, namely that the cause is sent out of court. The dismissal with prejudice of the company from the case took it out of court and all pending matters therein were thereafter, as far as the company was concerned, the same as if it had never been a party to the case. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N. W. 349. There was at the time the court considered and overruled the motion for a new trial only one party to the motion. The motion had

ceased because of the dismissal of the company to be a joint motion for a new trial.

This action is not barred by lapse of time or laches. Any action to enforce satisfaction of the indebtedness secured on the land was postponed until March 1, 1942, by the letter of May 21, 1940, written by O. F. Neal to Albert S. Johnston and what the parties did because of the letter. The amended petition in the pending case upon which it was tried was filed less than 10 years after March 1, 1942. The right to redeem is a favorite of equity. An action to redeem and one to foreclose are reciprocal and either may be had at any time before the statutory bar of 10 years. The statute of limitations does not begin to run in favor of a grantee in possession against an action to have a deed, absolute in form, established as a mortgage until the possession of the grantee becomes adverse to the title of the grantor. Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490. The grantee in the deeds given by appellees and the company knew the facts of the transaction of which the deeds were a part and the appellant was charged with knowledge of facts which put him on inquiry and if pursued would have informed the trustee of the facts upon which appellees rely in this case for the relief they seek. Appellant would have appellees placed in a disadvantageous position in the litigation because they did not have the letter of May 21, 1940, filed for record and recorded with the deeds they gave to O. F. Neal for the benefit of the company. This was the duty of O. F. Neal and the company before any benefit from the recording of the deeds could be derived by either of them. § 76-251, R. R. S. 1943. It has been determined that appellant when he took a deed of the land from the company had notice of the facts. The established omission of appellees is that they delayed taking action in court to have adjudicated the facts of the transaction of which all other parties concerned had knowledge or notice. The circumstances of the case do

not permit a denial of relief to appellees on the basis of their alleged laches. The defense of laches is an equitable one and to prevail the lapse of time and the relation of the defendant must be such that it is inequitable to permit plaintiff to have the relief he seeks. The defense is untenable to defeat an equity cause if there has been no material change in the position of the defendant. Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921. The defense of laches is not a favored one and it will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary. Langdon v. Langdon, 104 Neb. 619, 178 N. W. 178. The question of laches is decided on the circumstances of each case. Harrison v. Rice, on rehearing, 78 Neb. 659, 114 N. W. 151; Schurman v. Pegau, *supra*.

Appellant asserts that he acquired all the rights of the company by virtue of the conveyance by it to the original trustee and the conveyance from him to appellant and that in deciding the amount appellees must pay as a condition of their redemption of the land there must be included therein the amount of the unpaid indebtedness represented by the notes secured by the mortgages given by appellees to the company. The record shows that this indebtedness was on May 1, 1942, the sum of $24,000 and that no part thereof has since been paid except the amount of the net income from the land. The appellees insist that appellant may recover only the amount paid by the trustee to the company for its conveyance of all its interest in the land with interest thereon at 6 percent per annum less the amount of the net income from the land. The amount the trustee paid the company was $15,400.

The argument of appellees is that appellant has not attempted to establish that he was a purchaser of the indebtedness owing the company and evidenced by the notes and secured by the mortgages given it by appellees; that the company contracted to sell and convey to the

trustee only the right, title, and interest the company had in the land; that the deed of the company to the trustee recites that the land was free of encumbrance; that the company released the mortgages of record and the releases state that the indebtedness secured by the mortgages had been paid; that the record is silent as to any intention of the company to sell or the trustee to buy the indebtedness; that the notes or mortgages were not transferred, assigned, or delivered to the trustee; and that the trustee makes the claim that it is probable that the notes were surrendered by the company to appellees though the proof is that it is not known what disposition the company made of them. Appellees conclude that appellant, who is in legal effect a mortgagee in possession of the land, may not recover more than the amount the trustee paid the company with legal interest less the net income from the land.

The trustee became the equitable owner of the indebtedness evidenced by the notes and secured by the mortgages given by appellees by virtue of the deed from the company to the trustee. The deed by its terms conveyed all the interest the company had in and to the land to the trustee. Section 76-104, R. R. S. 1943, declares: "An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested." This court said in an early case, Eiseley v. Spooner, 23 Neb. 470, 36 N. W. 659, 8 Am. S. R. 128: "Every conveyance of real estate passes all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." See, also, National Bank of Commerce v. Lefferdink, 110 Neb. 275, 193 N. W. 916.

In Currier v. Teske, 82 Neb. 315, 117 N. W. 712, the facts were that Campbell was a mortgagee of land owned by Currier. The mortgage was foreclosed and Campbell was the successful bidder for the land at the sale. The foreclosure sale to Campbell was confirmed but the

sheriff made a deed to Herman Schmideke and he took possession of the land. This was done by virtue of an arrangement between Schmideke and Campbell which did not appear of record. There was no assignment of the bid of Campbell to Schmideke. The record showed no fact that entitled Schmideke to have the deed made by the sheriff. An heir of the mortgagor brought ejectment to recover the land and the possession thereof from the successors of Herman Schmideke. It was claimed the foreclosure proceedings were ineffective because the plaintiff in the ejectment suit had succeeded to the title of the premises but he was not a party to the foreclosure proceedings. The court concluded: "The net result of the foreclosure proceeding was that Schmideke paid and Campbell received the full amount of the mortgage, and in equity Schmideke would become the owner of the Campbell mortgage. His position, therefore, after he had obtained possession of the land, was that of an equitable mortgagee in possession." The rehearing reported in 84 Neb. 60, 120 N. W. 1015, 133 Am. S. R. 602, concerns matters not referred to in the foregoing.

Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524, was brought by Leavitt to secure foreclosure of liens evidenced by tax sales certificates. The certificates were purchased by and were issued to Leavitt who during the pendency of the action by quit claim deed transferred his interest in the real estate by virtue of his tax sales certificates to Byron R. Hastings. He subsequently transferred his interest by quit claim deed to George D. Cook. He filed a supplemental petition alleging that he had purchased the tax sales certificates for all the liens on the real estate by virtue of the certificates including taxes subsequently paid. A decree was rendered in favor of George D. Cook. The court said: "We think, therefore, that Cook had the equitable title to the Leavitt certificates of tax sales and as such equitable owner he might maintain this action." See, also, First State Bank of

Herrick v. Conant, 117 Neb. 562, 221 N. W. 691; Criswell v. McKnight, 120 Neb. 317, 232 N. W. 586, 84 A. L. R. 1361; Cather v. Damerell, 5 Neb. (Unoff.) 175, 97 N. W. 623; McLean v. McCormick, 4 Neb. (Unoff.) 187, 93 N. W. 697; Ford v. Axelson, 74 Neb. 92, 103 N. W. 1039.

When it is established that a deed, absolute in form, was intended as a mortgage the relative rights of the parties is determined by the law governing the relation of mortgagor and mortgagee. § 76-251, R. R. S. 1943; Snoke v. Beach, *supra;* Doran v. Farmers State Bank, *supra;* Ashbrook v. Briner, *supra;* State Reserve Bank v. Groves, 125 Kan. 661, 266 P. 42; 59 C. J. S., Mortgages, § 57, p. 97.

The right of redemption is an inherent and essential characteristic of a mortgage, though not expressed therein, and whatever the form of a transaction it is, if intended as security for money, a mortgage to which the right of redemption attaches. The grantor in a deed intended as security for a debt, as in the instance of an ordinary mortgagor, has a right to redeem by paying the amount intended to be secured and may claim the right at any time before it is barred. Snoke v. Beach, *supra;* Sedlak v. Duda, *supra;* Northwestern State Bank v. Hanks, *supra;* Ashbrook v. Briner, *supra;* Brown v. Hermance, 233 Iowa 510, 10 N. W. 2d 66; Barr v. Granahan, 255 Wis. 192, 38 N. W. 2d 705, 10 A. L. R. 2d 227. A grantor asking the aid of equity to declare a deed, absolute in form, to be a mortgage, is subject to the rule that he who seeks equity must do equity and accordingly he must honor the obligations that would be imposed upon him as a mortgagor. The grantee of a deed adjudged to be for security only and in fact a mortgage may, by a deed to another, transfer such interest as he has. If an absolute conveyance is intended as a mortgage it will retain its character in the hands of each subsequent purchaser who takes the property with notice of the rights of the parties. In any event, however, the

grantee of one to whom an absolute deed has been given as security for a debt, even if he took with notice, is a mortgagee whose interest may not be divested without discharging the mortgage. In Northwestern State Bank v. Hanks, *supra,* the court said: "It is equally well settled that if an instrument executed by parties is intended by them as security for a debt, whatever may be its form, or whatever name the parties choose to give it, it is, in equity, a mortgage. * * * Where the mortgagor avails himself of the right of redemption under a mortgage with the defeasance clause, the only thing required of him to do is to pay the debt." See, also, Swinson v. Sodaman, 300 Ill. App. 31, 20 N. E. 2d 623; Handrub v. Griffin, 127 Kan. 732, 275 P. 196; Robbins v. Blanc, 105 Fla. 625, 142 So. 223; 59 C. J. S., Mortgages, § 67, p. 107; 3 Wiltsie on Mortgage Foreclosure (5th Ed.), § 1217, p. 1836.

It has long been recognized in this jurisdiction that though proceedings had to foreclose a valid mortgage on real estate are void the mortgagor may not attack the title acquired through the foreclosure proceedings unless he offers to pay the amount of the indebtedness secured by the mortgage as found by the decree of foreclosure. It is said in McCabe v. Equitable Land Co., 88 Neb. 453, 129 N. W. 1018: "If a valid real estate mortgage has been foreclosed, even though the proceedings are void, the mortgagor will not be heard to question the title acquired thereby unless he pays or tenders the amount of the debt and interest."

Currier v. Teske, 93 Neb. 7, 139 N. W. 622, made reference to McCabe v. Equitable Land Co., *supra,* and other similar decisions and commented as follows: "The extent to which these cases go is that the foreclosure, though void * * * operates as an assignment of the mortgage foreclosed, and that the mortgagor cannot question the regularity of the decree as to one in possession under such foreclosure, without attempting to redeem."

The validity and effectiveness of the instruments ex-

ecuted by appellees have not been put in issue. The indebtedness they were incident to has not been wholly satisfied. It is inescapable that appellees must pay to or for the benefit of appellant the indebtedness with interest represented by the notes they gave the company less the net amount of income from the land and any interest legally due thereon as a condition of enlisting the benefit of equity to accomplish a redemption of the land.

Appellees remained in possession of the land and leased it for the crop years 1940 and 1941. The company advised appellees by letter dated April 28, 1942, that it had rented the land for 1942 as shown by leases prepared and negotiated by it and that it would collect all future rental for the land. The company did not consult appellees concerning this and did not have their consent for the company to take possession of the land, lease it, and collect the rentals from it. The acts of the company in this respect were thereafter until it conveyed its interest therein to the trustee without authority of law and were hostile to appellees. Likewise the acts of the trustee relative to the land after the conveyance to him were wrongful and hostile to appellees. The deeds from them to the company were accompanied by defeasance in writing. These were mortgages and the grantors had and retained all the rights of mortgagors. The legal title to the land did not pass to the company. It had only liens thereon. The assignment made by appellees on leases to the company was of the rental only. Ashbrook v. Briner, *supra;* Northwestern State Bank v. Hanks, *supra;* Higginbottom v. Benson, 24 Neb. 461, 39 N. W. 418, 8 Am. S. R. 211.

The original trustee constructed what he characterized as "a nice chicken house" on the land at a cost of $747.23. He also built a new hog house and outdoor toilet on the land at a cost of $329.69, and a corn crib and granary at a cost of $1,238.50. It is true that some used material was utilized in the construction of the corn crib but in

fact these were new, permanent improvements on the land and they were not in any proper view repairs. The successor trustee expended for work done on the land in October 1950 for what was intended to be a drainage system the sum of $1,795.50. This was after the trustee had knowledge that appellees claimed a right to redeem the land and that they were seeking an accounting of the income from it. The trustee did not consult with appellees concerning the work proposed to be done or the expense of it. There was also an expenditure by the trustee of $480.52 for similar work done on the land in the fall of 1949 and the spring of 1950. The trustee claimed compensation for overseeing the land from May 1, 1942, to December 1, 1954, in the sum of $2,780.76. There was included in the accounting had to determine what appellees should pay to appellant to redeem the land an item of $662.51 of interest on interest. The trial court permitted a deduction of each of the above seven items from the gross income of the land for which appellant was required to account. The action of the court in this regard is the subject of the cross-appeal of appellees in this case.

It has been concluded from what is said above that appellant or his predecessor in trust was not an innocent purchaser of the land. They each acted with notice of the facts. The improvements constructed on the land were not made under any pretense or claim that the trustee as mortgagee in possession was exercising his right to preserve the estate from deterioration. He was stoutly denying the right of appellees therein and asserting an absolute title to the land in the trustee. The mortgage agreement was repudiated and a claim of ownership of the land in fee was made adverse to appellees. The company took possession and dominion of the land without legal right in 1942 and in June 1950 when appellees requested an accounting of the income therefrom and suggested that they could probably pay the balance due the company expressed surprise and advised appellees

that their right in the land expired March 1, 1942, and that they had no rights in it or the income therefrom. Appellant about a month later informed appellees that there was nothing to negotiate about and that it was the position of the trustee that appellees had no right, title, or interest in the land that they conveyed to the company by deeds in 1940. Appellant makes that identical contention in this appeal. The possession of the company and the possession of the trustee and all that was done on the land or concerning it by them were acts hostile to the title of appellees. Appellees are not required in this action upon any principle of law or equity to account to appellant for the cost or value of the improvements made on the land. These under the circumstances of this case were made by the trustee to enhance, as he thought, the value of the land which he maintained was owned in fee by the trust. He abandoned buildings on the land and constructed new ones. He undertook to build and maintain an expensive drainage and flood protection system as advised by the soil conservation agency after the trustee had knowledge of the claims of appellees and their desire to redeem the land without advising or consulting with them except to tell them they had lost their interest in the land. Appellant speaks of what was done on the land as repairs. If they may be considered in any sense as repairs they are of that extraordinary and extensive kind not contemplated by the law within the rule that a mortgagee in possession may generally make ordinary repairs to preserve the estate. There is substantial unanimity of the authorities that a mortgagee who takes possession of realty without foreclosure is not entitled to any reimbursement for permanent improvements made by him. Such a mortgagee occupies the land of another and he has no more authority to dictate improvements to the owner after taking possession than he had before. If a mortgagee is not satisfied with the situation he may foreclose his mortgage and sell the property. He may not

by making improvements render it more difficult or impossible for the mortgagor to redeem. In White v. Atlas Lumber Co., 49 Neb. 82, 68 N. W. 359, this court said: "A mortgagee of real estate in possession before foreclosure, in the absence of an express or implied agreement upon the subject, is not entitled to any credit for permanent improvements made by himself, but he is liable for the net rents and profits which he has received, or which he might have received by the exercise of reasonable care." See, also, Sedlak v. Duda, *supra;* Cram v. Cotrell, 48 Neb. 646, 67 N. W. 452, 58 Am. S. R. 714; Jones v. Dutch, 3 Neb. (Unoff.) 673, 92 N. W. 735; Kinkead v. Peet, 153 Iowa 199, 132 N. W. 1095; Caro v. Wollenberg, 83 Or. 311, 163 P. 94; 3 Wiltsie on Mortgage Foreclosure (5th Ed.), § 1234, p. 1854.

Appellant with some reservation concedes that the original trustee and the successor trustee "* * * probably were in the status of mortgagees in possession * * *." A mortgagee in possession but who claims ownership hostile to the mortgagor is not entitled in an accounting for rents and profits from the land to credit for compensation for services rendered by him in managing or supervising the real estate encumbered by the mortgage. Any such services rendered must be considered as having been done for the benefit of the mortgagee. It is stated in Caro v. Wollenberg, *supra*, that: "While the mortgagee is in possession of mortgaged realty his attentions to the matter are in his own interest, and he cannot collect pay for services rendered for himself." The foregoing is approved in Murray v. Wiley, 180 Or. 257, 176 P. 2d 243, 170 A. L. R. 169, by this language: "Mortgagees in possession, on accounting to mortgagor who exercised his right of redemption, were not entitled to credit for compensation paid to one of mortgagees for managing the mortgaged property." See, also, Investors Syndicate v. Smith, 105 F. 2d 611; 2 Jones, Mortgages (8th Ed.), § 1449, p. 940; 36 Am. Jur., Mortgages, § 314, p. 846.

The accounting had in the trial court included interest on unpaid interest or compound interest in the amount above stated. This was incorrect. In the accounting there should not be any interest charged upon interest. Sedlak v. Duda, *supra*.

In determining the amount appellees should be required to pay to redeem the land the trial court was in error in the respects above stated. The amount of each of the seven items discussed in the foregoing should be eliminated and appellant should not have the benefit of any of them.

The judgment rendered February 3, 1953, should be and it is affirmed. The judgment rendered April 19, 1955, should be and it is reversed and the cause is remanded for further proceedings in harmony with this opinion.

The costs incurred by appellant on this appeal should be and they are taxed to him. The costs incurred by appellees on their appeal should be and they are taxed to them.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

IN RE APPLICATION OF THE CITY OF LINCOLN, NEBRASKA. CITY OF LINCOLN, NEBRASKA, APPELLANT, V. ANNA I. MARSHALL ET AL., APPELLEES.
74 N. W. 2d 470

Filed January 27, 1956. No. 33862.

1. **Eminent Domain.** The jury, in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.
2. ———. Where a part of a tract of land is taken for a public purpose, the fact that the remainder may thereafter be sub-

jected to assessment for public improvements does not constitute an element of damage in condemnation proceedings.

3. ———. Evidence of the price at which other similar lands in the locality have been sold is admissible in evidence on the question of damages in a condemnation proceeding as a part of the case in chief, where a sufficient foundation has been laid therefor.

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

Jack M. Pace and *Wayne R. Douce,* for appellant.

Max Kier, for appellees.

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

CARTER, J.

This is an action by the city of Lincoln to condemn and acquire by eminent domain a tract of land belonging to the defendant, Anna I. Marshall, for a public street. The verdict and judgment of the district court was for the defendant in the amount of $6,000. The city of Lincoln appeals.

The only issue before the trial court was the amount of damages sustained by the defendant as a result of the condemnation of the land for the purpose for which it was taken. The plaintiff alleges that the verdict and judgment is excessive as a result of errors committed by the trial court. The plaintiff has assigned three specific errors: (1) In permitting the introduction of evidence and in instructing the jury to consider future special assessments to be assessed against the property not taken, as an element of damages; (2) in refusing to permit plaintiff to lay a proper foundation for and make proof of sales of similar land to aid the jury in fixing the damages; and (3) in copying into the instructions material allegations of the pleadings which were unsupported by evidence.

The purpose of the taking was to complete the opening of Fiftieth Street in the city of Lincoln between O

and L Streets to a width of 60 feet. The land involved is specifically described in the petition. For the purposes of this appeal it will be described as a tract 240 feet wide fronting on O Street and 315.2 feet long extending south to N Street. The land taken is the west 30 feet of this tract, it now being the east 30 feet of Fiftieth Street between O and N Streets. The defendant William D. McClellan was made a party because he was in possession of the property as lessee. It appears, however, that he has assigned all his right, title, and interest in the property to the defendant Anna I. Marshall, and he has, therefore, no interest in the litigation. We shall hereafter refer to Anna I. Marshall as the defendant.

With respect to the first assignment of error, defendant alleged that the property not taken would be damaged by reason of the severance therefrom of the property taken "and this defendant will also be subjected to special assessments for paving, water and sewer in 50th Street, none of which improvements are required or could be assessed except for the taking of defendant's property for the opening of 50th Street." The plaintiff moved to strike the quoted portion of the answer, which motion was overruled by the trial court. Over objection, the defendant offered evidence that the property of the defendant not taken would be assessed approximately $2,420 for paving and $735 for water mains. The court submitted this evidence for the jury's consideration in fixing the amount of defendant's damages. The city consistently contended throughout the trial that this was error.

The record shows that the taking occurred on June 5, 1954. The damages must be assessed as of that date. Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. The applicable rule is: "The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account

every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." Schulz v. Central Nebraska Public Power & Irr. Dist., 138 Neb. 529, 293 N. W. 409. See, also, Rath v. Sanitary Dist. No. 1, 156 Neb. 444, 56 N. W. 2d 741.

The general rule is that where a part of a tract of land is taken for a public use, the mere fact that the remainder may thereafter be subject to assessment does not constitute an element of damages in condemnation proceedings. 29 C. J. S., Eminent Domain, § 172, p. 1042; 18 Am. Jur., Eminent Domain, § 279, p. 918. The reason for this rule is that the damages are to be assessed as of the date of the taking. The question of whether or not the street should be improved by grading, paving, or otherwise, was a question wholly unrelated to whether or not the land should be taken and used by the city as a street. Proceedings to pave the street or to construct water mains thereon are necessarily separate and apart from the condemnation proceeding. Compensation for the taking or damaging of private property for a public use is to be ascertained and paid in full without regard to special assessments for benefits growing out of improvements that may be made in the future. City of Tulsa v. Horwitz, 151 Okl. 201, 3 P. 2d 841; Gaylord v. City of Bridgeport, 90 Conn. 235, 96 A. 936; Wayland v. City of Seattle, 96 Wash. 344, 165 P. 113; City of Detroit v. Beecher, 75 Mich. 454, 42 N. W. 986, 4 L. R. A. 813. The reasoning supporting the rule is well stated in the earlier Washington case of In re Harrison Street, 74 Wash. 187, 133 P. 8, wherein it is said: "In determining the damages to be paid when the city proposes to change the grade of the street under its right of eminent domain, the purpose of the inquiry is to ascertain the cost or damage to the owner to accommodate his property to the changed situation, irrespective of the power vested in the city to levy an

assessment against the property because of the benefits flowing from the improvement. Under the provisions of our constitution, the city cannot confer that benefit upon the property until it first ascertains and pays the damages suffered by the property. In other words, before the owner can fully avail himself of the benefit to his property, he will be put to certain expense in adapting his property to the changed condition which is in law a damage. This damage the city must pay him before it can confer the benefit upon him. Having fully compensated the owner for the damage he must suffer in availing himself of the benefit conferred upon him, the city has the right to collect the assessment representing that benefit. To accept appellant's contention would make the city pay both the damage and the benefit, which cannot be supported under any theory of law. The owner must pay for his benefit by way of assessment upon his property, and the city must pay the damage caused the owner in conferring that benefit."

We point out that the city must appropriate and pay for the land before it can make public improvements thereon. Special assessments thereafter made cannot be assessed in excess of the benefit accruing to the remaining property. To permit a recovery for such future assessments as a part of the damages for the taking is to permit a recovery of a benefit and not a damage. The assessment of benefits for future public improvements is a separate proceeding from the condemnation of the land for a public purpose and has no relation thereto. The benefits represented by the special assessments must be paid by the condemnee in the same manner and in the same proportion as other property owners benefited by the improvement. To permit their recovery as a part of the damages in the condemnation proceeding would in effect constitute a payment of the benefits by the city and not the property owner as the law requires. The condemnee would thereby be favored by escaping the payment for benefits which other property

owners, benefited by the improvement, are required to pay. Such a discrimination in favor of a condemnee has no standing in law.

The defendant relies upon a number of decisions from other jurisdictions, including Sterner v. Nixon, 116 N. J. L. 418, 185 A. 48; Reyenthaler v. Philadelphia, 160 Pa. 195, 28 A. 840; City of Chicago v. Koff, 341 Ill. 520, 173 N. E. 666; Old South Association v. City of Boston, 212 Mass. 299, 99 N. E. 235; Schuler v. Board of Supervisors of Lincoln Township, 12 S. D. 460, 81 N. W. 890; and Philadelphia v. Crew-Levick Co., 278 Pa. 218, 122 A. 300. An examination of these cases reveals that they are either not in point on their facts or that they do not deal with the precise point we have before us in the present case. To the extent any of them may appear to support a rule contrary to the one we have herein announced, they are not persuasive. The rulings of the trial court on this subject were clearly prejudicial to the rights of the city.

As to the second assignment of error, the record discloses that the city attempted to show sales of similar land in the vicinity as an aid to the jury in fixing the damages. Objections to this evidence were sustained by the trial court for the reason that similar sales could be used only on cross-examination and that they could not be properly used in the city's testimony in chief.

The applicable rule is: "In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation and that the land so sold was substantially similar in location and quality to that condemned." Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201. See, also, Papke v. City of Omaha, 152 Neb. 491, 41 N. W. 2d 751; Lynn v. City of Omaha, 153 Neb. 193, 43 N. W.

2d 527. It is plainly stated in the Langdon case that the applicable rule does not exclude testimony in chief as to the sale of other lands where proper and sufficient foundation has been laid to make such testimony of value. We think the trial court was in error in refusing to permit the city to lay a foundation for the admission of evidence of other similar sales of land in the locality, and erred further in refusing to admit such evidence where a proper foundation had been laid therefor.

The third assignment of error is that the trial court erred in copying into the instructions portions of the allegations of the pleadings upon which no evidence was offered. This is based upon the inclusion of an allegation in instruction No. 2 that defendant would be subjected to special assessments for paving, water, and sewer in Fiftieth Street when the evidence shows that no sewer would be constructed therein. We do not deem it necessary to determine whether or not prejudicial error was contained in this instruction in view of our holding herein that the allegations with regard to special assessments were wholly improper. Since a retrial of the case is required and the purported issue will be wholly removed, it is an academic matter under the present state of the record.

For the reasons herein stated, the judgment of the district court is reversed and the cause of action remanded for a new trial.

REVERSED AND REMANDED.

IN RE APPLICATION OF DALE WILLIAMS FOR A WRIT OF HABEAS CORPUS.

DALE WILLIAMS, APPELLANT, V. IRA A. WILLIAMS ET AL., APPELLEES.

74 N. W. 2d 543

Filed January 27, 1956. No. 33894.

1. **Habeas Corpus: Infants.** Where the custody of a minor child

is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.

2. **Parent and Child.** 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.

3. ———. The natural rights of a parent to the custody of his child are not absolute. They must yield to the best interests of the child where the preferential right has been forfeited.

4. ———. Where a parent commits an infant child to the care and custody of others who properly care for the child in a suitable home for many years without compensation, and thereby permits strong mutual attachments to develop, the parent forfeits his natural right to its custody. The controlling consideration in a subsequent proceeding by the father to regain its custody is the welfare and best interests of the child.

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

Stevens & Scott, for appellant.

Russell & Colfer, for appellees.

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

CARTER, J.

In this case the relator, Dale Williams, seeks the custody of his 8-year-old son, Dale Ira Williams, by habeas corpus. The trial court denied relator's application for the custody of the child and relator appeals.

The record discloses that Dale Ira Williams was born on April 2, 1947. His mother died approximately 4 hours after his birth. On the same day the child was placed under the care and custody of the respondents, Ira A. Williams and Matilda Williams, the paternal grandparents of the child, where it has remained until this action was filed on June 1, 1955. The relator, Dale Williams, is 33 years of age and a resident of Aurora, Colorado, where he is gainfully employed. On December

26, 1948, he remarried. The question of the fitness of either the father or the grandparents to have the custody of the child was not made an issue in the case. The relator asserts his rights as the natural guardian of his child. He states that he has a suitable home; that he has remarried and can properly care for the child; and that his present wife will give the child the care necessary to its continued welfare.

The respondents reside on a farm near Indianola, Nebraska. They are each 60 years of age. They have adequate financial resources to properly care for the child. The family includes a 16-year-old daughter who resides at home. The evidence shows that they have a suitable home in which to maintain the child. They have transported the boy to and from country school, where he has done well. Each of the respondents testify that the child has been contented while staying with them and has evidenced a desire to remain with them. They testify that they have become attached to the child as if he were their own and express their opinion that the best interests of the child require that he remain with them. There is evidence in the record that the child has visited his father in Colorado but has an aversion to living there. The grandparents express a willingness to continue to care for the boy as they have done during the 8 years he has been with them. No complaint is made that the child has not been properly cared for during the time he has been with them.

The evidence shows that the father has visited the child from time to time since the grandparents have had his custody. The father has made some contributions to the support of the child but the grandparents have provided the major portion of the cost of the child's support. The father never sought the custody of the child until a few months prior to the commencement of this litigation. There is evidence of difficulties between the father and the grandparents, which arose shortly before this action was commenced. There is evidence

that the child became emotionally upset because of the father's attitude and the desire of the child to remain with his grandparents. There is no evidence in the record concerning the attitude of relator's second wife toward the boy, although the relator states that it would be agreeable with her. It cannot be determined, without disregarding the evidence, that the relator and his wife, or the grandparents, are unfit to have the custody of the child. The decision must therefore rest on other considerations.

The general rules governing the custody of minor children are well settled in this state. They have been stated to be: Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. 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, 158 Neb. 116, 62 N. W. 2d 525; Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151; Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579; State ex rel. Hamilton v. Boiler, 159 Neb. 458, 67 N. W. 2d 426. Since there is no evidence of the father's unfitness to have the custody of his child, the only question for determination is whether or not he has forfeited his preferential right to the child's custody.

The record in this case shows that the respondents have cared for this little boy from the day of his birth with the full consent and approval of the father. For 8 years the grandparents have raised and educated the boy as if he were their own, without any reasonable compensation. The grandparents testify to their attachment for this child which has naturally come about through the willingness of the father that they should assume the responsibility for his care and training. The only home the child has known since his birth has been that

of the grandparents. The little boy has been happy and contented in the home of the grandparents. They have been parents to the child for all intents and purposes. A court may well hesitate to take the child away from such surroundings to try an experiment elsewhere. The father will not be deprived of his right to visit the child at the home of the grandparents. But we are convinced from this record that if the boy is taken from his present surroundings, the severance of the relationship he has had for all 8 years of his young life will be to the detriment of his welfare. The indifference of the father for the child's welfare for almost 8 years and his willingness that others should assume the obligations of parents in his stead, with the development of the ties and affections that naturally flow therefrom, leads us to the conclusion that the father has forfeited his natural right as a parent to uproot and destroy the close relationship between the child and the grandparents which he permitted to come into existence with his full approval and consent.

While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent, where it has formed a natural attachment for persons who have long stood in the relation of parents with the parents' approval and consent. This has long been the rule in this state. Sturtevant v. State ex rel. Havens, 15 Neb. 459, 19 N. W. 617, 48 Am. R. 349; State ex rel. Thompson v. Porter, 78 Neb. 811, 112 N. W. 286; In re Burdick, 91 Neb. 639, 136 N. W. 988, 40 L. R. A. N. S. 887; Gorsuch v. Gorsuch, 148 Neb. 122, 26 N. W. 2d 598.

We quite agree that the natural right of a parent to the custody of his child is not lightly to be denied. But where it appears, as here, that the father abandoned the care of his child to his parents for 8 years beginning from the day of its birth, with his full approval

and consent, he has forfeited his natural right to the child's custody. The best interests of the child require that he remain in the custody of the respondents who have occupied the relation of parents throughout the 8 years of the child's life and whose home has been the only home the child has ever known. The trial judge who heard the evidence and saw the witnesses came to the same conclusion. We find no reason to question the conclusions reached by the trial court, or to disturb the judgment entered.

AFFIRMED.

ANEITA F. RUEHLE, APPELLANT, V. EDWARD W. RUEHLE ET AL., APPELLEES.
74 N. W. 2d 689

Filed February 3, 1956. No. 33629.

1. **Divorce.** Section 42-312, R. R. S. 1943, specifically provides that the court in a divorce action retains jurisdiction of the subject matter and the parties for the enforcement or modification of a judgment for maintenance of children, and prescribes the method by which a decree for child support may be modified.
2. ———. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments.
3. **Accord and Satisfaction.** An accord and satisfaction is predicated upon an agreement between the parties based upon a consideration and fully executed on the part of the defendant, whereby the plaintiff's cause of action is satisfied or discharged.
4. **Divorce.** A proceeding in a divorce case with reference to an adjudication of child support is a continuation of the divorce suit and one of its incidents, and an attorney's fee for services rendered in this court may be allowed and taxed as costs.

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

Charles Ledwith, for appellant.

Towle, Young & Scheaff and *Thomas J. McManus,* for *appellees.*

Heard before SIMMONS, C. J., CARTER, YEAGER, WENKE, and BOSLAUGH, JJ., and KOKJER, District Judge.

MESSMORE, J.

This is an action brought in the district court for Lancaster County by Edward W. Ruehle, the defendant in a divorce action brought by Aneita F. Ruehle, plaintiff therein, for the purpose of obtaining a judgment for child support rendered against him in the divorce action adjudged satisfied and released of record. The plaintiff in the divorce action, by cross-petition in the instant case, prayed for an accounting and that a lien be created on certain real estate held in the name of the defendant Grace Ruehle, the present wife of Edward W. Ruehle, for amounts payable as child support.

The record discloses that Aneita F. Ruehle obtained a decree of divorce from Edward W. Ruehle on May 18, 1939, and was awarded custody of their daughter Jo Ann, then 8 years of age, until further order of the court, and the sum of $40 a month for child support to be paid to the clerk of the district court for Lancaster County on the first day of each month to be delivered to Aneita F. Ruehle upon her receipt therefor. On November 29, 1939, the husband, Edward W. Ruehle, filed a supplemental petition for modification of the original decree of divorce with reference to child support. To this petition Aneita F. Ruehle filed an answer and cross-petition requesting an increase in child support to $75 a month. A decree was entered by the trial court on February 15, 1940, finding that the defendant Edward W. Ruehle should pay child support in the amount of $50 a month commencing March 1, 1940, payable to the clerk of the district court until further order of the court.

By stipulation of the parties filed November 30, 1940, it appears that there were delinquent child support payments in the amount of $229.84 for which Aneita F. Ruehle agreed to accept $104.92 in full payment. In addition, the defendant was to pay costs in the amount of $38.79 and attorney's fees in the amount of $63, and the amount of $15 on the first day of December 1940 and on the 15th day of December 1940, and on the same dates each month thereafter. In consideration of such payments, Aneita F. Ruehle was not to issue execution, garnishment, or other process against the defendant Edward W. Ruehle as long as the payments continued. On March 1, 1941, if all the payments had been promptly paid, Aneita F. Ruehle was to release her judgment for child support for the amounts accrued, and in the event payments were continued then at the expiration of each 3 months thereafter. The stipulation provided further that in the event Edward W. Ruehle failed to make any payments as therein provided, the plaintiff Aneita F. Ruehle, at her election, might terminate the agreement forthwith and take such steps as she desired to collect child support in the amount of $50 a month for such period of time as she had last receipted for in full. The stipulation provided further: "It is not the intention of the parties to modify the decree of this court as it now stands, but that said decree shall remain in full force and effect, subject, however to this agreement between the parties." The stipulation was dated November 28, 1940.

On January 8, 1953, the defendant Edward W. Ruehle filed a petition in the district court. This petition was later amended. We make reference to the amended petition containing the following allegations in substance. The petition set forth the date of the decree of divorce, the awarding of custody of the minor child, child support and the manner in which the same should be paid, and alleged that the child support payments were made directly to Aneita F. Ruehle or to the clerk of

the district court until September 1948, at which time Edward W. Ruehle had an oral conference with Aneita F. Ruehle about sending their daughter to Wesleyan University; that it was orally agreed by and between Aneita F. Ruehle and Edward W. Ruehle that in lieu of child support payments the defendant Edward W. Ruehle would pay all of the expenses of the daughter while she attended Wesleyan University; that Edward W. Ruehle did assume and pay such expenses which were far in excess of the monthly child support payments; that such payments were in lieu of child support payments; and that he paid all the tuition, board and room, and other expenses of their daughter Jo Ann from October 1948 until August 17, 1949. The amended petition further alleged that on or about August 1, 1949, the daughter Jo Ann decided to enter nurses training at Bryan Memorial Hospital, and it was agreed by and between Aneita F. Ruehle and Edward W. Ruehle that the latter would pay the entry expense of $100 and any additional expenses in connection with Jo Ann's training in lieu of child support that should have been paid to the clerk of the district court; that it was the understanding and belief of Edward W. Ruehle that Aneita F. Ruehle would accept the aforesaid payments at Wesleyan University and Bryan Memorial Hospital and all expenses of the daughter in connection therewith as full payment of child support as it became due, and that Aneita F. Ruehle would release and discharge Edward W. Ruehle and the judgment against him; that Jo Ann, the daughter of the parties, attained her majority on August 17, 1951; and that Edward W. Ruehle relied on the oral agreement with Aneita F. Ruehle and made all the payments as provided for by the oral agreement believing that Aneita F. Ruehle would credit him with such payments and release the judgment for child support against him, which Aneita F. Ruehle failed and refused to do.

The answer of Aneita F. Ruehle to the amended petition denied that Edward F. Ruehle ever made any child

support payments directly to her other than to the clerk of the district court with her consent; denied the oral agreement as pleaded in the amended petition; and admitted that on August 1, 1949, Jo Ann decided to enter nurses training at Bryan Memorial Hospital, and that on August 17, 1951, Jo Ann reached her majority and became self-supporting.

In the cross-petition Aneita F. Ruehle set forth the modification of the decree as heretofore mentioned, and the stipulation, and pleaded that she never released her judgment for child support on March 1, 1941, or any other date; that the stipulation was void and of no effect; pleaded the installments of child support and interest thereon due; that the legal relations of the parties had been affected by a conveyance of real estate to the present wife of Edward W. Ruehle dated June 8, 1951; that the construction of the deed was necessary to determine the rights of the parties; that an actual controversy existed and justiciable issues were presented, and a declaratory judgment on the issues would terminate the controversy; pleaded the purchase price of the property paid by Edward W. Ruehle, the mortgage thereon, and other facts with reference thereto; that a trust was created; and that Aneita F. Ruehle was without an adequate remedy at law. The prayer was for dismissal of Edward W. Ruehle's amended petition and for an accounting, interest, and a declaration of the rights and status and other legal relations of the parties as affected by the conveyance to Edward W. Ruehle's present wife of the real estate as described in the cross-petition, and to declare and adjudge that a trust of such real estate had resulted and was subject to a lien.

The trial court entered a decree on April 21, 1954, finding that the stipulation entered into between the parties on November 28, 1940, suspended the right to enforce the judgment as long as there was no breach of the agreement; that the oral agreement between Edward W. Ruehle and Aneita F. Ruehle that said defendant

Edward W. Ruehle, in lieu of payments to the clerk of the district court for child support, would take over the cost of providing an education for the daughter Jo Ann Ruehle was supported by ample consideration, and that there was complete accord and satisfaction; that Edward W. Ruehle was entitled to a release and satisfaction of the judgment for child support; and that the cause of action against the present wife of Edward W. Ruehle be dismissed.

Aneita F. Ruehle, the plaintiff, filed a motion for new trial which was overruled. Thereafter she perfected appeal to this court.

Edward W. Ruehle testified that he made payments to the clerk of the district court which approximated $15 each 2 weeks from December 1, 1940, to June 1949; that the daughter Jo Ann lived with her mother; that in the fall of 1948 Jo Ann changed her residence by entering Wesleyan University and moving onto the campus in Johnson Hall, girls' dormitory at University Place, on November 17, 1948, and from that time on did not live with her mother; that on October 12, 1948, prior to the time Jo Ann entered Wesleyan University, he had a conversation with Jo Ann and her mother relative to Jo Ann moving from the mother's home to the school; that school had started at that time; that in the conversation had with Aneita F. Ruehle he asked her if Jo Ann had talked to her about going to Wesleyan to live in Johnson Hall, to which she replied that Jo Ann had; that he then asked her if it was agreeable for Jo Ann to move out, and received a reply that if it was Jo Ann's wish it was agreeable; and that he then asked her if Jo Ann had discussed the release of child support payments since he could not afford to pay child support in addition to paying all the expenses while Jo Ann attended the university and she replied that Jo Ann had. He further testified that he paid all of Jo Ann's expenses, tuition, board, room, sorority dues, and other items of expense, and the agreement was that he was to continue to pay

child support payments into the district court until such time as it was determined whether or not Jo Ann would continue in school and be successful in her endeavors; that he paid the expenses of Jo Ann at the university and also $30 a month to the clerk of the district court until June 1949, with the understanding that Aneita F. Ruehle was to return the money paid into the clerk's office during such period of time that Jo Ann attended the university; and that Aneita F. Ruehle returned the payments in cash by giving the same to Jo Ann with instructions to return the money to her father. He further testified that in 1949 he stopped this method of making the payments upon the suggestion of Aneita F. Ruehle that it was a nuisance. During the summer of 1947 and 1948 Jo Ann worked at the Lincoln General Hospital as a nurses aid. In the fall of 1949 she entered Bryan Memorial Hospital to become a registered nurse. She continued her employment there until August 17, 1952. She was graduated from Wesleyan University in 1953. During the time she was taking training at Bryan Memorial Hospital he paid her expenses. Jo Ann subsequently married and moved to Los Angeles.

Jo Ann, by deposition, corroborated the testimony of her father that he paid all of her expenses for tuition, room and board at the university, also the child support as testified to by him, and that she was graduated from the university and became a registered nurse and self-supporting.

Aneita F. Ruehle did not testify. There is no contradiction of the testimony of Edward W. Ruehle and Jo Ann.

We hereinafter refer to the plaintiff, Aneita F. Ruehle, as appellant, and the defendant, Edward W. Ruehle, as the appellee.

The appellant sets forth many assignments of error. We consider the following important to a determination of this appeal: The trial court erred in finding there was a complete accord and satisfaction between the

appellant and the appellee, and in failing to grant the relief prayed for in the appellant's cross-petition; and the trial court erred in not finding that the written stipulation between the appellant and appellee dated November 28, 1940, was void and unenforceable for lack of consideration moving to the appellant.

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

Divorce and its incidents are matters of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the courts. See Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753.

The above-cited statute specifically provides that the court in a divorce action retains jurisdiction of the subject matter and the parties for the enforcement or modification of a judgment for maintenance of children and prescribes the method by which a decree for child support may be modified. See Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618.

Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. See, Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Clark v. Clark, 139 Neb. 446, 297 N. W. 661.

The decree of a district court in a divorce action, insofar as a minor child is concerned, is never final in the sense that it cannot be changed but is subject to revision at any time in the light of changing circumstances. The district court has a continuing power, after decree

of divorce, alimony, and child support has been granted, to review and revise the provisions of child support at its subsequent terms by petition of either of the parties. An application to modify the terms of a decree of divorce is not an independent proceeding. It is not the commencement of an action. It is simply a proceeding supplementary or auxiliary to an action in which certain matters theretofore determined are by the very terms of the statute subject to modification. See Bize v. Bize, 154 Neb. 520, 48 N. W. 2d 649.

The stipulation, as appears in the instant case, in no sense modified the decree with reference to the child support, and it was so agreed by the parties as the stipulation discloses.

Accord and satisfaction is defined in Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251, as follows: "An accord and satisfaction is predicated upon an agreement between the parties based upon a consideration and fully executed on the part of the defendant, whereby the plaintiff's cause of action is satisfied or discharged."

The appellee contends that an accord and satisfaction prevailed in the instant case when the oral agreement between the appellant and the appellee was made on October 12, 1948, and that according to this agreement the appellant agreed to release the judgment against the appellee for all child support that might have accrued and become due under the decree. We are not in accord with the appellee's contention in this respect. We are in accord that there is a complete accord and satisfaction of the child support that would have accrued or become due from and after October 12, 1948, by reason of an agreement that was far more beneficial to the interests of the daughter Jo Ann. She had the benefit of an education and nurses training, and acquitted herself with honor, all through the efforts of the appellee by agreement with the appellant.

We conclude that there should be an accounting as to the child support payments which had accrued and were

due up to October 12, 1948, with interest thereon at the legal rate, and that all credits should be given to the appellee for payments made by him for child support. The cause is remanded to the trial court for determination of the amount of child support due on this phase of the case.

The appellant, as shown by the pleadings heretofore stated in part, contends that the real estate described therein should be impressed with a lien for the payment of child support that might be found owing by the appellee. The record discloses the title to this property to be in the name of Grace Ruehle, the present wife of the appellee. We find nothing in the record to support the contention of appellant and, under the circumstances as presented in the record, there is no reason to impress a lien upon this real estate or subject any part of it to payments of child support that may be owing by the appellee.

The appellant contends she is entitled to an allowance for attorney's fees to be taxed as costs on the ground that this proceeding is a continuation of the divorce suit and one of its incidents.

We have held that under section 42-312, R. R. S. 1943, attorney's fees may be allowed until the subject matter is finally settled and determined. See Miller v. Miller, *supra*. It is true, the law permits an allowance of attorney's fees in a case such as this, but does not require it. Under the facts and circumstances as presented in the instant case, we believe that there should be no allowance of attorney's fees to be taxed as costs in behalf of the appellant, and that the appellant be required to pay her own costs and attorney's fees.

For the reasons given in this opinion, the judgment of the district court is reversed and the cause remanded with directions to modify the decree in accordance with the opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

CARTER, J., dissenting.

I am not in accord with the decision of the majority. The factual situation as stated by the majority is accepted as correct. However, for the purposes of this dissent I shall restate the conclusions to be drawn from the record.

Plaintiff and defendant were divorced on May 18, 1939. Plaintiff was granted the custody of Jo Ann Ruehle, then 8 years of age, and was awarded the sum of $40 a month for her support. On February 15, 1940, the trial court on proper application increased the child support to $50 per month. On November 28, 1940, there were delinquent child support payments in the amount of $229.84. In order to secure an amicable adjustment of the delinquent payments and the payments to be made by the defendant in the future within his ability to pay, a stipulation was entered into between the parties on November 28, 1940, which becomes of primary importance in the disposition of this case. The record clearly shows that the stipulation was openly arrived at without any overreaching by either of the parties. In fact, the stipulation was prepared by the attorney for one of the parties, and the attorney of record of each party appears to have signed the stipulation as witnesses to the signatures of their respective clients.

The body of the stipulation is in three paragraphs in which the parties stipulate as follows:

"1. That there is now due to plaintiff delinquent child support in the sum of $229.84, unpaid court costs in the sum of $38.79, and a balance due on attorney fees heretofore taxed against the defendant of $63.00, and that plaintiff shall accept as full payment of said child support the sum of $104.92, provided said court costs and attorney fees as above set out are paid in full.

"2. It is further stipulated that in event the defendant pays the sum of $15.00 as child support on the 1st day of December, 1940, and $15.00 on the 15th day of

December, 1940, and like amounts on the 1st and 15th days of each month thereafter, that plaintiff will not issue execution, garnishment or other process against the defendant so long as said payments continue, and that on the 1st day of March, 1941, in event all of said payments herein provided for have been made promptly at the times and in the amounts set out, plaintiff will release her judgment for child support in full to March 1, 1941, and in event said payments are continued as herein provided for, plaintiff will release her judgment for child support for the amounts accrued, at the expiration of each three months thereafter; provided further, that in the event that defendant fails to make any payment herein provided for at the time or in the amount required, plaintiff at her election may terminate this agreement forthwith and take such steps as she desires to collect child support at $50.00 per month from such period of time as she has last receipted for in full.

"3. It is not the intention of the parties to modify the decree of this court as it now stands, but that said decree shall remain in full force and effect, subject, however, to this agreement between the parties."

On August 17, 1951, the daughter, Jo Ann, attained her majority. On January 8, 1953, the defendant filed a petition in the action seeking a release of the judgment for child support after the plaintiff refused to voluntarily release it. The evidence shows that all child support payments agreed upon in the stipulation were made to plaintiff or to the clerk of the district court until September 1948. At that time plaintiff and defendant orally agreed that in lieu of child support payments, defendant would pay all expenses of Jo Ann while she took nurses training at Bryan Memorial Hospital. In the fall of 1948 Jo Ann desired to enter Wesleyan University and it was thereupon agreed by the plaintiff and defendant that defendant would pay all the expenses in lieu of child support payments. The evidence shows that until June 1949, defendant paid $30 per month into

the office of the clerk of the district court and that plaintiff returned such payments to the defendant, in accordance with the agreements made, until such method of handling was discontinued at the instance of the plaintiff because, as she said, it was just a nuisance. The foregoing facts were testified to by defendant and the daughter, Jo Ann. The plaintiff did not deny them. In fact, she did not even testify at the trial. The evidence stands admitted by the record.

I concur in the rules cited in the cases appearing in the majority opinion. I submit, however, that they have no application to a case such as we have before us. The facts established by the undisputed evidence show that plaintiff is equitably estopped from enforcing her judgment for child support. It seems necessary to point out that the attempt to enforce the judgment came more than 12 years after the stipulation was made, and almost a year and a half after the daughter, Jo Ann, had attained her majority, and after she had married and established a home in California. The support of a minor child is not therefore involved in the present litigation. It is not disputed that defendant complied meticulously with the written stipulation made by the parties and all the oral agreements that were subsequently entered into. No attempt was ever made to dispute these facts. The only breach of the written stipulation was by the plaintiff. She agreed in writing that if payments of child support were promptly made in accordance with the stipulation, she would at the end of each 3 months release the judgment as to payments accruing during that period. She neglected to do so, and, when called upon to do it immediately prior to the commencement of this suit in the manner to which she had agreed, she refused to do so. She now pleads her own breach of her agreement as a basis for a further recovery against the defendant who, it is admitted, kept his part of the agreement exactly as it was made. At no time did the plaintiff elect to terminate the agreement

in the manner in which the stipulation provided, for the reason, no doubt, that there had been no violation of its provisions which, by its terms, authorized her to do so. Her position in this litigation is: After receiving all the benefits of the stipulation and the agreements contained therein; after the daughter, Jo Ann, had been properly supported and educated by the defendant in accordance with its terms, and more; after she had been relieved of the care and support of Jo Ann; after she had violated both the terms and spirit of the agreement by refusing to release the judgment during the periods she was required by the agreement to do; she now has the effrontery to petition a court of equity to adjudge that she is entitled to a large sum of money, with interest, resulting from her own breach of contract and her own bad faith. After all, the only purpose of a child support order is to require the father to perform his duty to society and to his child with reference to her support.

It is not my position that the written stipulation of the parties had the effect of modifying the judgment. The stipulation of the parties itself provides otherwise. Nor do I contend that there has been or has not been an accord and satisfaction of the judgment. There is no need to discuss those matters. My position is that plaintiff is equitably estopped from enforcing the judgment, however valid it may be, by her own conduct.

In the early case of Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 73 Am. S. R. 491, 42 L. R. A. 794, this court said: "An estoppel in pais is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Mr. Pomeroy has formulated the following definition: 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed,

either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' (2 Pomeroy, Equity Jurisprudence 804.)" In City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457, this court said: "The petition pleads estoppel. With reference thereto it is said in 10 R. C. L. 688, sec. 19, that, 'While the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances.' And in 31 C. J. S. 193, sec. 3, it is said: 'It is commonly stated in many decisions that estoppels are odious and are not favored in law because they exclude the truth. Nevertheless, the wisdom and justice of the principle of estoppel, especially estoppel in pais, * * * are generally recognized, the view being founded on principles of equity, morality, and justice, and in accord with good conscience, honesty, and reason; and, as such, the doctrine subserves its true purpose as a plain, practical, fair and necessary rule of law.' * * * 'It is based on the grounds of public policy and good faith, and is interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence.' 31 C. J. S. 248, sec. 63. * * * As previously stated, and as shown by the authorities, the factual situation in each and every case and the circumstances surrounding it are so distinctively different that, out of numerous definitions, not a single one would apply in all cases wherein the question of

estoppel is raised, but, as pointed out, where the circumstances are such that a grave injustice or inequity or fraud would be perpetrated by failing to apply the doctrine, as appears in the instant case, then it may be applied."

It might be urged that an estoppel was not pleaded in the present case. The rule is: "Ordinarily an estoppel or waiver must be pleaded by the party invoking it, but where the facts showing an estoppel or waiver are within the issues made by the pleadings and the evidence thereof is admissible for any purpose, it is not necessary that the estoppel or waiver shall be specially pleaded." Ross v. First American Ins. Co., 125 Neb. 329, 250 N. W. 75. The facts establishing an equitable estoppel are pleaded and conclusively established in the present case.

The holding of the majority appears to rest largely on the theory that public policy in relation to the protection and support of minor children in divorce actions requires an adherence to the hard and fast rule announced in Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618; Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340; Clark v. Clark, 139 Neb. 446, 297 N. W. 661; and similar cases. As a general proposition as it arises in ordinary cases I concur in that conclusion. But an estoppel in pais is dependent upon the circumstances in each particular case. And those circumstances must be considered as of the time that the estoppel is alleged to arise. So considered, there is no question of the support of a minor child presently involved. The fact that the rights of a minor child were once involved does not mean, necessarily, that the public policy regarding their support is forever present. The time can well arise when the public policy which supports an estoppel in pais can be superior to or the only public policy involved. While this court does not appear to have passed on this question, courts of other jurisdictions have done so.

In Koenig v. Koenig (Mo. App.), 191 S. W. 2d 269,

the court in a similar case said: "Plaintiff had a judgment against defendant for $15 per month for support of her two children; there was $195 due on the judgment, when plaintiff and defendant agreed that upon payment to plaintiff of $750, she would release defendant from further liability. Plaintiff accepted the payment of the $750 and for over nine years made no complaint of any fraud or duress in the procurement of the agreement and the satisfaction of the judgment. The agreement was entered into and carried into effect with deliberation and upon advice of able counsel. * * * And while it is true that the defendant could not, by contract with plaintiff, deprive the children of their right to support from him in case the plaintiff should fail to fulfill the contract by providing suitable support for the children, this does not mean that the contract as between plaintiff and defendant was not valid and binding. * * * There is no suggestion in the petition that the children are now in need of support or will be in the future, or that plaintiff has not been able to or has not complied with her agreement and properly supported them in the past." In Lochrie v. Lochrie, 232 Mo. App. 153, 108 S. W. 2d 178, it was said: "There can be no doubt that the satisfaction of the judgment was void as to the daughter, and a motion to set aside during minority or prior to her marriage would have been timely. * * * At the time the settlement was effected and the release was made, approximately $200 was paid to her (the wife) for the future maintenance of the minor, in addition to the delinquent installments and a fee of $25 to her attorney. This constituted sufficient consideration for the release of the judgment so far as plaintiff is concerned." In Schnierle v. Schnierle, 33 Ohio L. Ab. 212, 33 N. E. 2d 674, it was said: "If the plaintiff were awarded the judgment she seeks in this case, the judgment would belong to her and not to the child. The judgment would not require her to pay any sum recovered in support of the child. * * * In view of

the fact that the child is not interested in the judgment sought to be obtained in this case no good reason has been advanced why this agreement should not be recognized and given effect by the court." See, also, Dutcher v. Dutcher, 103 Kan. 645, 175 P. 975; Bidinger v. Bidinger, 89 Ohio App. 274, 101 N. E. 2d 241.

Proceedings to enforce an order for the payment of money for the support of minor children are subject to any valid defense against the required payment. 27 C. J. S., Divorce, § 321, p. 1227. Laches has been held to be a defense. Matthews v. Wilson, 31 Ind. App. 90, 67 N. E. 280. Acquiescence on the part of a wife in the husband's paying less than the amounts stipulated by the court has been generally held to constitute a defense to an action or proceeding for the full amount stipulated in the court order. McKee v. McKee, 154 Kan. 340, 118 P. 2d 544, 137 A. L. R. 880; Parker v. Parker, 189 App. Div. 603, 179 N. Y. S. 51; Caprio v. Caprio, 169 Misc. 568, 8 N. Y. S. 2d 205; Glaze v. Strength, 186 Ga. 613, 198 S. E. 721. The holdings of the latter cases can be summarized in the language of the Kansas court in McKee v. McKee, *supra,* wherein it was said: "A fair construction of appellee's testimony is that she acquiesced — however unhappily — in the reduction to $50. That she did so is confirmed by the fact that every month for over nineteen years she took the $50, made no objection to appellant, and took no steps of any sort to enforce payment of $60. She waited until after the daughter was of age and no longer required or asked any support from either of her parents and had signed the written release.

"While lapse of time alone will not ordinarily support a defense of laches, it has been held sufficient to make the doctrine applicable in cases where it would be clearly inequitable to permit the enforcement of bare legal rights (19 Am. Jur. 352, § 508), or where the delay in asserting rights has been wholly unreasonable. (21 C. J. 220, § 218). However, we have here much

more than mere lapse of time. We have acquiescence on the part of appellee — an important factor in determining whether there has been such laches as will bar recovery. (21 C. J. 224, 225, § 219; 10 R. C. L. 397, 398, § 144, note 17.) We have the affirmative acts of appellee in accepting the monthly payments, without complaint, through the years. If appellant believed, as he asserts, that his action in reducing the payments was with the consent of the court, then her conduct let him rest in that belief. If we assume that he became aware that no formal court order had been entered, then it must be said that her acts and conduct lulled him into inaction in the matter of securing, if possible, such a court order. Can it fairly be said that appellee's actions did not result in disadvantage to the appellant as far as enforcement of the alleged deficiencies is concerned? We think not. In the first place, payment of the lump sum now demanded is quite a different thing from payment of $10 a month. Furthermore, in the light of all the circumstances, it is obvious that appellant's situation as it relates to possible modification of the order has been altered to his detriment by appellee's acquiescence and long silence. The doctrine of laches being equitable in character, all facts and surrounding circumstances are to be considered in determining its applicability. We think it would be clearly inequitable, under the instant facts, to permit any recovery by appellee." See Miller v. Miller, *supra,* wherein this court recognized the application of such equitable principles in cases similar to the one at bar. See, also, Schroeder v. Ely, 161 Neb. 252, 73 N. W. 2d 165.

Whether the defense invoked, under the facts of a particular case, be laches, acquiescence, lapse of time, or estoppel, it is available in a case of this kind. All the principles of equity are not thrown to the four winds simply because a minor child was once involved. Equitable principles were not evolved to prevent injury, fraud, injustice, and inequitable consequences by denying to

a person the right to repudiate his acts, agreements, and representations in one case, and to permit him to do it in another. It is a general principle to be applied in all cases when the circumstances warrant its application.

I quite agree that if the child were a minor in need of support, any agreement made by the plaintiff and defendant depriving the child of adequate support would be void as to the child, and could properly be set aside in accordance with the public policy of the state.

In the case at bar the minor child has reached her majority, and has in effect disclaimed any interest in the litigation. An allowance made by the court in addition to what plaintiff has already received would be a judgment for her and not for the child. Plaintiff does not claim that she has expended money of her own in support of the child for which she has not been reimbursed. She merely sees an opportunity, by disavowing her agreement which was relied on in good faith by the defendant, to relieve the defendant of a large sum of money. Equity does not permit one to repudiate his agreements made in good faith to accomplish such a dishonest scheme producing such inequitable consequences. The minor child having reached her majority, there is no public policy regarding this child support decree behind which this plaintiff may hide. She is subject to the same rules governing equitable estoppel as is any other person who desires a dishonest change of position to accomplish selfish motives.

It is not questioned in this record, in fact it is readily admitted, that the defendant supported Jo Ann, paid for her education and training, and performed the agreements made with the plaintiff to the latter's complete satisfaction. The daughter, Jo Ann, now an adult person, so testifies. The only breach of the stipulation was the failure and refusal of plaintiff to discharge the decree in the manner provided. Equity will invoke the rule that it will consider done that which should have been done. If this rule is applied, plaintiff has no claim

to relief. How can it be said that the plaintiff, after entering into the agreement and inducing the defendant to rely upon it to his injury, may now avoid the effects of her own breach and insist upon the enforcement of a legal right based thereon? A recognition of such right finds no support in the principles of equity, morality, and justice, and are not in accord with good conscience, honesty, and reason. To so hold is to debase the principle of equitable estoppel which should be interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to the plaintiff the right to repudiate her agreements, stipulations, and representations when they have been relied upon as she intended them to be. I submit that, under all the facts and circumstances admitted to be true in this case, it would be grossly inequitable not to apply the principle of equitable estoppel. Its application requires an affirmance of the district court's order denying any relief to the plaintiff and a granting of the application of the defendant for a satisfaction of the child support judgment.

I am authorized to state that Simmons, C. J., concurs in the foregoing portion of this dissent.

There is a further reason why this case must be affirmed. Article V, section 2, Constitution of Nebraska, provides that district judges may sit as members of this court in four instances: (1) When the court sits in two divisions of five judges in each division, (2) when determining the constitutionality of a statute, (3) when hearing an appeal from a conviction of homicide, and (4) when reviewing a decision rendered by a division of the court.

The pertinent part of the constitutional provision provides: "* * * Whenever necessary for the prompt submission and determination of causes, the supreme court may appoint judges of the district court to act as associate judges of the supreme court, sufficient in number, with the judges of the supreme court, to constitute two divisions of the court of five judges in each division.

Whenever judges of the district court are so acting the court shall sit in two divisions, and four of the judges thereof shall be necessary to constitute a quorum. Judges of the district court so appointed shall serve during the pleasure of the court, and shall have all the powers of judges of the supreme court. The Chief Justice shall make assignments of judges to the divisions of the court, and shall preside over the division of which he is a member, and designate the presiding judge of the other division. The Judges of the supreme court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute, and all appeals from conviction of homicide; and may review any decision rendered by a division of the court. In such cases, in the event of the disability or disqualification by interest or otherwise, of any of the judges of the supreme court, the court may appoint judges of the district court to sit temporarily as judges of the supreme court, sufficient to constitute a full court of seven judges. * * *." I submit that the present case is not one where the Constitution authorizes a district judge to participate.

The situation presented by this part of the dissent arose in the following manner. At the time the case was first argued, Chappell, J., considered himself disqualified, and the case was heard by the other six members of the court. A proposed opinion reversing the trial court's judgment was submitted by Messmore, J., which failed of adoption, and the case was reassigned to Simmons, C. J. The latter submitted a proposed opinion affirming the trial court's decision, which failed of adoption. The differences of opinion were such that a hopeless even division of the court was acknowledged by all participating members of the court.

The case was set down for reargument, and Kokjer, District Judge, was invited to sit with the court at the reargument. He did so, and in due time expressed the view that the proposed opinion by Messmore, J., correctly determined the issue. Prior to the taking of the

vote on a motion to adopt the proposed opinion of Messmore, J., the right of a district judge to vote on the matter was specifically challenged. In due time Simmons, C. J., concurred with Yeager, Messmore, and Wenke, JJ., that it was a case in which a district judge could participate as a member having "all the powers" of a judge of this court. The foregoing facts are the ones upon which I base my contention that a district judge is without power to participate in such a case as we presently have before us, that the appeal actually resulted in an equally divided court, and that, under such circumstances, an affirmance is required. If there is an equally divided court, the cases are legion that an affirmance is required. See 5 C. J. S., Appeal and Error, § 1844 (b), p. 1314, and cases cited in the note thereto.

I submit that the constitutional provision is plain and without the semblance of ambiguity. It is not subject to construction. The fact that certain practices have been indulged in by the court cannot change the plain meaning of the constitutional provision. The acquiescence of Simmons, C. J., in the views of Messmore, Yeager, and Wenke, JJ., that Kokjer, District Judge, is eligible to participate, can add nothing to such an apparent disregard of this pertinent provision of the fundamental law of our state.

I would be less than fair if I did not state that the indiscriminate use of district judges as members of this court has been discussed by members of the court from time to time in the past. A cursory search into past records does not reveal a single case that I have been able to find, although there may be some, where a situation such as we have before us has arisen, to wit: Where the regular members of the court, who were qualified to hear the case, *divided equally* on the merits, and where the vote of a district judge purported to *reverse* a judgment of the district court entered by a district judge who, in the eyes of the law, is of equal standing. But even if such case or cases exist, it could

not operate to change the plain language of the Constitution. I submit that these facts provide an appropriate case for the challenge to be made which questions the right of district judges to participate in cases of this kind. It raises purely a question of constitutional law, and nothing more. The issue cannot be decided on evidence of past practice over the years, by language used when this issue was not directly raised, or by some strained interpretation of the constitutional provision which is plain, clear, and not subject to construction. Nor can such a ruling be justified on the theory that this court sits as a division at any time that a full bench is not available for the simple reason that a "division" of the court is defined in the very section of the Constitution under consideration. Such an attempted construction would have the effect of nullifying other plain language contained in the constitutional provision and constitute a complete change in its meaning by judicial pronouncement. The court should apply the same rules of constitutional construction when dealing with limitations or grants of power which apply to it as it applies to litigants when constitutional questions are presented for determination. The department of government charged with the interpreting power should be very zealous, it seems to me, to apply the same rules of construction to its own grants and limitations of power that it applies to others. If the highest court of a state may construe plain provisions of the Constitution, dealing with the powers of the court, according to its own views of what it should be instead of what it is, the court becomes, in effect, a continuing constitutional convention. It requires no condemnation in terms to point up the fact that such a willful disregard of its constitutional authority strikes at the very foundations of constitutional government.

The effect of the court's action is to deprive the defendant of the fruits of his judgment by a process not authorized, but in fact condemned, by the Constitution. I submit that the record shows on its face that an affirmance

is required and that the purported action by Simmons, C. J., Yeager, Messmore, and Wenke, JJ., authorizing the participation of Kokjer, District Judge, in order to secure a purported majority, is in direct violation of the Constitution, and wholly void. The judgment of reversal being void on its face, it is subject to the same defenses as any other void judgment.

I have been directed by Boslaugh, J., to state that he concurs fully in this dissent.

KOKJER, District Judge, concurring.

I concur in the majority opinion which carefully applies the salutary rules that have been provided by statute and earlier decisions of this court.

A father is charged with the support of his children. When a divorce is granted and custody of the children is awarded to the mother it becomes the duty of the district court to inquire into the reasonable needs of the children and the ability of the father to supply those needs and to direct him to pay within the limits of his ability the amount required for that purpose. As has been pointed out in the majority opinion, the statutes provide that if the circumstances of the parties shall change or if it shall be to the best interests of the children the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter to any extent the decree so far as it concerns the care, custody, and maintenance of the children or any of them. The parents have no right to alter the terms of the decree except by means of such court procedure. As each installment becomes due it becomes fixed and final and even the court has no power to change it. Supporting authorities for these rules are set out in the majority opinion. The dissenting opinion concurs in the rules.

These rules are good because they help to assure proper care of the children. They make it difficult for a father to escape supporting his children by the many artifices and pressures men use to get their divorced spouses to

accept less than is needed for the maintenance of the children. For example: A man lets the payments become delinquent, he tells his former wife that he cannot pay, that he will quit his job, that he will lay in jail if necessary, that he will leave the state and pay nothing unless she will settle for less. The mother may be made to believe that she will be better off to take what he is willing to pay than to insist on getting what the children actually need and what he is actually able to pay.

The parties in this case appear to have been well advised of these rules because at one stage of the proceedings they followed them. The divorce was granted on May 18, 1939, custody of the 8-year-old daughter of the parties was awarded to plaintiff, and defendant was directed to pay $40 per month for her support. On November 29, 1939, defendant filed a petition praying that the child support payments be reduced. Plaintiff filed an answer and cross-petition praying for an increase to $75 per month. The district court heard these petitions and presumably taking into account the minor daughter's needs and defendant's ability to pay, entered a decree on February 15, 1940, increasing the allowance for child support to $50 per month. Little more than 9 months later the parties signed the stipulation whereby Aneita F. Ruehle agreed to accept $104.92 in full payment of delinquent installments totaling $229.84 on condition that court costs of $38.79 and a balance due to her attorney for fees in the case were paid in full. It was further agreed that she would accept $15 payments on the 1st and 15th of each month and would release her judgment for accrued amounts each 3 months. There is no explanation in the record as to why this stipulation was signed. It may be inferred that the defendant desired to relieve himself of a part of the burden of supporting his daughter; that he did not have grounds to believe that the court, which had recently determined the amount of $50 a month was required and that he

had the ability to pay that amount, could be persuaded that conditions had changed. In that situation the stipulation offered a way out for him. But why did plaintiff and her attorney go along with this plan? The record does not tell us. Had she become more affluent or less needy since she had asked for an increase to $75 per month? Or, seeing that defendant had failed to keep up his payments until he was $229.84 in arrears, were they convinced he could not be compelled to pay according to the decree without great trouble and expense and decided to take what he was willing to offer? In any event it is clear that the stipulated agreement was void from its inception. It was illegal and it was not based on any consideration whatever. Did the parties change their positions in any way because plaintiff accepted the smaller payments for several years? The only change indicated by the record was that plaintiff received less than she was entitled to receive and defendant paid less than he was supposed to pay. Can it be believed that it cost plaintiff only $30 a month—$1 a day—to furnish board, room, clothing, medical and dental care, and incidental expenses for the daughter of the parties? Someone had to pay the difference and it is fair to infer that the plaintiff paid the additional amounts required.

It is true plaintiff accepted the $30 a month and it is also true that the daughter is now of age. Under these circumstances is plaintiff estopped on any equitable basis from collecting the balance due her? Should it be held that if a man holds such an illegal advantage long enough it becomes transformed into an equitable defense? If the mother accepts the reduced payments the father is willing to make and by her own efforts furnishes the added amounts required to feed, clothe, and shelter her daughter until she attains her majority, should that fact relieve the father of his liability?

Circumstances may be imagined which would support an equitable estoppel, but the record in this case does not describe any such circumstances.

On October 12, 1948, there was an oral agreement between the parties whereby defendant agreed to pay the daughter's expenses in college and plaintiff agreed to return to him the installments of child support as they should fall due. A careful examination of the record clearly shows that the agreement applied to those child support payments only which were to fall due thereafter. There is no hint in the evidence that the parties agreed to settle for any delinquent accruals. There was a good and valuable consideration for this agreement; it was for the best interests of the minor child involved; it was fully performed by both parties. As to the installments falling due after October 12, 1948, there was a valid accord and satisfaction and this was recognized in the majority opinion.

It is recognized that payment in a lump sum will be more of a burden than paying in monthly installments. Also that interest required by statute to be paid on the judgment will add to the burden. This is unfortunate. By requiring plaintiff to pay her own attorney's fees and expenses in this proceeding, which under the law could be taxed to defendant, the majority opinion gives some measure of relief in this regard.

YEAGER, J., concurring.

SIMMONS, C. J., dissenting in part and concurring in part.

As stated by Judge Carter, I concur in the conclusions reached by him on the issues presented by this appeal. I would, however, rest the decision on the issues presented by the parties and would hold that the judgment was satisfied by the agreement of October 12, 1948, and that that agreement was supported by a sufficient consideration. See, Asmus v. Longenecker, 131 Neb. 608, 269 N. W. 117; Fluckey v. Anderson, 132 Neb. 664, 273 N. W. 41; Koenig v. Koenig (Mo. App.), 191 S. W. 2d 269; Bidinger v. Bidinger, 89 Ohio App. 274, 101 N. E. 2d 241; Schnierle v. Schnierle, 33 Ohio L. Ab. 212,

33 N. E. 2d 674; Lochrie v. Lochrie, 232 Mo. App. 153, 108 S. W. 2d 178.

Before discussing in some detail the majority and the concurring opinion, I think it advisable that we determine the issues presented by the pleadings to the trial court and to this court for determination.

An analysis of the issues demonstrates the error of the decree ordered by the majority opinion; it supports my views as to the intent and scope of the accord and satisfaction of October 1948; and it supports the views of Judge Carter that an equitable estoppel applies here.

In the recent case of Rodgers v. Jorgensen, 159 Neb. 485, 67 N. W. 2d 770, we restated these rules: "A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner."

"The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions, * * * but judicial admissions * * * i. e., they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues * * *."

What are the judicial admissions made by the mother in this case that limit and confine the issues?

The father filed his petition asking for a decree that he had satisfied the child support judgment.

The mother by cross-petition pleaded the decree of May 18, 1939, awarding $40 a month child support. She pleaded the decree of February 15, 1940, awarding $50 a month for child support. She pleaded the stipulation of November 28, 1940, wherein it was agreed that the

father would pay certain court costs and attorney's fees and that thereafter would pay $15 on the 1st and 15th day of each month and that every 3 months the mother would release the judgment for child support "for the amounts accrued" and that if the father failed to make the payments the mother "at her election may terminate this agreement." The mother pleaded this agreement and relied upon it.

She then pleaded: "Said decree, as modified on February 15, 1940, and as further modified by the stipulation of the parties, dated November 28, 1940, *is still in full force and effect,* and the terms thereof are clear and unambiguous." (Emphasis supplied.) She filed that judicial admission on August 8, 1953. She then alleged that the father had breached the stipulation by failure to pay the court costs and attorney's fees "upon which the reduction in the amount of child support payments was conditioned * * *." She then in 1953 elected to terminate the agreement of November 28, 1940, as it provided she could if the payments were not made. Upon the trial the proof was that the court costs and attorney's fees had been paid and at the trial at the conclusion of plaintiff's case with consent of that court, she deleted her allegation that the court costs and attorney's fees had not been paid. Hence her reason for terminating the agreement in 1953 disappeared.

Clearly, then, up until August 1953, the mother recognized the agreement of November 1940 as a valid and binding agreement. She challenged it then for the first time *prospectively.*

At the same time, without changing her allegation of fact herein set out, she added the allegation of a conclusion of law that the stipulation was wholly without consideration and void. That contention was advanced February 3, 1954.

The mother prayed for specific relief in full accord with the allegations of her petition. She prayed "that an accounting be had of the amount due the plaintiff

under, and by virtue of, the decree of this court, rendered herein on May 18, 1939, and as modified by decree dated February 15, 1940, and as further modified by the stipulation * * * dated November 28, 1940."

That is the issue which the mother made in the district court and which remains the issue here.

Under that judicial admission, limiting and defining the issues of this case, the only relief to which the mother is entitled here would be an accounting of the amounts due, if any, from June 1949, when the father quit paying that $30 a month, to August 1951, when the child became of age.

Now what does the majority do under those allegations and that prayer? They deny the relief for which she pleaded and grant her relief for which she did not ask and about which by every intendment she alleged she was not entitled.

It may be said that the mother also prayed for "further and different relief."

However, it has long been the rule that a decree must conform to the pleadings and the evidence. Ross v. Sumner, 57 Neb. 588, 78 N. W. 264; State ex rel. Connolly v. Haverly, 62 Neb. 767, 87 N. W. 959; Banking House of A. Castetter v. Dukes, 70 Neb. 648, 97 N. W. 805.

In State ex rel. Emerson v. Dickinson, 59 Neb. 753, 82 N. W. 16, we held: "It is a rule everywhere recognized by courts administering our system of jurisprudence that the relief awarded by a court must respond to the issues—must be within the case made by the pleadings."

Here the majority order a decree that does not respond to the issues, is not within the case made by the pleadings, and is in direct contradiction of the issues and pleadings.

I go now to the concurring opinion of Judge Kokjer.

In large part it is based upon a hypothetical case or

cases that have no support in either the issues presented or the evidence in this record.

It states the duty and power of a court to require the father to provide, within the limits of his ability, for the reasonable needs of his minor children.

At this state of the proceedings there is no minor child involved. The minor child became of full age on August 17, 1951. Whether the father is now required to pay all or part of the so-called delinquent payments, that payment cannot retroactively contribute anything to the support and maintenance of the minor daughter.

Any payments now required to be made by the father to the mother would result in the enrichment of the mother and would award money to her that was never intended to be for her benefit.

If we had a case where the support of a minor child were involved, it would present a different issue and require a different answer. But that case is not this case.

The concurring opinion assumes, without any basis of fact whatever in this record, that $30 a month was actually insufficient to pay the cost of the care of the daughter for the period from 1940 to 1948 and that "Someone had to pay the difference and it is fair to infer that the plaintiff paid the additional amounts required." Later the concurring opinion holds that the mother "by her own efforts" furnished the added amounts. The mother makes no such claim. There is no claim or evidence that the payments made from 1940 to 1948 were actually insufficient to meet the needs of the daughter. There is no claim or evidence that the daughter was inadequately supported. In fact there is no evidence in this record as to what part, if any, of the $30 was spent on the daughter. The most that can be found from this record is that the mother received the $30 a month, that the daughter lived with the mother, and that all parties were fully satisfied with

the payments and the support. So that case and that inference is not this case.

The concurring opinion refers to a father who by "many artifices and pressures" gets a wife to accept less than is needed for the maintenance of the minor children. The "example" contains elements that are not supported by any evidence in this record. It is true that in 1940 the father was delinquent in payments then required by the decree. It is true that he then told his wife that he could not pay the full amount. It is true that the mother accepted the lesser amount. It is also true that from 1940 the mother never challenged the payments as insufficient either to meet the decree or to meet the needs of child support. Rather it affirmatively appears that she accepted them each month without question or protest. In 1953 for the first time, she demanded the so-called delinquent payments. She did not assert that the payments made were insufficient for the support of the child, nor did she assert that she had paid her own funds for that purpose so as to show even an equitable interest in the payments now demanded. So that case is not this case.

The concurring opinion holds that in November 1940 when the stipulation was signed providing for payments of $30 per month "It may be inferred that the defendant desired to relieve himself of a part of the burden of supporting his daughter * * *," and that "the stipulation offered a way out for him." That is said of a father, who deprived of the custody of his daughter by court decree, as this record shows, voluntarily, encouragingly, and willingly both before and after the agreement of October 12, 1948, and both during and after the daughter's minority, paid the cost of her college education and of fitting her to earn a livelihood in an honorable profession. And this record shows without dispute that he did it over the expressed views of the mother that it would be of no avail.

The concurring opinion speaks of the "illegal advan-

tage" which the father held. The father for 9 years kept his promise to pay the $30 a month. Was that an illegal act? The majority recognize it as a legal act to the extent that he is given credit for those payments on the court decree. Is the court now holding that part payment or failure to make full payment is an illegal act? The father kept his promise to give the daughter a college education in return for a promise of the mother that "she would release the child support." Wherein does that create an "illegal advantage"?

But what about the "advantage" that the majority now give the mother? For 9 years she failed to keep her promise to release the judgment for child support "at the expiration of each three months" period after the payment of the $30 a month was made. The mother is accorded the advantage of that failure to perform.

For 9 years she accepted these payments, then refused them because of the fact that the father was educating the daughter and spending in excess of the requirements of the decree; for 13 years she led the father to believe that he was meeting his full obligation and more and now is accorded the advantage of relief from an equitable estoppel.

Should not the same rule of advantage and disadvantage apply alike to both parties?

The concurring opinion holds that circumstances may be imagined which would support an equitable estoppel but that this record does not describe it. If this record does not call for an application of equitable estoppel, then I can conceive of none that would.

But the majority admit, and the concurring opinion explains, the basis of an equitable estoppel which they apply.

The concurring opinion states that the requiring of a lump sum payment with interest is an added burden to the father. Under the theory of the concurring opinion it is a burden exclusively of his own making. But the concurring opinion holds "This is unfortunate," so the

majority require the mother to pay her own attorney's fees and expenses so as to "give some measure of relief in this regard." Why "unfortunate"? Why "some measure of relief"? That is another way of saying that it would be inequitable to compel him to pay those items, so they release them indirectly by an equitable balance! If the father were one who had sought to "relieve himself" of part of the "burden" of supporting his daughter; if he were a user of "artifices and pressures" to escape those burdens in part; if he were one who claimed the benefits of "an illegal advantage"; if he were one who compelled the mother "by her own efforts" to furnish the support he was bound to furnish; if he were one who sought "a way out" from the burdens of the decree, he would be entitled to no relief. I submit that if he is entitled to "some measure of relief" he is entitled to a full measure. The majority accord him a wee bit of equity by requiring the appellant to pay her own attorney's fees and expenses in this proceeding.

Heretofore we have denied attorney's fees in this class of cases where there was "no reasonable justification" for the position taken by the party claiming them. See, Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808; Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877. In the above cases we denied attorney's fees to the unsuccessful appellants. Here the majority deny attorney's fees to the successful appellant. I submit that if there is justification for the denial of attorney's fees to the mother, then there is justification for the granting of full equitable relief to the father.

I now go to an interesting contradiction. The concurring opinion in an opening paragraph states: "The parents have no right to alter the terms of the decree except by means of such court procedure." In a concluding paragraph it is held that a mutual agreement of the parents, based on a good consideration, for the best interests of a child, if fully performed, constitutes a valid accord and satisfaction which is enforceable.

An accord and satisfaction of what? The decree, of course. The resultant effect is the altering of the terms of the decree as to both amount and place of payment without court procedure or approval, and in complete variance from the terms of the decree.

Finally, then, we get down to this situation: The majority hold that the oral agreement of October 1948 was a valid one supported by an adequate consideration. I agree. The question then remains as to what were the terms and extent of the accord and satisfaction.

The concurring opinion holds "A careful examination of the record clearly shows that the agreement applied to those child support payments only which were to fall due thereafter. There is no hint in the evidence that the parties agreed to settle for any delinquent accruals."

There is no mention of "delinquent accruals" in the evidence for the obvious reason that both parties at that time and for 8 years prior thereto had accepted as a fact that there were none—that all payments due had been met. There was no occasion to mention delinquencies. What did they mention, and why?

I now recapitulate the status of this matter as it stood on October 12, 1948. On May 18, 1939, the divorce decree required that the father pay $40 a month child support. By decree entered on February 15, 1940, these child support payments were increased to $50 a month effective March 1, 1940. The father defaulted in part in those payments and then came the "stipulation" of November 28, 1940, under which the father agreed to pay and the mother agreed to accept $30 a month and to release the judgment at the expiration of each 3-month period. The father thereafter paid the $30 a month; the mother accepted it without question but did not release the judgment as she had agreed to do.

In September 1948, the daughter wanted to go to college. The father, continuing to pay the $30 a month, then voluntarily paid the entrance fees, tuition, miscel-

laneous items, etc., for her entrance in collage. These items are shown to be well in excess of $100. The daughter continued to live at home with the mother. The father continued to pay the $30 a month.

The father at that time assumed and paid the increased expenses incident to the beginning of a college career without agreement of any kind.

In October 1948, the daughter desired to remove to the campus and become a resident student there. The father then told the daughter and the mother that he could not pay that increased expense and continue to pay the child support payments to the mother. The mother had doubts about the daughter making a success of a college career. It was then agreed that the father would continue to pay the child support payments to the clerk of the district court and the mother would return them to the father until it was determined whether the daughter would continue in school and if she did not then "we would go back to the original status of the agreement."

Obviously they were to return to the original status of the agreement only in the event the daughter did not continue in school.

By June of 1949 the daughter was succeeding in college and was ready to enter summer school. The $30 a month payments had been made and had been returned to the father. The mother then directed that the $30 a month payments be stopped and there never was any occasion thereafter to "go back to the original status of the agreement."

The daughter testified that there was conversation about the mother releasing the father "from the payment of this $30 a month child support"; that her mother said it was all right for the daughter to go to college; that the father would pay the expenses and that the mother "would release the child support"; and that a "fair summary" was that the mother would "drop the child support" and the father would pay the college ex-

penses. The bill of exceptions shows that the mother was in the courtroom when the trial began. She was not called to testify. The above constitutes the direct unchallenged evidence of the agreement of October 12, 1948, which the majority holds was supported by a sufficient consideration and which the father fully performed.

On the theory of the majority, the partial delinquencies that had accrued over the years were due and payable in a lump sum with interest on October 12, 1948, and remained in that status on and after October 13, 1948.

Did the father bind himself to pay the costs of a college education in return for only a partial release of child support payments?

Obviously neither the father or the mother had such intention and just as obviously the mother had no secret intention that sometime in the future she would exact the arrearages.

Had there been any intent otherwise, would not the mother have demanded or at least mentioned the full payment of the arrearages? Would not the father have demanded that the increased payments be credited to the delinquencies? Nothing of the kind was done. Neither of the parties contemplated such a demand.

How did the parties construe the agreement? For almost 4 years the mother accepted as a fact that the child support was released and satisfied. Patently, the father so considered it. Throughout her minority and after attaining her majority, the daughter, who was the beneficiary of these payments, so considered it. She does not now question that construction. All of the parties recognized that the accord of October 1948, when fully satisfied and performed, ended the matter. That was the common intent. On that basis there was full performance.

By the undisputed evidence, a return to the original status was not to have occurred if the daughter continued in college, which she did. The father fully performed the agreement of October 12, 1948.

The condition upon which a return to the original status depended, did not arise. The only reasonable conclusion that can follow from this evidence is that if the daughter continued in college and the father paid the expense, that that ended the child support obligation finally and positively. The daughter did continue in school. The father did pay all the expenses in accordance with the agreement. There is no "hint" in the record upon which any other conclusion can be based.

The majority hold that there was a sufficient consideration for the October 12, 1948, contract. That contract the majority hold is enforceable. That contract prevents a recovery by the mother. The majority now require the father to pay the child support which has been fully satisfied in accordance with this agreement.

The above demonstrates also the basis for the minority's position that an equitable estoppel applies.

In Cady v. Travelers Ins. Co., 93 Neb. 634, 142 N. W. 107, we stated this rule: "The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction."

We last stated it in Consumers Cooperative Assn. v. Sherman, 147 Neb. 901, 25 N. W. 2d 548, in this way: "The practical interpretation given an indefinite or ambiguous contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction."

In Dunn v. Mutual Benefit Health & Accident Assn., 135 Neb. 506, 282 N. W. 487, we said: "We know of no better way of determining the intent of the parties than by giving the contract the effect that the parties themselves gave it."

In James Poultry Co. v. City of Nebraska City, 135

Neb. 787, 284 N. W. 273, we held that a practical construction, to be adopted, "must be reasonable." Here the construction placed on the contract by the parties is obviously a reasonable one.

It seems to me that these rules are particularly applicable where a contract is in parol, and its terms testified to long after the event and long after full performance has been had.

I would affirm the judgment of the trial court.

I disagree with Judge Carter in his conclusion that the participation of Judge Kokjer in this case is in "direct violation of the Constitution, and wholly void."

We should have a more complete statement of the factual situation. This requires the use of names of the members of the court. Although it is probably unnecessary, in doing so I wish to assure the bar that there is no personal acrimony involved at any stage of these proceedings. Language used by Judge Carter, coming from another's pen might be "fightin' words," but from Judge Carter's it is not so.

This case was orally argued to the court, with six judges sitting, on January 5, 1955. Judge Chappell did not sit because of a personal disqualification. In regular order it was assigned to Judge Messmore for study and the preparation of a proposed opinion. Judge Messmore submitted a proposed opinion and on February 26, 1955, it failed to receive the requisite vote for adoption. On that date the case was assigned to me in regular order, I being one of the judges not voting for Judge Messmore's opinion. In March 1955, I prepared and submitted a proposed opinion. It likewise was not adopted.

The case was set for reargument, along with 14 other cases, for the week beginning May 2, 1955. Due to the absence of Judge Messmore, Judge Kokjer was invited to sit as a member of the court considering all 15 cases argued that week. He sat with us and participated in the consideration of cases submitted that week. In

regular order the cases of Kasai v. Kasai, 160 Neb. 588, 71 N. W. 2d 105; Olson v. State, 160 Neb. 604, 71 N. W. 2d 124; and Ruehle v. Ruehle were assigned to Judge Kokjer for study and the submission of proposed opinions. Judge Messmore, although absent, was recognized as participating in the reargument and resubmission of the instant case.

Judge Kokjer prepared and submitted proposed opinions in the first two of the above cases and they were adopted by the court.

Parenthentically, it may be added that District Judge Flory sat with us during the week beginning May 31, 1955, heard argument, participated in the conferences, prepared opinions which were adopted, and voted for or against opinions of other members of the court in the cases argued that week.

The summer recess intervened. At a consultation this fall, Judge Messmore offered his proposed opinion in its present form with the statement that Judge Kokjer was in favor of it.

For the first time, a challenge was then made, directed to the right of Judge Kokjer to participate in the decision. The case was held over. I then investigated the matter, prepared a memorandum, which was submitted to the court, in which I concluded that Judge Kokjer was, under the Constitution, sitting with "all the powers" of a judge of this court. At the consultation on November 5, 1955, the opinion of Judge Messmore was adopted by a majority vote. If that be "acquiescence" on my part, then it is "acquiescence" in my own opinion.

I agree with Judge Carter that this matter has been discussed from "time to time" in the conference room. However, when it has arisen, it has been resolved as the court has resolved the instant challenge.

When I came upon the court, Judge Rose was the only member who had been here both before and after the adoption of the present constitutional provisions. During the years I was privileged to sit by his side, I never

heard him challenge our procedures in this regard. Had there been constitutional error he would have been the first to do so.

Judge Carter states that he knows of no case where the "regular members of this court" divided equally, and the vote of a district judge caused a reversal of the trial court. Apparently the theory is that an unconstitutional procedure is of no consequence if a constitutional result is had. I disagree.

I call attention to Hartford Fire Ins. Co. v. County of Red Willow, 149 Neb. 10, 30 N. W. 2d 51. That case was heard before six "regular members" and one district judge. The "regular members" divided equally on the merits. The vote of the district judge resulted in an affirmance. On Judge Carter's theory that result would have followed in any event. He cites text authority to that effect.

The same authority states (textwise): "Constitutional or statutory provisions requiring that a designated number of judges shall concur in an opinion in order that there may be a valid and binding adjudication by the court, or in order that a statute be declared unconstitutional, must, of course, be complied with." 21 C. J. S., Courts, § 184(a), p. 295.

"Where, upon the question whether relief should be granted or refused, the judges constituting the court are equally divided in opinion, full relief cannot be granted, and the subject matter with which the court is dealing must remain in statu quo, although relief may be granted in so far as a majority deems the relief sought appropriate." 21 C. J. S., Courts, § 184(b), p. 296.

I shall not labor those propositions down that detour. So far as this state is concerned, it is answered in Article V, section 2, of the Constitution, which provides: "A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature." That is plain and unambiguous language and negatives Judge Carter's

view in that regard. Later herein I shall develop the history of that provision.

If Judge Carter's position is correct here then there was no authority for District Judge Kroger to sit in the Hartford case and this court did not have authority to pronounce a decision. Rather that appeal should have been affirmed because of a failure to secure the required votes to pronounce a decision and to order affirmance. Yet we did "pronounce a decision" which has since been followed by this court as a precedent. See, Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104; Novak v. Laptad, 152 Neb. 87, 40 N. W. 2d 331; Bay v. Robertson, 156 Neb. 498, 56 N. W. 2d 731; Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407; Andelt v. County of Seward, 157 Neb. 527, 60 N. W. 2d 604, wherein a unanimous court referred to the "decision of this court."

Judge Carter holds that the provision of the Constitution here involved is "plain and without the semblance of ambiguity"; that the Constitution is "plain, clear and not subject to construction"; that the action of the court is "an apparent disregard of the pertinent provision" of the Constitution; that it "changes the plain language of the Constitution" "by judicial pronouncement"; that it constitutes a willful disregard of our constitutional authority by a process "condemned, by the Constitution"; and that the decision is in "direct violation of the Constitution."

That is an indictment, serious enough if leveled at the four members of the court against whom it is directed. But as can be demonstrated, it is applicable to every member who has sat on this court for any length of time since January 1, 1921, when the present Constitution went into effect.

This challenge goes not to the question of whether the judge votes for affirmance or reversal, but to the question of the power of this court to appoint a district judge or judges to sit with the court to decide cases.

Does a district judge, appointed to sit under the circumstances of this case here, "have all the powers of judges of the supreme court" (Art. V, § 2, of the Constitution), or is he an invited guest, privileged to listen to our deliberations, advise us, and on occasion submit opinions for us to consider and adopt, but without the power of judges of this court to vote for or against an opinion? Is he ineffective at the point where effective action is required?

Judge Carter holds that in this matter we should apply the same rules of constitutional construction as apply to litigants when constitutional questions are presented. I agree. He cites no such rules. I go to our decisions.

In In re Hammond, 83 Neb. 636, 120 N. W. 203, 23 L. R. A. N. S. 1173, we held: "* * * the words of the constitution are to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption, and the course of ordinary and long-settled proceedings according to law."

This was last cited with approval in State ex rel. Caldwell v. Peterson, 153 Neb. 402, 45 N. W. 2d 122.

In State ex rel. Central Realty & Investment Co. v. McMullen, 119 Neb. 739, 230 N. W. 677, we quoted with approval this holding from Hinz v. Musselshell County, 82 Mont. 502: "'Our state Constitution must be construed in the light of the history of the commonwealth, the surrounding circumstances, the subject-matter under consideration, the object sought to be attained, as well as the system of laws which were in force in the territory at time of its adoption.'" This was repeated with approval in State ex rel. Johnson v. Chase, 147 Neb. 758, 25 N. W. 2d 1.

In State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502, we held: "A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provi-

sions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable."

The court also held: "The meaning of a constitutional provision is to be determined as of the time of its adoption, and the intent and understanding of its framers and the people who adopted it is the principal inquiry in construing it.

"It is permissible in determining the meaning of language of a Constitution to consider the facts of history, the evil intended to be overcome, the objects sought to be accomplished, and the scope of the remedy its terms include."

There is not one but are three separate provisions of the Constitution in Article V, section 2, relating to the judicial membership of the court. Each deals with a separate situation:

1. "A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature."

2. "Whenever necessary for the prompt submission and determination of causes, the supreme court may appoint judges of the district court to act as associate judges of the supreme court, sufficient in number, with the judges of the supreme court, to constitute two divisions of the court of five judges in each division. Whenever judges of the district court are so acting the court shall sit in two divisions, and four of the judges thereof shall be necessary to constitute a quorum."

3. "The Judges of the supreme court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute, and all appeals from conviction of homicide; and may review any decision rendered by a division of the court. In such cases, in

the event of the disability or disqualification by interest or otherwise, of any of the judges of the supreme court, the court may appoint judges of the district court to sit temporarily as judges of the supreme court, sufficient to constitute a full court of seven judges."

A practice which began in January 1921, when the above provisions became effective, and has continued down to our sessions of last April and May must have had authority behind it. We have no one on or about the court now who was here when the constitutional provision was adopted and became effective.

We held in Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772: "* * * we are justified in taking judicial notice of proceedings in the constitutional convention * * *." See, also, State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799.

In the press recently, I noticed a statement of the prayer of a Sioux Indian. It was: "Great Spirit, help me never to judge another man until I have walked two weeks in his moccasins."

I propose now to go back after 35 years and, so far as possible, walk in the moccasins of the members of the Convention which framed these above provisions. In doing so I shall undertake to discover "the intent and understanding of its framers" as appears from the proceedings of the Constitutional Convention. I shall discuss the proposals in their sequence in order of time, for by so doing the error of Judge Carter's conclusion is clearly demonstrable. The construction which he visions so clearly disappears when exposed to that light.

I shall refer to the above three provisions as authorities 1, 2, and 3. I shall refer to the Proceedings of the Constitutional Convention of 1920 by page only.

Prior to the adoption of the present provisions, the Constitution provided: "The supreme court shall consist of seven (7) judges; and a *majority of all the elected and qualified judges* shall be necessary to constitute a quorum or pronounce a decision." Article VI, section 2,

of the 1875 Constitution. (Emphasis supplied for reasons appearing later herein.)

First what was "the evil intended to be overcome" by the substantial amendment to the Constitution regarding the Judicial Department? It was, in great part, the delay in this court in reaching and determining causes due to the congestion of cases on our dockets. It was legislatively recognized in 1917 and again in 1919 when the Legislature created a Supreme Court Commission "to aid the Supreme Court to clear its docket." See, Laws 1917, c. 173, p. 389; Laws 1919, c. 260, p. 1057.

The Constitutional Convention convened on December 2, 1919.

Also that week this court and the commission sat for oral argument in a large number of cases. Except for cases advanced, the cases heard that week had been on the docket for periods of from 12 to 20 months—and that although the commission for years had been aiding the court to clear its docket.

The Convention created a Committee on Judicial Department. (Page 58.) The membership was largely made up of lawyers. Mr. Heasty, a lawyer, became chairman of the committee. A large number of proposals were referred to it. On February 5, 1920, the committee reported recommending that all those proposals be indefinitely postponed and on that date it introduced an "in lieu" proposal by unanimous action. (Page 676.) This proposal then became the basis of all subsequent action.

These proposals were summarized by Mr. Epperson (page 1145) and will not be repeated here.

The committee recommended changes and additional provisions that became the foundation of what I have designated as authorities 1, 2, and 3 (page 676). I shall return later to those changes.

Mr. Heasty, chairman of the committee, said "there were two dominant ideas confronting the Committee. First, that so far as the judicial department was con-

cerned there would be no more constitutional officers created, and secondly, that the congested docket of the supreme court should be cleared up; that the Committee should devise some way, some means, by which the supreme court will be able to take care of its business with reasonable expedition * * *." (Page 993.) Other statements of similar effect were made by members. They need not be cited as there was no dispute on that intent as the evil to be overcome.

As Mr. Donohoe, now and for many years past United States District Judge, said, the proposals were designed ultimately to enable the court to get its work "brought up to date. When that time arrives, then the court might sit as a united court, and these other members would be relieved of that work." (Page 1006.)

As I see it, a narrow question to be determined is the meaning of the word "division" as the framers of the Constitution used and intended it.

Of the three authorities, what I term here authority 2 was the first to be debated. For convenience I restate it:

2. "Whenever necessary for the prompt submission and determination of causes, the supreme court may appoint judges of the district court to act as associate judges of the supreme court, sufficient in number, with the judges of the supreme court, to constitute two divisions of the court of five judges in each division. Whenever judges of the district court are so acting the court shall sit in two divisions, and four of the judges thereof shall be necessary to constitute a quorum."

It was ultimately adopted substantially as offered, except for changes proposed by the Committee on Arrangement and Phraseology. (Page 1384.) It was not adopted, however, until authority 1 as originally proposed was materially changed and its authority and purpose clarified. That I will discuss later herein.

Mr. Scott proposed that the number of Judges be increased from seven to ten so that the court could sit in

divisions of five men to a court, each of those divisions working separately "just as your two divisions are now working." (Page 999.) Here he referred to the court as a division and the commission as a division. I mention that as I shall other uses of the word division to show the broad inclusive base of the meaning which the members of the Convention attached to it. Mr. Flansburg used the "two divisions" with reference to the court and the commission. (Page 1008.)

Mr. Flansburg proposed that the court have authority to call in lawyers "in case of emergency" three in number and if "dispatch" of work was the goal, have the court sit in divisions of three. (Page 1004.)

Mr. Byrum suggested that under this proposal the court could sit in two divisions "and two alone" and that the provision was "not flexible." (Page 1011.)

Mr. Heasty stated under this proposal the court could sit in two divisions which would be "constituted of five judges each." (Page 995.)

However, Mr. Pitzer, a member of the committee, following him, said: "To divide a court of seven judges into two divisions, with no other additional judges * * * would practically require a unanimous report, but it was for the purpose of giving *some margin in that respect* as well as assistance; that is the committee felt that the divisions when organized should consist *of at least five judges* * * *." (Emphasis supplied.) I find no challenge to Mr. Pitzer's statement.

Early in the debate Mr. Heasty stated that the committee felt it would be unwise to allow less than four judges "to render a decision or constitute a quorum." (Page 995.) As will be pointed out later herein, the committee receded from that "render a decision" view.

In the debates to this point, Judge Carter's views find support and contradiction in the debates. I do not labor that matter further because of the quite clear intent and purpose of the members of the Convention when they considered and adopted what became authority 1.

Before going to that I revert to one contention advanced by Judge Carter, that district judges may sit as members of this court "When the court sits in two divisions of five judges in each division." With that statement I agree, but it is not an exclusive provision. Clearly district judges may sit in a division. But five judges thereof are not necessary, for the next sentence of the Constitution provides that "four of the judges thereof shall be necessary to constitute a quorum." I submit that four and not five judges is the minimum in a division of that class, and that five judges was not intended to be a necessary maximum number, as will appear later herein.

I now go to authority 1. It was adopted as a solution to meet the objections advanced to authority 2. I restate it for convenience:

1. "A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature."

The 1875 Constitution provided that: "* * * a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, § 2. The committee originally proposed that "A majority of judges shall be necessary to constitute a quorum or pronounce a decision * * *." (Page 676.)

The debate on authority 2 began on February 13, 1920. (Page 948.) The debate on authority 1 began on March 16, 1920. (Page 2302.) Mr. Nye proposed that this court be authorized to sit in two alternating divisions of not less than three judges and the Chief Justice, and that three could pronounce a decision when sitting in division. (Page 2306.)

The committee then offered an amendment which had been proposed by Judge Albert of Columbus that in Mr. Heasty's language was in accord with Mr. Nye's proposal except that it did not "cut out the right of the court

to call district judges * * * if the court deems it best and proper" and authorizes "the court to create certain divisions if it sees fit to do so." (Page 2312.) It gave the court the "alternative, sitting in divisions, of calling in the district judges to assist, if necessary." He urged the retention of the power to call in district judges but to preserve the alternative of the court sitting in divisions and calling in district judges if necessary or expedient. (Page 2313.) In answer to a question Mr. Heasty said: "There might be occasion to call in District Judges *or* there might be occasion to sit in division until such time as the court caught up with its work." (Emphasis supplied.) (Page 2315.)

Mr. Flansburg referred to the proposal as one conferring "additional jurisdiction." (Page 2316.)

Mr. Nye held that the court could not sit in two divisions unless three district judges were called in. Mr. Heasty replied: "* * * when the court sits *in divisions, that is as a court,* of course four would sit in one division and the Chief Justice would sit with the other three, * * *." (Emphasis supplied.) (Page 2319.)

Judge Albert then proposed a substitute as follows: "A majority of the members sitting shall have authority to pronounce a decision except in appeals from convictions for homicide and cases involving the constitutionality of an act of the Legislature." (Page 2320.) Later the reference to homicide cases was stricken. (Page 2564.)

With that exception, the substitute became the exact language of the Constitution as stated in authority 1.

Judge Albert said: "The object of this substitute is to enable the court to sit in divisions" (Page 2320); that it "made a flexible arrangement"; and that "if * * * the court as now constituted sitting in two divisions could not keep up with the work, then they could call in these judges and let them try it" and if that did not work they could go back to the "old system." He did not explain what he meant by the "old system" but I

assume he meant the use of a commission. (Page 2321.)

Parenthetically, the Legislature created a commission in 1925, Laws 1925, Chapter 76, page 237; in 1927, Laws 1927, Chapter 69, page 231; and in 1929, Laws 1929, Chapter 85, page 335, to "aid" the court in keeping its docket clear.

Mr. Ferneau—a lawyer—said that if the Albert amendment was adopted it provided "two ways by which the court may dispatch business"; that it was "more elastic"; and that the court would have the right "to sit in divisions" and if "they saw fit to call in district judges." (Page 2322.) He said if the substitute of Judge Albert is adopted "we will have both of these ways incorporated." (Page 2323.) Judge Albert's proposal was adopted by a vote of 67 to 18. (Page 2323.)

Later on March 19, 1920 (page 2547), the matter came up again. Mr. Heasty said that the Judge Albert amendment "permits the Supreme Court to sit in divisions; that four judges *must* sit in each division." (Emphasis supplied.) (Page 2562.) And "It permits an alternative of sitting in divisions or calling district judges." (Page 2563.)

It came up again on March 23, 1920 (page 2658), on third reading (page 2687). Mr. Byrum raised the question that the Albert substitute had been possibly left out. (Page 2691.)

Mr. Heasty assured him that it had not been, and said: "You see the only difficulty that the present Supreme Court has had in regard to sitting in divisions has been due to the fact that the old Constitution required a majority of four to pronounce a decision" (page 2692) and that "the only reason it proved unsuccessful was the fact that our present Constitution required the concurrence of four members to pronounce a decision." (Page 2692.) Mr. Byrum in explaining his vote said: "* * * it seems to be the opinion of the others * * * that it allows the Supreme Court to sit in divisions, with-

out calling in District Judges." He was content. (Page 2697.)

Mr. Nye said he voted for the proposal because it permitted the Supreme Court to sit in divisions "and overshadows the evil of calling in District Judges, which will never be done." (Page 2698.)

In the Address to the People of Nebraska, the Convention, in explaining the proposed amendments, said: "The new Section 2, authorizes the Supreme Court to sit in *divisions,* the Chief Justice sitting in each division, four judges being necessary to constitute a quorum, *but the concurrence of only three judges being necessary to pronounce a decision.* This provision will eliminate the difficulties encountered by the Supreme Court *when sitting in divisions under the present Constitution* requiring the concurrence of four judges to pronounce a decision. *Furthermore,* under this new provision, *if it is deemed advisable,* the Supreme Court may call in District Judges to sit with the Supreme Judges and thereby create two divisions of the Supreme Court of five judges each, for the purpose of disposing of a congested docket. Electors will observe that this system will expedite the work of the Supreme Court without additional expense to the taxpayers." (Emphasis supplied.) (Page 2845.)

The above constitutes a Convention recognition of the fact that the new provision authorized the court as such to sit in divisions as had been done under the then existing constitutional provision. Four judges were "necessary" to constitute a quorum. Concurrence of three judges was "necessary" to pronounce a decision. The "necessary" requirements were obviously minimum requirements, in both instances. Can it be held that the Convention intended that four judges sitting in division would constitute a quorum and that five or six so sitting would not? Or can it be said that three judges concurring could pronounce a decision and that four or five or six so concurring could not? I shall not chal-

lenge the power to so provide. I do contend that, in the language of the street, such a conclusion "does not make sense."

As pointed out above, there is a clear recognition in the debates that the court had sat in "divisions" prior to the present Constitution. How many sat in those divisions?

I have spot-checked one volume of our reports to find the answer. 97 Nebraska covers the period from October 1914 to March 1915. In that volume, there are 90 cases decided with three judges not sitting, 21 with two judges not sitting, and 42 with one judge not sitting. Obviously a "division" was sitting when four, five, or six judges participated.

Authority 3 was not extensively debated so far as the question here is concerned. I quote it again for convenience:

3. "The Judges of the supreme court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute, and all appeals from conviction of homicide; and may review any decision rendered by a division of the court. In such cases, in the event of the disability or disqualification by interest or otherwise, of any of the judges of the supreme court, the court may appoint judges of the district court to sit temporarily as judges of the supreme court, sufficient to constitute a full court of seven judges."

As proposed by the committee, it contained the language that "The Judges of the supreme court, sitting without division * * * may review any decision rendered by a division of the court." It was retained and is in the present Constitution. At the time proposed, it may be that it was intended to relate to a division of the court sitting with district judges. After the adoption of the Albert amendment it likewise related to a division of the court sitting without district judges. There was no occasion to debate it or change it.

It is revealed clearly in the debates and the provisions

of the Constitution as adopted by its framers that the Convention intended, not to put the court in a rigid straightjacket, but to give it "elastic" powers in this regard, so that it could "clear its docket" and "keep it clear," and "take care of its business with reasonable expedition."

The debates show that the members of the Convention recognized that the court, if it chose, might review a decision of a division of the court.

If Judge Carter's position is correct, then the Convention intended to authorize, and the Constitution authorizes, this court sitting without division, to review a unanimous decision made by four judges of this court and one district judge sitting in that class of a division, and does not authorize the review of a decision made by a majority of three judges of this court sitting with a quorum of four judges. That also does not make sense.

If Judge Carter's position is correct, then the Convention intended to authorize, and the Constitution authorizes, one judge of this court and two district judges to pronounce a decision (being a majority of that class of a division) and does not authorize six judges of this court and one district judge to pronounce a decision except in cases involving the constitutionality of a statute, appeals from conviction of homicide, and when reviewing a decision rendered by a division of this court consisting of five judges, one or more of whom is a judge of the district court. Again that does not make sense.

Members of the Convention stated that the purpose was to create a "complete" (pages 1010 and 1011) and "elastic" system. Clearly it was intended that the provisions adopted would enable the court to clear its docket, keep it so, and ultimately, if need be, determine a matter with "a full court of seven judges." From such a system there would, in all probability, be a majority pronouncing a decision.

If Judge Carter is correct, then the Convention cre-

ated a void, a situation where such a majority decision could not be had, and where a judgment of a trial court would be affirmed, not by a decision of the court, but by a failure to decide. Such a conclusion is negatived by the debates and the language of the Constitution. It also does not make sense.

Our procedure in the instant case is authorized under either authorities 1 and 3 or 2. When we heard this case with six judges of this court sitting, we were proceeding under authority 1 in that class of a division. When we granted a reargument we called in a district judge and constituted "a full court of seven judges" to review a decision rendered by a division—the decision being that the division was unable to pronounce a decision by a majority of the members sitting.

Or when we heard this case on reargument we were sitting under authority 2 in the class of a division with a district judge participating.

Accordingly, Judge Kokjer participated in this case with "all the powers" of a judge of this court, including the right to vote for or against either of the proposed opinions.

To so construe and apply the Constitution leaves no void in the powers of this court to pronounce a decision by a majority vote.

We need not stop with an analysis of the intent of the framers of the constitutional provisions. The court was in session here in the Capitol Building when the Convention met, and during its deliberations. I shall now "walk in the moccasins" of the judges of this court for a bit of time.

The proceedings show that members of the Convention were in informal consultation with and secured the advice of the Chief Justice and members of the court during the consideration of the various proposals that resulted in the present constitutional provisions. (See pages 1004, 1009, 1585, 2313, 2319, and 2320 for illustration.) The members of the court would obviously know

what the Convention intended by what it wrote and why it did it. I assume that we may accept the fact that they would undertake to comply with that intent.

The new constitutional provisions became effective on January 1, 1921. The court then began to apply the Constitution in accord with the intent expressed in the debates and in the language of the Constitution. Not only that, but they recognized and gave priority to divisions under authority 1 before inaugurating divisions under authority 2, just as Judge Albert advised the Convention as to the intent of his proposal.

I have examined the Journal for the first 2 years of the court's proceedings under the new Constitution. During this period the court used every one of the authorities and procedures—as the court has done at times during all of the 35 years since.

On January 3, 4, 5, and 6, 1921, the court sat with the Chief Justice and Judges Rose, Aldrich, and Flansburg, and heard argument. On January 6, Judge Letton sat in one case in lieu of Judge Rose. On January 7, the full court sat, with Judge Letton not sitting in two cases argued that day.

On January 13 and 14, the full court sat and entered a series of orders, including the assignment of a large number of cases for hearing before the Supreme Court Commission.

Did this court then construe its act as sitting in divisions? At least one member did, without protest from the other six.

The cases of Kates v. Spencer, 105 Neb. 599, 181 N. W. 520; Weber v. Thompson-Belden & Co., 105 Neb. 606, 181 N. W. 649; Baldwin v. Omaha & C. B. St. Ry. Co., 105 Neb. 614, 181 N. W. 525; and State v. Wright, 105 Neb. 617, 181 N. W. 539, were each argued to four judges in January 1921 (after the new provisions went into effect). At the close of the decisions in each case is this language:

"Letton, J., not being a member of the *division* which heard this case, did not participate." (Emphasis supplied.)

This appears in both the Journal and the printed reports in the above and subsequent cases.

On January 17 and 18, 1921, the court sat with the Chief Justice and Judges Letton, Day, and Dean. This was in accord with the suggestion made in the Convention that when the court sat in divisions of four that the Chief Justice should sit with both divisions.

Thereafter the court sat with four judges at times. On January 28 and 31, and February 2 and 4, 1921, the court sat with seven judges. It returned to sitting with four judges on February 7, 8, 9, 10, and 11, 1921, with the Chief Justice and the same associate justices sitting. On February 14, 15, 16, and 18, 1921, the Chief Justice and four judges sat.

On February 25, 1921, the court sat with the Chief Justice and five associate judges.

On March 4 and 5, 1921, the court sat with the Chief Justice and four associate judges. On March 7 and 8, the Chief Justice and three associate justices sat for oral argument.

On March 12, 14, and 16, 1921, the Chief Justice and four associate justices sat, and on March 19, 1921, five sat with the Chief Justice.

I shall not further exemplify that record.

Clearly the court did not consider that it was limited to four judges when so sitting.

On March 25, 1921, the case of Nabower v. State, 105 Neb. 848, 182 N. W. 493, was decided. There was one dissent. The case was argued on February 11, 1921, to four judges. This appears to be the first case decided by three votes under the majority-of-those-sitting rule.

On April 27, 1921, the Journal shows that for the prompt submission and determination of causes the court was appointing district judges to sit as acting associate judges. Two were named for each week from May 2, 1921, to June 6, 1921. That was followed with this: "The court will sit in divisions at the times stated, one

division sitting each week." This was a procedure under authority 2.

On May 3, 9, 11, 12, 17, 19, and 31, 1921, four judges of this court sat with two district judges.

On May 4, 5, 10, 13, 20, 23, 24, and 25, 1921, three judges of this court sat with two district judges. The same number sat on June 1, 2, 3, 6, 7, 8, and 9.

Thus the court construed the elastic provisions of the court's power under authority 2 when it was first exercised. This court since that time has followed that procedure and precedent.

In September and October 1921, a new pattern of procedure appears. Alternate weeks the court sat with four members of this court and two district judges, and the next week it sat with three members of this court and two district judges.

The same pattern appears in November 1921.

Beginning Novembr 10, 1921, the Journal shows "Sitting as Division No. 1," four judges of this court and two district judges, and "Sitting as Division No. 2," three members of this court and two district judges. The same situation is shown in the Journal for December 12, 13, and 16, 1921, and February 6, 7, 8, 9, and 10, 1922. There is a clear recognition by the court of the fact that it was sitting in divisions under authority 2 and with a division of more than five judges.

It was suggested during the debates of the Convention that the calling of district judges for short periods of time might not be satisfactory either to the court or to the district judges.

Whether that was found to be true is not disclosed. In any event, on September 15, 1922, the court, finding it necessary for the prompt submission and determination of causes, appointed District Judges Redick and Shepherd to act as associate judges of the Supreme Court from October 2, 1922, to January 1, 1923. During that period of time the court sat in "division," but not in two divisions sitting simultaneously, as was done at

times in the earlier proceedings. Most of the time both Judges Redick and Shepherd sat with, in one instance at least, three of the "regular" judges, occasionally with four judges, and more often with five, making "a full court of seven judges." When the district judges sat singly, they sat with four, five, or six of the "regular" judges. The same procedure was followed from January 1 to March 30, 1923, with District Judges Troup and Raper sitting. And thereafter it was followed by the calling in of district judges for similar lengths of time.

On May 18, 1922, the court sat with six members of this court and Judge Redick as district judge. One of the cases argued was Chadwick v. Intermountain Ry. Light & Power Co., No. 22596. The case was affirmed without opinion on July 19, 1922. The briefs show that it was a workmen's compensation case. The sole question presented was one of dependency. The attorney for the appellee was George A. Eberly, long a distinguished member of this court. If Judge Carter is right, then the court, as constituted, had no authority to hear the case. I venture the opinion that had there been any question on that matter, Judge Eberly would have raised it. He did not.

I have not undertaken herein to make a complete summary of the court's proceedings under the new Constitution. Sufficient facts from the Journals are stated to establish conclusively that this court from the beginning walked in accord with the constitutional provisions as written and as portrayed by the framers during the debates preceding the adoption. I find no record of anyone having questioned those procedures.

There were able lawyers in the practice at that time and since, who were members of the Convention. I have not felt free to consult with those who yet remain with us. I have the conviction that, had there been error in the proceedings of the court, the lawyers and judges would then have challenged them. I find no record of

any such challenge. I can see no merit in such a challenge.

Let me illustrate by reference to the case of State ex rel. Davis v. Peoples State Bank, 111 Neb. 126, 196 N. W. 912. Mr. Davis was Attorney General when this action was docketed here. He was Attorney General from January 1919 to January 1923, and hence served during the period of the Constitutional Convention and during the period that this court was establishing its procedures under the new provisions.

O. S. Spillman became Attorney General in January 1923. He was a member of the Constitutional Convention and the Committee on Judicial Department. He appeared as Attorney General for the appellant. Jacob Fawcett, long a distinguished member of this court, then in private practice, appeared for the appellee.

The case was argued and submitted to the court on September 19, 1923, before five members of this court and District Judges Redick and Shepherd. The case did not involve the constitutionality of a statute, it was not an appeal from a conviction of homicide, and it was not a review of a decision rendered by a division of the court.

If Judge Carter is correct in his position, this body that heard, considered, and decided the cause was an unconstitutionally created court, because more than five judges sat.

That hearing resulted in a judgment of reversal with three "regular judges" dissenting. Of necessity the opinion was adopted by the vote of the two district judges. If Judge Carter is right, then the case should have been affirmed at that time by a vote of three to two of the judges of this court.

Reargument was granted.

On March 20, 1924, the Journal shows a court order reciting that, because of a vacancy caused by the death of Judge Aldrich, the court was appointing Judge Redick

to serve as "Associate Judge" of this court until a successor of Judge Aldrich was appointed.

If Judge Carter is right, that order was a void order, lacking constitutional authority. It was a valid order, however, if we recognize the intent of the Constitution to have available ultimately "a full court of seven judges," so that a decision of a majority could be rendered.

At that time the Davis case stood with three judges of this court definitely against the opinion, and two judges for it.

When Judge Kokjer was appointed to sit with us in May 1955, three judges of this court were definitely for the opinion of Judge Messmore, and three judges were definitely against it. Under those circumstances we did what the court did in 1924: We appointed a district judge to make a full court of seven judges.

Reargument was had on March 21, 1924, before six of the judges of this court and Judge Redick. "A full court of seven judges" was had just as we provided "a full court of seven judges" in the instant case. The decision in the Davis case resulted in a judgment of affirmance with two judges of this court and Judge Redick dissenting.

If Judge Carter's construction of the Constitution is correct, then the court had no authority to call in a district judge to sit, for the "division" that heard the case originally was constituted of more than five judges. The fact that an affirmance would have resulted in any event does not cure the constitutional error—if it existed, and I hold it did not.

Of the six judges of this court who sat on that reargument, five had been members of the court before and during the Constitutional Convention period. The attorney for the appellant had been a member of the Constitutional Convention. The attorney for the appellee had been a distinguished member of this court.

I submit that had there been any question of the pro-

cedures followed, in that case there would have been a challenge made. No challenge appears.

A check of our Journals indicates that beginning in the late 1920's and carrying through well into the 1930's, the court was appointing a large number of district judges to act as associate judges on this court. The Journal shows that they were usually authority 2 appointments.

I propose now to walk a bit here and there in the moccasins of the court, and particularly those of Judge Carter, during that period.

On September 16, 1929, this court appointed eight district judges to sit "for the prompt submission and determination of cases." Judge Carter, then a district judge, was one of them. This was clearly an authority 2 appointment. On February 17, 18, 19, and 20, 1930, five members of this court, and Judge Carter and one other district judge, sat and heard oral argument in a total of 16 cases. Several of them were affirmed by "Per Curiam" opinion. As the Bar well knows, it has been several years since per curiam opinions were used. Judge Carter wrote opinions for the court in three of those cases which were adopted. Did the court have authority to appoint him, to permit his participation in the decisions and to write opinions? I find no challenge to that procedure in the reports.

In January 1935, Judge Carter became a member of this court. April 20, 21, 22, and 23, 1936, six judges of this court (including Judge Carter) and one district judge sat and heard a total of 19 cases. On October 7 and 8, 1936, five members of this court (including Judge Carter) and one district judge, sat and heard argument in six cases.

And so the record goes.

I became a member of this court in November 1938. We continued from that time until now to appoint and sit with district judges as had been done theretofore.

It would seem that the dread paralysis of judicial

acquiescence in constitutional error (if it be such) was a disease that afflicted many of the judges of this court. I find none who escape the malady.

Can it be said that the lawyers and judges participating in the Davis case and the others throughout the years could not read and understand "the plain language of the Constitution" as Judge Carter, at this late date, reads and understands it? I take it not.

The completeness of the system and its elasticity is illustrated by another amendment made in 1920. Article VI, section 12, of the 1875 Constitution provided: "The judges of the district court may hold courts for each other and shall do so when required by law."

That was amended in the 1920 Constitution so as to provide: "The judges of the district court may hold court for each other and shall do so when required by law *or when ordered by the supreme court.*" Section 12, Article V. The material amendment is emphasized. Why the amendment?

It is disclosed in the debates of the Convention. It was recognized that district judges might become disqualified or disabled, there might be vacancies that would result in retarded judicial service, and that the court work of some districts might become congested. More particularly, it was recognized that the absence of district judges, while serving here, might result in delayed judicial service in a district. Under those circumstances this court was given power to order a district judge to serve in a district other than his own. (Page 1007.) This court was given power to prevent the occurrence of that temporary void.

I now pass over the years and take up the problem which we faced in State ex rel. Johnson v. Marsh, *supra.* That was an original action filed in this court. Every member of this court at that time was a party defendant. We were all disqualified by interest. We appointed seven district judges to hear, consider, and determine the matter.

Under Judge Carter's present construction of the Constitution, the only authority that we had for doing so was that it "involved the constitutionality of a statute." But it did not.

The sole question presented by the relator was: At what date did salary increases involved in an act of the Legislature become effective? There was no allegation of unconstitutionality of the legislative act, but rather there was a question raised as to the construction of the act as to its effective date in the light of certain constitutional provisions and of certain of our earlier decisions holding earlier acts unconstitutional.

We were confronted with such decisions as that of the Supreme Court of Missouri in State ex rel. Volker v. Kirby, 345 Mo. 801, 136 S. W. 2d 319. In that case an attempt was made to question the constitutionality of an act of the Legislature by asserting that if construed a certain way it would be unconstitutional. It was admitted that a constitutional construction could be given. The court held that to raise a question of constitutionality: "* * * the contention must be that the law is unconstitutional whatever it means and under any construction of which it is susceptible. 'The only challenge of unconstitutionality of a statute which does involve such a question is the claim that the statute is inherently and totally invalid in any event.' "

We have held: "If a statute be subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, the courts are required to adopt the construction which would make the act valid." Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388, 126 A. L. R. 729.

Under the Missouri case our rule would remove a charge of unconstitutionality. In the instant case no such charge was made.

A second question was presented to the court in the salary case. If we had authority to appoint district judges, could we appoint seven district judges so as to

constitute a court composed entirely of district judges?

We determined that we had the constitutional authority to appoint seven district judges to sit "temporarily as judges of the supreme court" to hear, consider, and determine the matter.

So far as I am concerned that decision was reached on the following basis: The state had created this court. It had conferred broad jurisdictional powers upon it. In the 1920 amendments the people of the state had departed from the orthodox appellate court with a fixed inelastic judicial personnel, and had provided an elastic system that authorized the use of district judges on this court. They made available for service on this court, not only the seven elected members, but the entire body of district judges of the state. They recognized that one or more judges of this court might be disqualified in a particular case. They provided for that contingency. They left no void there. They provided a complete system of judicial personnel that would enable this court to hear and determine any matter within its jurisdiction.

It was the purpose of the people to create a court with jurisdiction, power, and personnel to decide any question properly presented.

We appointed the district judges in State ex rel. Johnson v. Marsh, *supra,* and they sat, heard, considered, and decided the case favorable to the individual defendants, who, although judges of this court, in that case were litigants. The executive officers of the state accepted their decision as a controlling decision of the highest court of this state. They paid the salaries involved.

Judge Carter "acquiesced" in that procedure, decision, and the resulting action taken in accord with it.

I have one further observation.

The Constitution confers original jurisdiction on this court in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, and habeas corpus. Art. V, § 2.

One of the reasons for conferring such jurisdiction is that in those classes of cases there may arise need for prompt, authoritative, and final decision of questions presented. Our rules relating to the advancement of cases recognize that cases in that category may be advanced if they involve questions of great public interest, as they often do. Rule 16, Part I, Revised Rules of the Supreme Court.

Quite often this court is presented with procedural motions which must be decided prior to the submission of cases on the merits. Such motions are normally given priority in our work so as to prevent delay in the final submission of a case.

Suppose in either of the above situations there is one judge who is disqualified. The remaining six judges of the court see the answer differently and divide three and three. In such a case the court cannot fall back upon a decision of the trial court as an out.

If Judge Carter is correct, the court would be unable to decide the matter until such time as one judge yielded his views or there be a change of judges through the processes of election, resignation, or death. Litigation requiring prompt decision would be interminably delayed.

Surely the framers of the Constitution, who were desirous of removing and preventing delays, would not have created a void where nothing could be decided under those circumstances. Rather I contend that they created and intended to create a court that could at all times where necessary be a "full court of seven judges."

For over a third of a century this court has construed these constitutional provisions. True—the construction has not been in a decision in the sense of statements of propositions in the body of opinions. The construction, consistent throughout, has been in our practices and procedures as revealed in our reports and Journals.

Judges and lawyers have known about them. The interested public has known about them or could have known

by an examination of the Journals of our proceedings and our printed reports. Litigants have won and lost as a result of decisions made by courts so constituted. The Court of Appeals of Kentucky has succinctly stated the rule as follows: "The Constitution as written has been construed by this court, and that construction accepted and acquiesced in for many years, is as much a part of the instrument as if it had been written into it at its origin." District Board of Tuberculosis Sanitarium Trustees v. City of Lexington, 227 Ky. 7, 12 S. W. 2d 348. See, also, Shamburger v. Duncan, — Ky. —, 253 S. W. 2d 388.

For many years the work of this court has been kept current. This happy result was visioned by the Constitutional Convention. It has been achieved by the use of all of the different methods which the Convention devised and the people adopted. We have not found it necessary to sit in two divisions, as such, since 1941. We have, however, since that time sat in divisions composed of the court's own members, and divisions consisting of judges of this court and district judges.

We have generally sat as "a full court of seven judges." To do so when necessary we have appointed, occasionally, a district judge or district judges to sit with us so that litigants would have the benefit of that judicial manpower and the expeditious decision of cases. The methods which we have used to "clear" our docket and keep it so, have full constitutional authority.

IN RE DRAINAGE DISTRICT NO. 100 OF GRANT COUNTY, NEBRASKA, A PUBLIC CORPORATION.
DOROTHY A. PETERSEN ET AL., APPELLEES, V. MAMIE A. THURSTON ET AL., APPELLANTS.
74 N. W. 2d 528

Filed February 3, 1956. No. 33840.

1. **Drains.** In levying assessment benefits by a drainage district, that portion of land actually appropriated and taken by the

district for the right-of-way of the ditch should not be assessed to the landowner from whose premises it is taken.

2. ———. The validity of drainage classification and assessment of benefits can be questioned only by those parties who are prejudiced or injured thereby.

3. **Drains: Appeal and Error.** Upon appeal to the district court from the decision and judgment of the board of supervisors of a drainage district, all original objections made to the classification and assessment of benefits are heard and determined in a summary manner as in equity, and upon appeal therefrom to this court the cause is tried de novo.

4. ———: ———. Upon such an appeal to the district court, the drainage district is the moving party and has the burden of proving the validity of the classification and the amount of the benefits by a preponderance of the evidence.

5. **Drains.** The manner and extent of such classification and benefits are best known and understood by engineers who are experts in the matter of drainage, and when, as required by statute, the district engineer has examined the land and made his report to the board of supervisors of the drainage district which has approved same, it furnishes prima facie evidence of the classification and benefits, and in the absence of fraud, such evidence is sufficient to sustain the decision and judgment of such board unless it is overcome by competent evidence to the contrary.

6. ———. A uniform and exact classification and assessment of benefits is impossible, and it is sufficient if the classification and assessment of benefits to each tract of land is made upon a uniform plan which is fair and just under the evidence with relation thereto. However, if it clearly appears that the classification and assessment made is arbitrary and unreasonable or is made in violation of statutes with relation thereto in such manner as to prejudice or injure an objector, the court will intervene to protect him.

7. ———. In determining the assessment of benefits accruing to land by reason of the construction of a drainage ditch, it is proper to take into consideration whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, the true and final test being what will be the influence of the proposed improvement on the market value of the property.

APPEAL from the district court for Grant County: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Charles A. Fisher, for appellants.

William B. Quigley, Davis, Healey, Davies & Wilson, and *Robert Berkshire,* for appellees.

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

CHAPPELL, J.

Mamie A. Thurston and her husband Clyde A. Thurston, hereinafter called defendants, appealed to the district court from the decision and judgment of the board of supervisors of Drainage District No. 100 of Grant County, hereinafter called the district, which overruled defendants' objections and approved the report of the district engineer classifying and assessing 174 acres of defendants' land for benefits thereto by proposed construction thereon of drainage works and improvements. After a hearing whereat evidence was adduced by the parties, the trial court rendered a judgment which approved and affirmed the decision and judgment of the board of supervisors, hereinafter called the board. After describing each tract of land within the district and naming the respective owners thereof, the judgment provided: "It is further ordered that the total acreage of each land owner to be equally benefited and equally assessed in this drainage district is as follows: Rolf H. Brennemann - 291.50; Kurt W. Brennemann - 70.0; George S. Peterson - 31.0; Dorothy A. Petersen - 117.50; Bert Hayward - 84.50; William L. Hayward - 17.0; Mamie A. Thurston Clyde A. Thurston and Clyde Chester Thurston, as theri (their) separate interests may appear - 174.0. Total acres equally benefited - 785.50, and that the costs and expenses incurred by this drainage district shall be assessed equally on such acre unit in that the benefits to each unit acre will be uniform." Costs were taxed to defendants.

Motion for new trial filed by defendants and Chester Thurston, their son who claimed to have an interest in

some of defendants' property involved, was overruled, whereupon defendants appealed to this court assigning substantially that the judgment of the trial court was not sustained by the evidence but was contrary thereto and contrary to law. We conclude that the assignments should not be sustained.

No question is raised or presented here with regard to procedure followed prior to or in the hearing before the board or upon appeal to the district court or this court. The named members of the board appear herein as ostensible appellees. Such persons, as well as others who were members of the district, except defendants, will be hereinafter designated by name.

Petersen v. Thurston, 157 Neb. 833, 62 N. W. 2d 68, was a proceeding instituted in the district court for Grant County for the purpose of organizing the district here involved. Therein defendants, who concededly did not sign the original articles and application, filed objections to the inclusion of their land within the district upon the ground that the land would not be benefited in any manner thereby. The trial court in such proceedings found and adjudged that defendants' land would be benefited, and included it within the district. Upon appeal therefrom we affirmed such finding and judgment.

Therefore, defendants' contention in the case at bar that their land would not be benefited in any respect by the proposed drainage works and improvements has already been adjudicated and the only questions now presented for determination here are as follows: (1) Whether or not, as contended by defendants, the trial court erred in affirming an assessment allegedly made by the decision and judgment of the board not only upon that portion of defendants' land actually taken for construction of the ditch but also that portion adjacent to the borders of the ditch, the use of which was reserved by the district for purposes of operation and maintenance if and when such became necessary; and (2) whether

or not, as contended by defendants, the trial court erred in affirming the assessment made by the district engineer and approved by the board upon 174 acres of their land. We conclude that the trial court did not err in affirming the assessment as made.

With regard to defendants' first contention, the record discloses that the ditch on defendants' land would be 4 feet wide at the bottom, with 1:1 slopes which would slightly vary the width of the ditch at the top, dependent upon the depth of the ditch as it was constructed along and over defendants' low lands. A note appearing upon exhibit 1, a plat prepared by the district engineer and received in evidence, read: "It is necessary that a 4-rod wide right of way, extending 2 rods to each side of the center line of all of the drain canals of the District, shall be reserved for the purpose of operation and maintenance of all such canals if and when such maintenance should become necessary." Thus, the reserved conditional use of such land on each side of the borders at the top of the ditch was not land actually taken and appropriated by the district as a right-of-way of the ditch. Thereby the district simply reserved an easement over such portion to be used by it only for operation and maintenance purposes if and when that should become necessary. There is no evidence whatever that such use would be perpetual or necessary at all times so as to deprive defendants of that land and the use thereof. The only logical inference in the absence of any other evidence with relation thereto is that defendants would have the beneficial use of such well-drained portion of their land right up to the borders of the ditch and that such portion should have been assessed.

In Nemaha Valley Drainage Dist. v. Stocker, 90 Neb. 507, 134 N. W. 183, this court held: "In levying an assessment by a drainage district, that portion of land taken for the right of way of the ditch should not be assessed to the landowner from whose premises it is taken." In the opinion it is said: "It is clear that, if the

land is taken from appellant by the construction of the ditch, he ought not to be compelled to pay for benefits to property of which he is deprived by the very act of construction. We think this was erroneous, and the appellant is entitled to be relieved from the assessment to the extent that it is based upon land actually appropriated by the district." See, also, 28 C. J. S., Drains, § 57, p. 404; 19 C. J., Drains, § 211, p. 717, and authorities cited.

The land actually appropriated and taken from defendants as a right-of-way of the ditch was only that portion necessary for construction thereof. In that connection, the shaded portions of land outlined upon exhibit 1 and verified by testimony of the district engineer show that 175.5 acres of defendants' land would be equally benefited by the drainage works and improvements, but concededly only 174 acres thereof were classified and assessed. Thus, contrary to defendants' contention, 1.5 acres of defendants' land which was actually taken and appropriated by the district for right-of-way of the ditch was not assessed. In that connection, defendants have failed to adduce any evidence which would sustain a conclusion that they were deprived of any more of their land by actually taking the same or by the very act of construction.

We turn then to defendants' second contention. In that regard, the two Petersens, the two Brennemanns, and Bert Hayward were all members of the district and its board. William L. Hayward and defendants were the only other members of the district. Defendants were also the only members of the district who objected in any manner to the classification and assessments. However, defendants contend as one basis for relief that the lands of the Petersens, the Haywards, and Kurt W. Brennemann would not benefit by the drainage works and improvements, and that only the land of Rolf H. Brennemann would be benefited thereby. That contention has no merit, not only because it has already

been adjudicated in Petersen v. Thurston, *supra,* but also because there is not sufficient competent evidence to sustain it, and if there were, defendants could obtain no relief simply upon the ground that the lands of such other persons who did not object had been classified and assessed at too great a portion of the assessment rather than not assessed enough. In that connection, it is said in 28 C. J. S., Drains, § 67, p. 429: "All interested persons are entitled to object to the assessment, whether as to the apportionment or to the total assessment. However, the validity of drainage assessments can be questioned only by those landowners who are prejudiced by the defects complained of." Also, in 28 C. J. S., Drains, § 72, p. 440, speaking of drains and assessments, it is said: "It is essential that the party seeking relief on appeal must have been injured by the decision from which the appeal is taken."

The question still remaining then is whether or not the court erred in affirming the assessment made by the district engineer and approved by the district board upon 174 acres of defendants' land. We conclude that the trial court did not err in so doing.

In arriving at that conclusion, there are well-established, applicable, and controlling rules of law to consider. It is provided by statute that upon appeal to the district court from a decision and judgment of the board of supervisors of a drainage district classifying lands and assessing benefits, all original objections made thereto shall be heard and determined in a summary manner as in equity. § 31-329, R. R. S. 1943. Thus, upon appeal to this court from the judgment rendered therein by the district court, the cause is tried de novo.

Also, concededly, upon such an appeal to the district court, the drainage district is the moving party and has the burden of proving the validity of the classification and the amount of the benefits by a preponderance of the evidence. As said in Drainage Dist. v. Bowker, 89 Neb. 230, 131 N. W. 208: "The drainage district has

the affirmative side of the proposition, and should first present its evidence in order to maintain its position. No doubt the report of the engineer when approved and confirmed by the drainage board is prima facie evidence of the matters therein required to be stated, but this fact does not change the burden of proof. If the drainage district has the burden, it can use the engineer's report, if so confirmed and approved in the first instance, as evidence to sustain that burden. However, when the evidence is all before the court * * * the burden of proof as to the amount of benefits to the land of the defendant (for the landowner is virtually a defendant) is upon the drainage district."

In Dodge County v. Acom, on rehearing, 72 Neb. 71, 100 N. W. 136, this court said: "The land is covered with swales and depressions, where the waters accumulate and slowly seep away or evaporate. It is a matter of common knowledge that drainage benefits such land, but the manner and extent of such benefits are best known and understood by engineers, who are experts in the matter of sanitation and land drainage. Therefore when the engineer in charge of such work has examined the lands, has made his estimates, and reported them to the county board, in the absence of fraud, such report ought to, and does, furnish prima facie evidence of the benefits which will accrue to each tract of land, and such evidence is sufficient to sustain the orders of the board, unless it is overcome by competent proof to the contrary. The engineer who had charge of the improvement in question, in addition to his findings and report, stated on the witness stand that all the lands included in his report would be benefited, and that he did not know of a foot of that land but what the water falling on it would get into the ditch. It does not necessarily follow that, because some of the land does not lie on or touching the ditch, such land will not be benefited by its construction and maintenance. Where bottom land, like that described by the evidence

herein, is saturated and filled with water, it takes a long time, in the course of natural drainage, or by evaporation, for it to dry and become fit for cultivation. If, however, it is situated near a well constructed ditch, the land adjacent to and touching the ditch will quickly be drained of its excess of water, and this will enable the waters falling upon adjacent lands to speedily work their way into the ditch; and such lands, though not joining or touching the ditch, will surely be benefited thereby."

Also, as said in Nemaha Valley Drainage Dist. v. Stocker, *supra*: "The benefits must be assessed as nearly as may be just under all the circumstances surrounding each tract. Exact nicety of apportionment as to each square yard or square rod is impossible. If the result of the improvement will be to specially benefit each tract or subdivision as a whole it is immaterial whether within its limits there are portions which are not susceptible of cultivation and the value of which if taken by themselves and disconnected from the remainder of the tract would not be enhanced."

As stated in 17 Am. Jur., Drains and Sewers, § 74, p. 823: "As is fully shown in another article, the law does not require that special assessments correspond exactly to the benefits received; on the contrary, it is a matter of common knowledge that absolute equality cannot be attained, and so long as a fair and reasonable method of spreading the assessment is followed, the courts will not intervene for minor inequalities. But when it clearly appears that an assessment is arbitrary and unreasonable, the courts will accord protection."

In Nemaha Valley Drainage Dist. v. Marconnit, 90 Neb. 514, 134 N. W. 177, it is said: "At the outset it is well to say that a uniform and exact apportionment of the benefits to each tract of land is an impossibility in most cases. The most that any officer or tribunal can do is to estimate the benefits to each tract upon as uniform a plan as may be in the light afforded by the evi-

dence and by a personal examination and inspection."

As said in Nemaha Valley Drainage Dist. v. Higgins, 90 Neb. 513, 134 N. W. 185: "The testimony shows that both of these tracts were in part subject to overflow, but that each tract was not liable to be entirely flooded. Among other things, it is insisted that, because each entire tract is not subject to be covered with water, the assessment is not confined to the land benefited, is unjust, and cannot be sustained. It is clearly impossible to make an assessment according to the varying contour lines of the high water mark. The only practicable method is to assess the land benefited as nearly as may be according to the actual boundaries of the land of each proprietor or with reference to government subdivisions."

In Omaha & North Platte R. R. Co. v. Sarpy County, 82 Neb. 140, 117 N. W. 116, this court said: "This court has lately had occasion to consider this question, and has held that the term 'marsh' or 'swamp lands' has a wider significance than the terms 'marsh or swamp,' and that the provisions of the act may properly apply to land which from its low and level character may, from excessive rainfall, retain at some seasons of the year sufficient water so that it is rendered incapable of cultivation. Campbell v. Youngson, 80 Neb. 322. It is there expressly said that power is conferred by this act 'to drain lands which are not, strictly speaking, "marshes" or "swamps," but which are "marsh or swamp lands," meaning thereby lands which are so situated as to be rendered difficult or incapable of successful cultivation by reason of retaining in the soil or carrying on the surface an excessive quantity of water during certain portions of the year, even though at other times they may be as solid, dry and firm as lands in general.'" Section 31-301, R. R. S. 1943, now reads "swamp or overflowed lands" which would not change the above application.

Finally, in Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292, affirmed on rehearing, 72 Neb. 71, 100 N. W.

136, and approved in Baker v. Morrill Drainage Dist., 98 Neb. 791, 154 N. W. 533, this court held: "In determining special benefits accruing to land by reason of the construction of a drainage ditch, it is proper to take into consideration whatever will come to the land from the drain to make it more valuable for tillage, or more desirable as a place of residence, or more valuable in the general market, the true and final test being what will be the influence of the proposed improvement on the market value of the property."

In the light of such authorities, we have examined the record, which summarized disclosed as follows: In compliance with section 31-310, R. R. S. 1943, the board caused a complete topographical survey to be made of the district by W. F. Chaloupka, its graduate engineer, who had more than 40 years of experience as such in that territory. The area included within the boundaries of the district is located some 6 to 8 miles north of Hyannis in both Grant and Cherry counties. It lies within the upper reaches of the Middle Loup River basin, entirely within the area of the sandhills in that region. It extends and generally drains a part of accumulated waters from west toward the east, thence to the northeast, terminating on defendants' land at the Dumbbell Ranch drain. As required, the district engineer made a complete topographical survey of the district and submitted it to the board with maps and profiles of such survey and a full and complete plan of draining, reclaiming, and protecting the lands in the district from the overflow or damage by water or floods.

As required by section 31-312, R. R. S. 1943, the district engineer went over, inspected, and examined the lands and other property in the district which might be affected by the proposed drainage and reclamation works and improvements and also the streams, watercourses, ditches, ponds, lakes, and bayous within the district, or partly within and partly without the district. Further, the maps and profiles drawn by him and submitted

to the board complied in every material respect with section 31-318, R. R. S. 1943, and his report was filed as required by such section.

In conformity with section 31-311, R. R. S. 1943, the district engineer also made an estimate of the cost of the entire drainage works and improvements required in the district to protect and reclaim the lands and property showing the several items of the same.

Section 31-313, R. R. S. 1943, provides in part: "The engineer shall assess, as hereinafter directed and according to the rules hereinafter prescribed, the amount of benefits which will accrue to each tract or parcel of land * * * by virtue of the works and improvements of the drainage district. Each tract or parcel of land, * * * within the district shall bear its share of the entire cost and expenses incurred by the district in making such works and improvements in proportion to the benefits assessed, whether such improvements be made on the tract or parcel of land * * * or not."

Section 31-315, R. R. S. 1943, provides that: "No assessment shall be made for benefits to any lands upon any other principle than that of benefits derived, but all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of such improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water."

Section 31-317, R. R. S. 1943, provides in part: "The engineer shall also classify all lots, tracts, lands, and other property according to the benefit that each may receive from such drainage improvement, and the lots, tracts, and lands receiving the greatest percentage of benefits shall be classified at one hundred, those receiving a less percentage of benefit at such less number as its benefit may determine."

The district engineer testified as a witness for the district and his filed report, including the survey, maps, profiles, plan, estimate of cost, and classification of as-

sessments prepared by him and approved by the board in compliance with related statutes, properly appear in the record as part of the district's evidence. He testified that such exhibits were correct and accurate in every respect and truly reflected the facts therein set forth, and that the classification and assessments made by him, approved by the board, and affirmed by the district court, were fair, just, and equitable.

His examination, study, and surveys of the land were made in 1950 and again in 1952. He also subsequently inspected the lands and reviewed his surveys three times before the trial. He testified that the number of acres of land heretofore set forth belonging to each and all members of the district and receiving the greatest percentage of benefits should be and were classified and assessed equally at 100, as required by sections 31-311 to 31-318, R. R. S. 1943. He further testified that he could also have included some marginal lands belonging to each of the seven landowners in the district which would have received but little if any benefit, but that to have done so would not have affected the total assessment of each landowner, and there is no competent evidence to the contrary. Unless defendants could establish by competent evidence, and they did not do so, that the failure to assess lands receiving a percentage of benefits at less than 100 would have reduced their assessment, defendants are in no position to complain. We find no gross departure from the method of assessment required by statute as occurred in Drainage Dist. No. 1 v. Village of Hershey, 139 Neb. 205, 296 N. W. 879, relied upon by defendants. In other words, as heretofore noted, exact nicety of apportionment is impossible, and it is sufficient if the benefits are uniformly assessed as nearly as may be fair, just, and equitable under all the circumstances surrounding each and all tracts. See, also, Drainage Dist. No. 1 v. Village of Hershey, 145 Neb. 138, 15 N. W. 2d 337.

The report of the district's engineer and his testimony

as well disclose that the entire district area consists of lakes and old lake beds, high rolling sandhills, and flat, low, wet, and swampy meadow lands, which are more or less swampy and very wet most of the year except at times of severe drought or late in the fall; and that during the wet season the area here involved all becomes flooded and heavily saturated with water, resulting in hay crop damage and heavy loss. He testified that it was not intended to drain the sub-soil or to lower the ground waters but rather to control and preserve same by concrete structures incorporated in the ditches in order to quickly intercept and carry off only flood waters from heavy rains and early spring thaw waters before material damage could result to growing crops or those being harvested. He testified that the acres included in the whole area involved are similar in every respect over the entire district; that they were most susceptible to flood and in need of drainage; and that the classification and assessments were uniform and proper in every respect.

The testimony of one Robert Paul, theretofore given in Petersen v. Thurston, *supra*, was offered by defendants and read in evidence by stipulation. He was an engineer with experience in drainage and irrigation work, although he had no former experience with such work in sandhill territory such as that here involved. He made a cursory survey of the district and was never upon the land therein except for a few days in August 1953 and once after that time. He testified with regard to elevations and contours of lands in the district, thereby leaving the inference that defendants' 174 acres of land would not be benefited by construction of the proposed drainage works and improvements but that such low, wet lands, with some rushes or coarse grass upon it, could as well be drained if defendants dug their own ditches. However, upon cross-examination, referring to defendants' land, he testified as follows: "Q. Isn't it true Mr. Paul, this land could be in flood condition

and badly in need of drainage, and you from your present investigation would have no knowledge of the condition? A. And again I would say that it is a matter of opinion, 'It is badly in need of drainage'. Some people say it does and some say it doesn't and from my knowledge I would say it could be either way. Q. Lets establish the time you have actually seen this area. When was the first time, Mr. Paul? A. The first time I was on it was probably August 27 and August 28 and 29, and the 26th. I believe I was there three or four times in that week and I saw it once since then and that is the only time I have seen it. Q. Were you told at the time you were making your investigation that this was an extreme drought condition in this area and probably the worst dry period that they have had through that area; did you have that information? A. Yes, sir, I did. Q. Did you, Mr. Paul, attempt to define in any of the drainage area, the high water point of the area of flood water? A. No, because I did not feel with the time that was alloted to me to do this work, that I could do it and all I did was to run profile down through what I considered the place the water would drain and I just profiled in order to actually determine where the water would stand under any condition without actually seeing it stand, not as ice but as water. I would have to make a complete contour map of the area unless you saw the water actually standing. Q. So in my limited understanding of the survey, you were finding the low points on the whole area? A. Yes, to show where the water would run if any running. Q. And that is all this map proposes to do? A. Yes, and the fall. Q. But it covers the low parts? A. It is not meant to determine the amount of benefit. Q. And as you make your findings and the findings by the Exhibit 1, they coincide exactly or almost exactly? A. As to the amount of fall, yes. I have located the two culverts on here and it seems we used the same bench marks and followed almost the same course, our distances are very close

and the elevations checked almost identical. Q. Almost surprising to find such correlation? A. I don't think either of us are surprised. Q. Both were accurately done? A. Yes, sir." As heretofore noted, exhibit 1 was the plat prepared by the district engineer.

In the light of such evidence, we conclude that the testimony of defendants' engineer did not materially affect or dispute in any substantial manner that given by the district engineer.

Defendants and their son also testified as witnesses in defendants' behalf. They testified in substance that there were some low spots and ponds on their land involved, and that some waters from Rolf H. Brennemann's wet, swampy land on the west drained down upon it, but they had been able to harvest their hay thereon every year since 1950 except in 1952, which was a particularly wet year. They admitted that there was ice on and over their valley during the winter months which generally had accumulated from the west end, and that it was still there at time of trial in February 1955. They also admitted that in the blizzard of 1949 some 50 or 60 of their cattle died on such ice. They testified that they would rather have evaporation or percolation; that the proposed drainage works and improvements would not benefit their land in any respect because they had plenty of drainage if the water from the west was not dumped down on their land; and that the ditch would lower their water level, would be a hazard for their livestock, and an inconvenience in harvesting their hay, despite the construction of adequate culverts or bridges as proposed.

Defendants' contention that their land would receive no benefit from the proposed drainage work and improvement is untenable. That question has not only been already adjudicated but also there is not sufficient competent evidence in the record to sustain such a conclusion. Further, there is no competent evidence with relation to any data, yardstick, criteria, or standard upon

which the trial court or this court could predicate a percentage of benefits to defendants' 174 acres of land except upon the basis of 100 established by the district by a preponderance of the evidence.

We conclude that the district sustained the burden of proof by a preponderance of the evidence, and that defendants' evidence was insufficient to sustain their contention that the classification and assessment of their land should not be sustained. Therefore, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendants.

AFFIRMED.

KROTTER & SAILORS, A CO-PARTNERSHIP, APPELLANT, V. ROY J. PEASE ET AL., APPELLEES,
74 N. W. 2d 538

Filed February 3, 1956. No. 33893.

1. **Mechanics' Liens.** The right to a mechanic's lien is of statutory origin. It did not exist in common law or in equity.
2. ———. A claimant to be entitled to the benefit of the Mechanic's Lien Act must bring himself within its terms and comply with the procedure required to perfect a lien.
3. ———. If a claimant is within the specifications of the statute granting the right and has complied with the procedure required to perfect a lien the provisions of the statute will be liberally interpreted to accomplish the purposes of the legislation.
4. ———. The Mechanic's Lien Act provides security exclusively for materialmen and laborers.
5. ———. The statute providing for a lien on the premises improved in favor of one who performs labor on or furnishes material for the improvement does not extend to a person who supplies money with which the cost of the work or material is paid.
6. ———. The right to a lien by virtue of the Mechanic's Lien Act is created immediately material is furnished or labor is performed within the provisions of the act if a claim is made therefor as required by the statute.
7. **Statutes.** A liberal interpretation of a statute is one which seeks for and fairly and reasonably effectuates the legislative

intent as to the purposes of the legislation as expressed by the language of the statute.

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

Charles M. Bosley and *Robert C. Bosley,* for appellant.

Daniel E. Owens, Ross D. Druliner, Jr., Robert S. Finn, Fred T. Hanson, Jack H. Hendrix, and *Hines & Hines,* for appellees.

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

BOSLAUGH, J.

Roy J. Pease and Bernice F. Pease, husband and wife, were the owners as joint tenants of Lot 4 in Block 5, Smith's Addition to Benkelman. They made an oral agreement about December 24, 1951, with Krotter & Sailors, a co-partnership and a retail dealer in lumber, building materials, and hardware in Benkelman, by the terms of which it was to receive the net proceeds of a loan of $8,500 made by the Tecumseh Building & Loan Association to the owners of the premises and appellant was privileged to furnish materials within the lines which it handled for the construction of the house and to pay the cost of the labor and all materials furnished for the building. It was agreed that any amount of the cost of the construction thereof in excess of the amount received by appellant from the proceeds of the loan made to the owners by the building and loan association was to be paid by the owners to appellant when the construction was completed. The loan was made and the net proceeds thereof were received by appellant and it paid the cost of all labor and materials used in the construction of the house as the bills therefor were presented to appellant at its place of business. There were materials used in the building that were not furnished by appellant and some of them were selected and purchased by the owners as it was understood they

might do as a part of the agreement between them and appellant. The cost of these were paid by it. The owners selected and purchased linoleum at the store of Paul F. Morris. He delivered it to the house and installed it therein on April 10, 1952. The residence was completed and the owners moved into it April 12, 1952. The statement for the cost of the linoleum was on June 10, 1952, at the request and by direction of Roy J. Pease presented to appellant by Paul F. Morris and it was paid by appellant. That was the first time that Paul F. Morris knew that appellant was to pay the cost of the linoleum and it was the first time that the appellant knew the cost of it or had the opportunity to pay it.

Appellant filed a claim of lien under the Mechanic's Lien Act in the office of the county clerk of Dundy County October 10, 1952. The last item of the claim of lien is dated June 10, 1952, and is described as "Paul Morris Linoleum 254.04." It is not claimed that the linoleum was purchased, delivered to the premises, or installed therein that date. It is established without dispute that it was furnished by Paul F. Morris and installed in the house as floor covering on April 10, 1952. The last item on the claim of lien represents the payment of the cost of the linoleum by appellant to Paul F. Morris. The last material that was furnished for the house was May 19, 1952, and it consisted of four minor items at a total cost of $3.17.

A mortgage given by the owners on the premises as security for the payment of a note they owed the Security State Bank of Bird City, Kansas, was filed for record in the office of the county clerk of Dundy County February 13, 1953. The bank pleaded in this case that the claim of lien of appellant was insufficient and was not a lien on the premises because it was not filed in the office of the county clerk within 4 months of the time any labor was performed or material was furnished in the building of the house as required by the Mechanic's Lien Act of the state.

Roy J. Pease died August 12, 1954, and Bernice F. Pease became the sole owner of the premises. This case was brought by appellant to foreclose the lien it claimed on the premises by virtue of the claim of lien filed by it as above stated. The district court found upon the trial of the case that the building and loan association had a first lien and the bank had a second lien on the premises; that the last materials for the construction of the house were furnished May 19, 1952; that the linoleum mentioned in the claim of lien was furnished by Paul F. Morris and was installed and attached to the house April 10, 1952; that appellant paid the cost of the linoleum to Paul F. Morris June 10, 1952; that the payment of the cost of the linoleum was not the furnishing of material within the meaning or scope of the Mechanic's Lien Law of the state; and that the claim of lien of appellant was filed more than 4 months after anything was furnished by it for the construction of the house, and that the claim was invalid. A judgment of dismissal was rendered as to the cause of action alleged by appellant, its motion for a new trial was denied, and it has prosecuted this appeal.

The adversaries in this appeal are appellant and Security State Bank of Bird City, Kansas, hereafter referred to as appellee. The other parties to the case named in the record do not oppose the judgment of the district court in any manner or in any respect.

The claim of appellant is that it was obligated by contract with the owners of the premises improved by construction of the house to pay Paul F. Morris the cost of the linoleum he furnished and laid in the house; that the payment of this item was indistinguishable from the payment by appellant as the contract obligated him to do of other amounts for items of materials and labor required for the construction of the building; and that appellant was performing his contract obligation when he paid Paul F. Morris the cost of the linoleum June 10, 1952, and "On that date, the plaintiff (appellant)

actually furnished the linoleum under the terms of the agreement."

Appellant to sustain the lien it claims relies exclusively upon the fact of its payment of the cost of the linoleum June 10, 1952, as a furnishing of material within the Mechanic's Lien Act notwithstanding it is undisputed that the linoleum was actually delivered to the house constructed on the premises of the owners, placed therein, and attached thereto on April 10, 1952, that the owners took possession of it on April 12, 1952, and thereafter occupied it as their home. The appellee insists that the payment of the cost of material furnished and used as a part of the construction of the house did not constitute furnishing material so as to permit the filing of a mechanic's lien within 4 months after the date of the payment because the material was furnished and placed in the building by third party 2 months before the date of the payment; that the payment of money for material used in the construction of a building does not in any event constitute the furnishing of material within the meaning of the Mechanic's Lien Act; and that the claim of lien by appellant is in any event ineffective and invalid.

The right to a mechanic's lien is of statutory origin. It did not exist at common law or in equity. A claimant of such a lien must in the first instance bring himself within the statute. Fremont Foundry & Machine Co. v. Saunders County, 136 Neb. 101, 285 N. W. 115; Timber Structures v. C. W. S. G. Wks., 191 Or. 231, 229 P. 2d 623, 25 A. L. R. 2d 1358. A claimant to be entitled to the benefit of the statute providing for such a lien must comply with the procedure necessary to perfect a lien. Parsons Construction Co. v. Gifford, 129 Neb. 617, 262 N. W. 508; Davidson v. Shields, 129 Neb. 877, 263 N. W. 490; Fremont Foundry & Machine Co. v. Saunders County, *supra;* Timber Structures v. C. W. S. G. Wks., *supra.* If a claimant is within the statute granting the right and has complied with the proce-

dure specified therein to perfect a lien the provisions of the statute will be liberally interpreted to accomplish the purposes of the legislation. Grantham v. Kearney Municipal Airport Corp, 159 Neb. 70, 65 N. W. 2d 325.

The statute providing for a mechanic's lien defines who are entitled to a lien, for what a lien may be claimed, and the procedure to secure a lien. §§ 52-101, 52-102, 52-103, R. R. S. 1943; Durkee v. Koehler, 73 Neb. 833, 103 N. W. 767. The relevant language of the first section is: "Any person who shall perform any labor or furnish any material * * * or fixtures * * * for the construction * * * of any house * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof * * *, shall have a lien to secure the payment of the same upon such house * * * and the lot of land upon which the same shall stand * * *." A discussion of this statute in Barry v. Barry, 147 Neb. 1067, 26 N. W. 2d 1, contains the following: "It will be noted that the first few words are a designation of those who are entitled to a lien under the statute. They are: 'Any person who shall perform any labor or furnish any material or machinery or fixtures * * *.' * * * The right to this type of lien is not new to the laws of this state. In fact the right was created by statute even before statehood and has continued without interruption thenceforth. * * * An examination of these statutes in sequence will disclose some changes and extensions in some respects but that there has been no change in the designation of those who are entitled to a lien. * * * While this language is broad in its implications yet we cannot think that it is broad enough to include plaintiffs in the class of those entitled to a lien for material furnished. Viewing the evidence most favorably to them it cannot be said that they furnished material. Rita and Mary C. Barry furnished only money. * * * All we know is that each paid a part of the costs of the furnace and of its installation. The material for which they paid was furnished by Olson

Bros. Bernard Barry is in an exactly comparable situation with regard to the furnace. With regard to the other items he is in the situation also of having paid for material furnished by others. We are clearly of the opinion that the statute does not extend its protection to such as these plaintiffs."

The Mechanic's Lien Act provides security exclusively for materialmen and laborers. The language is: "Any person who shall perform any labor or furnish any material * * * shall have a lien * * *." § 52-101, R. R. S. 1943. The allegations and proof of appellant are far short of charging or establishing that it furnished the linoleum within the meaning and intention of the statute. In Lovingood v. Butler Constr. Co., 100 Fla. 1252, 131 So. 126, 74 A. L. R. 513, it is said: "No provision is made by statute for a materialman's lien upon a building in favor of one who advances money to the owner to be used for the payment of bills for such materials, nor in favor of a creditor who at the owner's request pays the bills for such materials or promises the materialman to pay them." Glassco v. El Sereno Country Club, Inc., 217 Cal. 90, 17 P. 2d 703, approved the earlier case of Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360: "It has long been the settled law of this state that 'the mechanics' lien law provides exclusively for the security of materialmen and laborers; and one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefits of the law.'" The Glassco case also adopts what follows from Burr v. Peppers Cotton Lumber Co., 91 Cal. App. 268, 266 P. 1025: "The placing of appellant (the contractor), by reason of his alleged acts, within the classes afforded a lien under the California statute, would give anyone advancing moneys, which paid for supplies or material, in effect, a mortgage or trust deed upon property. That such is not the rule is announced both in text-books on the subject of

mechanics' liens, and the decisions of the Supreme Court of this state. Boisat on Mechanics' Liens, section 114, says: 'A statute giving liens to those furnishing work or material does not extend to those furnishing money with which the work and materials are paid for * * *.'" See, also, United States v. Rundle, 107 F. 227, 52 L. R. A. 505; Hardaway v. National Surety Co., 211 U. S. 552, 29 S. Ct. 202, 53 L. Ed. 321.

The Mechanic's Lien Act means that the right to a lien authorized by it is created immediately labor is performed or material furnished for the improvement of the property of an owner if a claim therefor is made as required by the act. If the procedure specified is satisfied the claim of lien "* * * shall, from the commencement of such labor or the furnishing of such material for two years after the filing of such lien, operate as a lien * * *." § 52-103, R. R. S. 1943. In Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643, this court said: "Under the law of this state the lien of a mechanic or laborer attaches at the commencement of the furnishing of the material, or at the commencement of the performance of labor by him, and not from the beginning of the construction of the improvement on which he labors or for which he furnishes material." The linoleum was furnished, placed in, and attached to the house April 10, 1952, and was used therein on and after April 12, 1952, by the owners of the property. The claim of lien attempted to be foreclosed herein was filed in the office of the county clerk October 10, 1952. This was 6 months after the linoleum was furnished and it was almost 5 months after the items of material were furnished that appear in the claim of lien on date of May 19, 1952. The maximum period allowed for filing a claim of mechanic's lien in the circumstances of this case had expired before October 10, 1952. § 52-103, R. R. S. 1943; Davidson v. Shields, *supra*.

Appellant makes reference to and stresses the con-

clusions of this court to the effect that the Mechanic's Lien Act is remedial and that it will be most liberally construed. This view has been frequently expressed and is firmly established but this does not mean that the words of the act will be forced out of their clear and natural meaning but rather that they will receive a fair and reasonable interpretation with respect to the objects and purposes of the legislation. The liberal interpretation authorized by this doctrine is one that effectuates the legislative intent and not one that evades or disregards the clear provisions of the enactment. The court may not under the claim of liberal construction of the act include within its operation claims of persons not specified in the statute. A litigant asserting a lien because of the act must bring himself fairly within the expressed intention of the legislation. The comment of this court in Henry & Coatsworth Co. v. Fisherdick, *supra,* is appropriate to be quoted: "While this court has held that this statute is remedial and should be liberally construed, it has never arrogated to itself the right, if it had the disposition, to put a construction on the law that would, to all intents and purposes, amount to an amendment of it."

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

AFFIRMED.

GLADYS A. ABRAMSON, APPELLANT, V. MAX ABRAMSON ET AL., APPELLEES.
74 N. W. 2d 919

Filed February 10, 1956. No. 33750.

1. Statutes. The 1947 Legislature passed the Uniform Judicial Notice of Foreign Law Act, being Laws 1947, chapter 93, page 272, which is now sections 25-12,101 to 25-12,107, inclusive, R. R. S. 1943.
2. ———. The foregoing statutes were not intended to remove the necessity of pleading and presenting the common law or

statutes of another jurisdiction of the United States when recovery based thereon is sought in an action brought in this state to enforce a cause of action arising thereunder. It only removes the requirement of proving it. A court may require that it be pleaded and presented.

3. Marriage. The validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere and conversely if invalid by the lex loci contractus, it will be invalid wherever the question may arise.
4. Contracts: Equity. In an action in equity, where both parties are asserting rights founded upon an illegal and void contract, it is a well-settled rule that a court of equity leaves the parties to such a situation just where they placed themselves and as the court found them. Its doors are closed to any applicant for relief from or under such a contract.
5. Marriage. However, a meretricious relationship does not necessarily bar claims to property acquired during the period of such relationship, where the claim is based on general principles of law without respect to a marital status. The fact that the parties have engaged in an illicit relationship does not bar either party from asserting against the other such property claims as would be otherwise enforceable.
6. Attorney and Client. It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.
7. Divorce. An allowance for counsel fees and suit money is, like an award of alimony, dependent upon the existence of the marriage relation; and if this is denied and the wife fails to refute such denial, her application must be refused owing to her failure to make out a prima facie case.

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

Schrempp & Lathrop, for appellant.

Boyle & Hetzner, for appellees.

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

WENKE, J.

This is an appeal from the district court for Douglas

County. The action involves marriage and divorce. The trial court held a common-law marriage existed between the parties but denied Gladys A. Abramson, the plaintiff, separate maintenance for which she had prayed. However, on its own motion the trial court awarded plaintiff an absolute divorce and denied the defendant, Max Abramson, the divorce he had asked for in his cross-petition. In addition to awarding her a divorce the trial court awarded plaintiff the home in which she was living, the title to which is in her name and is legally described as Lot Twelve (12), Block Twelve (12), in Edgewood, an Addition to the City of Omaha, and located at 5924 Pacific Street in Omaha, Nebraska; the furniture and furnishings therein; the sum of $5,000 in lieu of permanent alimony; and attorney's fees totaling $3,000, defendant being ordered to pay all costs. Each of the parties filed a motion for new trial and from the overruling thereof the plaintiff perfected this appeal and the defendant has cross-appealed.

"Divorce cases are tried de novo on appeal to this court, subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Schlueter v. Schlueter, 158 Neb. 233, 62 N. W. 2d 871.

In view of the nature of the questions raised by the cross-appeal we shall consider it first. Therein appellee contends the trial court erred in finding and holding that the parties were husband and wife by virtue of a valid common-law marriage. Since the common-law marriage must have been consummated in Iowa appellee raises the further question of whether or not the law of Iowa was properly raised.

"In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded

and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours." Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431. See, also, Forshay v. Johnston, 144 Neb. 525, 13 N. W. 2d 873.

The 1947 Legislature passed the Uniform Judicial Notice of Foreign Law Act, being Laws 1947, chapter 93, page 272, which is now sections 25-12,101 to 25-12,107, inclusive, R. R. S. 1943.

We said of this act: "The foregoing statutes were not intended to remove the necessity of pleading and presenting the common law or statutes of another jurisdiction of the United States when recovery based thereon is sought in an action brought in this state to enforce a cause of action arising thereunder. It only removes the requirement of proving it. A court may require that it be pleaded and presented." Scott v. Scott, *supra*. See, also, Smith v. Brooks, 154 Neb. 93, 47 N. W. 2d 389.

In her petition appellant pleaded: "Plaintiff, Gladys A. Abramson, and defendant, Max Abramson, are husband and wife respectively, and were lawfully married on September 5, 1929, in Clarinda, Iowa; * * *." No motion was made to make this more definite and certain as to the type of marriage appellant claimed was entered into by the parties.

In his answer appellee pleaded: "Defendant further alleges and without waiving any of the foregoing that if this Court should find that sufficient facts exist on which a common law marriage could be based, that the plaintiff has been guilty of extreme cruelty, resulting in the destruction of the objects and ends of matrimony, if such exist."

The bill of exceptions fully establishes from the evidence adduced and by statements made by the court and counsel for both sides during the course of the trial that the parties and the court fully understood this question as one of the issues raised by the pleadings and being tried by the court. At the close of appellant's

case appellee's counsel made a motion to dismiss appellant's petition and as one of the grounds therefor stated: "That the plaintiff has failed as a matter of law to prove a common law marriage in Iowa; That he has failed to prove the essential requirements of a common law marriage in Iowa; That he has failed as a matter of law to prove a common law marriage in Iowa for the reason that the testimony is insufficient as it is without corroboration; * * *."

We find this issue was sufficiently pleaded and presented in the lower court to properly raise the issue in the trial court and therefore reviewable on appeal. See, § 25-12,103, R. R. S. 1943; Scott v. Scott, *supra*.

Even so, appellee contends it is fundamental that uniform laws are based upon reciprocal laws in other jurisdictions involved and, in the absence of similar enactments in the foreign jurisdiction (Iowa) are without force and effect, citing section 25-12,106, R. R. S. 1943, in support of such contention. This section provides: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it."

We do not think this, or any other provision of the act, makes any such requirement. The act is the law of this state and applicable to any action brought in the courts of the state seeking to enforce rights based upon the common or statute law of any state, territory, or other jurisdiction of the United States. See § 25-12,101, R. R. S. 1943.

As already stated, appellant brought her action for the purpose of securing separate maintenance. As stated in Scott v. Scott, *supra*: "While such actions are proper, however, by their very nature they require a marriage relationship to exist between the parties for it is on that relationship that the right thereto must be based."

Since 1923 a common-law marriage could not be entered into in this state. See § 42-104, R. R. S. 1943. How-

ever, "The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the lex loci contractus, it will be invalid wherever the question may arise." Forshay v. Johnston, *supra.* See, also, Scott v. Scott, *supra.*

During the period of time herein involved a common-law marriage could be legally entered into in Iowa. See, Pegg v. Pegg, 138 Iowa 572, 115 N. W. 1027; In re Estate of Boyington, 157 Iowa 467, 137 N. W. 949; Love v. Love, 185 Iowa 930, 171 N. W. 257; State v. Grimes, 215 Iowa 1287, 247 N. W. 664; Bradley v. Bradley, 230 Iowa 407, 297 N. W. 856; In re Estate of Stopps, 244 Iowa 931, 57 N. W. 2d 221.

"Generally in order to constitute a valid common-law marriage there must be a contract or mutual agreement presently to become husband and wife between persons capable in law of making such a contract or agreement, and the contract or agreement must contemplate a permanent union, exclusive of all others." 55 C. J. S., Marriage, § 19, p. 843.

"A merely meretricious relationship does not constitute a sufficient basis of a common-law marriage, and cohabitation of two persons who are generally reputed to be husband and wife, or introduction or holding out as husband and wife by the persons concerned, does not in itself constitute such a marriage." 55 C. J. S., Marriage, § 22, p. 850.

The law of Iowa as to common-law marriages is stated in Pegg v. Pegg, *supra,* as follows: "We recognize so-called common-law marriages as valid; but for such a marriage to be valid there must be a present agreement to be husband and wife, followed by cohabitation as such."

And in In re Estate of Medford, 197 Iowa 76, 196 N. W. 728, it is stated: "To constitute a common-law marriage, there must be a present agreement between the

parties to be husband and wife, followed by cohabitation as such."

"Contracts of this character may be per verba de praesenti; that is, where the parties take each other in the present tense, implying that the marital relation is constituted immediately, and contracts per verba futuro, which implies no more than the parties will marry each other at a later time. Contracts of the former sort, when duly acted upon, create a valid marriage; while words evidencing only the intention to be married in future are ineffectual even where followed by cohabitation." State v. Grimes, *supra.*

No particular form of contract is necessary. Brisbin v. Huntington, 128 Iowa 166, 103 N. W. 144. However, "* * * a mere written or oral agreement to be husband and wife, without present intention to assume that relation in fact, does not constitute a marriage between the parties, especially if the agreement is entered into for some other purpose, is well settled." Pegg v. Pegg, *supra.* See, also, State v. Grimes, *supra.*

In Love v. Love, *supra,* where an oral understanding was involved, the court laid down the evidentiary rule in this regard as follows: "The difficulty is not in defining common-law marriage, but arises generally from the uncertainty of proof. If the parties are capable of contracting, and mutually agree that they are husband and wife, with the present intention of becoming such, and this is followed by a consummation of the marriage relation, the contract is complete. The consummation of the contract does not depend upon cohabitation for a period of time, but, like other contracts, it is complete when made. Marriage, whether solemnized in the usual way or by mutual consent and agreement, is generally followed by the parties' dwelling together, and performing the duties and obligations of the marriage relation. Proof, therefore, of continued cohabitation between parties who have held themselves out to the public as husband and wife justifies the inference that the parties

are married. If the marriage agreement testified to by plaintiff was admitted by the defendant, proof that the parties lived and cohabited together, or held themselves out to the public as husband and wife, would not be required." See, also, Bradley v. Bradley, *supra.*

Cases involving agreements, oral or written, in which this rule has been applied are Pegg v. Pegg, *supra;* In re Estate of Wittick, 164 Iowa 485, 145 N. W. 913; Love v. Love, *supra;* State v. Grimes, *supra;* Bradley v. Bradley, *supra.* In other words, evidence as to cohabitation, holding out as man and wife, and general repute in the community in regard thereto are for the purpose of showing the intent with which such an agreement was entered into.

Before discussing the evidence there are additional principles which have application here and therefore should be set forth. They are:

"* * * it is well settled that, where cohabitation is in its beginning illicit, affirmative proof of a subsequent present intention to change that relation into the legitimate relations of husband and wife is essential to establish a marriage." In re Estate of Boyington, *supra.* See, also, State v. Grimes, *supra.*

That evidence relating to the relationship of the parties in Nebraska was competent, not as tending to show a relationship entered into between the parties in Nebraska but as bearing upon and explanatory of what had preceded that time. See In re Estate of Wittick, *supra.*

The evidence as to the appellant and appellee having taken trips to other states, including Iowa, is subject to the following: "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." Binger v. Binger, 158 Neb. 444, 63 N. W. 2d 784.

The testimony of both appellant and appellee, particularly that of appellee, lacks much to make it worthy of belief. However, in view of what is hereinafter held, we shall take the testimony of appellant as the basis for arriving thereat.

Appellant met appellee in St. Joseph, Missouri, in the latter part of 1928. She was at that time living with her parents on a farm about 10 miles west of St. Joseph. On September 5, 1929, she and appellee left St. Joseph in the latter's car and drove to Clarinda, Iowa. At that time she was 17 years of age and he was 21. There they stayed overnight in a hotel or tourist home. The next day they drove to Council Bluffs, Iowa, and stopped at the Ogden Hotel which is located on Broadway. They stayed at this hotel some 3 months. They then moved to a hotel located west of the Ogden. It was also located on Broadway in Council Bluffs. They stayed in this hotel about a month. Then they moved into a house in the neighborhood of Twenty-eighth Street and Avenue H in Council Bluffs. They lived in this house until about November 1931 when they moved to the Clearmont Hotel in Omaha, Nebraska.

During the time they lived together in Iowa appellant testified they cohabited together and held themselves out as husband and wife.

After they moved to Nebraska admittedly they lived together as man and wife, held themselves out as such, and had the general reputation in the several communities where they lived that they were such. However, appellee testified they never lived together until appellant came to Nebraska and started living with him in the Clearmont Hotel. After living in the Clearmont Hotel for some time they moved to various homes in Omaha, living at 5924 Pacific Street at the time appellee left

appellant in the fall of 1952. Appellant was still living at this address at the time of trial.

Two children were born to these parties: Maxine, who is living with appellant, on April 14, 1932, and a son, who died at about the age of 3 years, sometime thereafter. Appellant also testified she had a miscarriage while they were living in Council Bluffs.

Appellant's testimony shows the parties had lived together as man and wife since September 5, 1929; had always held themselves out as husband and wife; and, after coming to Nebraska in November 1931, had a general reputation in the communities of Omaha where they lived as being husband and wife. The question then arises, was this done pursuant to any understanding or agreement that they intended to become husband and wife. In this respect appellant testified as follows:

"Q- Prior to the time that Maxine was born did you have any conversation with Max Abramson about going through a marriage ceremony and if so what did he tell you? A- Well, that we were already married.

"Q- What did he tell you was the reason you were married? A- After we slept together. I suppose that would be reason enough.

"Q- He contended that you were married by that act, is that correct? A- Yes.

"Q- Did you rely on his word in that respect? A- Yes, I did.

"Q- Have you always regarded yourself as a married woman? A- Yes, I have * * *."

"Q- You felt you were married to him because of having lived with him and had three children? * * * A- Yes.

"Q- The fact that you slept or lived with him in Iowa does that lead you to believe that you are married to him? A- Yes.

"Q- And on that solely you determined that you are married to him? A- Not on that solely - some things that he said.

"Q- The things he said to you afterwards? A- Yes."

We find nothing in the evidence of any agreement or understanding had between the parties on or before September 5, 1929, that they intended to become husband and wife. We think their relationship started out as an illicit or meretricious one and find nothing in the record in the way of affirmative proof that thereafter, while they were living in Iowa, that there was any present intent to change the relationship into one of legitimate relationship of husband and wife which, under such a situation, is essential to establish a common-law marriage.

Having come to the conclusion that no marriage ever existed between these parties the following is applicable: "'* * * The action was one in equity; both parties were asserting rights founded upon an illegal and void contract. In such a case, it is a well-settled rule that a court of equity leaves the parties to such a situation just where they placed themselves and as the court found them. Its doors are closed to any applicant for relief from or under such a contract. Netherton v. Frank Holton & Co., 191 Wis. 483, 489, 210 N. W. 379.' (Brill v. Salzwedel, 235 Wis. 551, 292 N. W. 908.)" Smith v. Smith, 255 Wis. 96, 38 N. W. 2d 12, 14 A. L. R. 2d 914.

It should be understood, as stated in 55 C. J. S., Marriage, § 35(c), p. 878, that: "* * * the fact of a meretricious relationship does not bar claims to the property acquired during the period of such relationship, where the claim is based on general principles of law without respect to a marital status; the fact that the parties have engaged in an illicit relationship does not bar either party from asserting against the other such property claims as would be otherwise enforceable."

As stated in Baker v. Baker, 222 Minn. 169, 23 N. W. 2d 582: "The parties are left to resort to such action in regard to their property rights as they may be advised."

Finally appellee, by his cross-appeal, questions the

trial court's authority to allow attorney fees. The rule in this state is: "It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery." State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392.

Section 42-308, R. R. S. 1943, provides: "In every suit brought either for a divorce or for a separation, the court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; * * *."

As already stated herein such actions require a marriage relationship to exist between the parties and, in the absence thereof, cannot be sustained. In the absence of any right to bring and sustain such an action the statutory authority to allow attorney fees therein does not exist. As stated in 17 Am. Jur., Divorce and Separation, § 571, p. 453: "An allowance for counsel fees and suit money is, like an award of alimony, dependent upon the existence of the marriage relation; and if this is denied and the wife fails to refute such denial, her application must be refused owing to her failure to make out a prima facie case."

In view of the foregoing we reverse the judgment of the district court and remand the cause to it with directions that it be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

HIRAM DWOSKIN, ALIAS HIRAM DEE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
74 N. W. 2d 847

Filed February 10, 1956. No. 33815.

1. **False Pretenses.** In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud.

2. **Criminal Law.** When the necessary elements of the crime are sustained by evidence, the question of the intent with which the transaction was carried on is usually one for the jury to determine after a consideration of all the facts and circumstances. The fact that additional representations may have been made relating to future transactions is material only as a circumstance to be considered by the jury in determining the question of intent.
3. **False Pretenses.** Where the essential elements of the crime of obtaining money by false pretenses are present, it is no defense that the defendant had an option to buy the property on which he made default.
4. **Trial: Appeal and Error.** Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Schrempp & Lathrop, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

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

MESSMORE, J.

The plaintiff in error, hereinafter called the defendant, was convicted of obtaining money by false pretenses and was sentenced to serve 4 years in the State Penitentiary. He brings the record of his conviction to this court for review.

The amended information, in substance, charged that Hiram Dwoskin, alias Hiram Dee, did falsely pretend to William L. Sudyka and Louella L. Sudyka that the Allied Finance System, a corporation, was the owner of or had the power to execute a conveyance of Lot 6, Block 4, Phillips' Addition to the city of Omaha, Douglas County, Nebraska, also described as 2419 South Tenth Street, Omaha, Nebraska; that by such false pretenses the defendant did induce William L. Sudyka and Louella

L. Sudyka to enter into a contract with the Allied Finance System and defendant for the purchase of said property and to pay to Allied Finance System and defendant the sum of $3,000 in money as a down payment on the purchase price of said property; that neither the Allied Finance System nor the defendant were the owners of said property; that neither the Allied Finance System nor defendant had any authority to contract for the sale of such property or the power to execute a conveyance of such property; that relying upon such false pretenses, William L. Sudyka and Louella L. Sudyka did pay and deliver $3,000 in money to the Allied Finance System and defendant; that the Allied Finance System and defendant received the $3,000 in money; and that such pretenses were false and made with the intent to defraud William L. Sudyka and Louella L. Sudyka.

The charge was brought under section 28-1207, R. R. S. 1943. So far as material here, the statute provides: "Whoever (1) by false pretense or pretenses, or by a promissory representation as to some future action to be taken by the person making the representation where made with the present intent that such future action would not be performed or carried out, shall obtain from any other person, * * * any money, * * * with intent to cheat or defraud such person, * * *." The statute then provides for punishment of the offense.

The gist of the offense is described in Brennan v. State, 141 Neb. 205, 3 N. W. 2d 217, as follows: " 'In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses, with the intent to cheat and defraud.' Ketchell v. State, 36 Neb. 324, 54 N. W. 564; reaffirmed in Thompson v. State, 112 Neb. 389, 199 N. W. 806."

The defendant elected to try his own case. He was assisted, in part, by an attorney from the public defender's office.

At the close of the State's evidence, the defendant moved for a directed verdict of acquittal and predicates

error on the part of the trial court in overruling this motion. This raises the question of the sufficiency of the evidence to submit the case to the jury, which may be summarized as follows.

By stipulation of the parties, the Allied Finance System and the Equity Holding Company are Nebraska corporations. The evidence clearly indicates that the defendant was the sole and complete owner of these corporations, and there is no evidence to the contrary. We make this observation at this time for the reason that both the Allied Finance System and the Equity Holding Company will be mentioned subsequently in the opinion.

The record discloses that Leo J. Kemler and Lillian Kemler, his wife, acquired title to Lot 6, Block 4, Phillips' Addition to Omaha, Douglas County, Nebraska, by warranty deed from Jens Dahl Jensen and Marie Jensen, husband and wife, executed on March 5, 1951. The property is also known as 2419 South Tenth Street. Kemler testified that in March 1951, he entered into a contract for the construction of a house on the property, with the defendant, the Built-Rite Company, and paid the defendant $4,400, making the last payment around July 1951. In addition, he executed a mortgage to the Allied Finance System, a Nebraska corporation, on March 5, 1951, in the amount of $9,000. He dealt only with the defendant when he dealt with the Allied Finance System. A dispute arose between Kemler and the defendant apparently with reference to liens that might be placed against the property. As a result of this dispute, a contract was entered into between Kemler and his wife and the Allied Finance System on August 4, 1952. By the terms of the contract Kemler and his wife were to sell to the Allied Finance System the property in question for $5,500, the purchaser agreeing to buy the property subject to all encumbrances of record or any encumbrances that might be placed there-

after on the property, and to close the purchase on or before 90 days after the date of the agreement.

Kemler further testified that he never had any conversation, correspondence, or communication of any kind with the defendant or the Allied Finance System after August 4, 1952, or before December 6, 1952, with reference to William L. Sudyka and Louella L. Sudyka; that he never sold the property; and that he did not own it at the time of the trial.

On cross-examination Kemler testified that he was represented by an attorney, and that after August 4, 1952, his attorney had correspondence with the defendant with reference to the property in question. Kemler's attorney wrote a letter dated December 19, 1952, to the defendant in care of the Built-Rite Company, informing the defendant that the attorney had a deed to the property heretofore described, made by Leo J. Kemler and Lillian Kemler, husband and wife, conveying the property to the Allied Finance System, and would deliver the deed to the defendant upon the payment of $5,500, on condition that the amounts named in the letter were paid within a reasonable time, not to exceed 30 days from the date of the letter.

On January 30, 1953, Kemler's attorney wrote to the defendant referring to the attorney's letter of December 19, 1952, and stating that the purpose of the letter was to amend the letter of December 19, 1952, and informing the defendant that the deeds mentioned in that letter and the amounts specified were to be paid by February 15, 1953.

On re-direct examination Kemler testified that on or after February 15, 1953, he never executed any document with reference to the sale of this property to the defendant or the Allied Finance System, nor had any conversation with the defendant; that the option, as evidenced by the letters, was never exercised by the defendant; that he never received from the defendant or the Allied Finance System, or anybody else at any

time after December 6, 1952, any money from the sale of this property; that after the property was sold, his attorney received in Kemler's behalf a note from the defendant for $5,000; that Kemler received a total of $447.40 from the defendant; and that no further money was paid on this note.

William L. Sudyka testified that he contacted the defendant by a telephone call and made an appointment with him to look over the property in question as it had a "for sale" sign on it, by Built-Rite. The defendant did not keep the appointment, and 2 weeks later, on December 6, 1952, this witness called the defendant again and made an appointment to go to defendant's place on North Thirtieth Street. He met the defendant and asked him what he wanted for the property, and the defendant told him that he would have to have some money for a down payment. The witness said that he had $3,000. They then proceeded to the house and looked it over. The interior was not finished. The defendant said he wanted $14,900 for the house. After looking over the house this witness, his wife, and the defendant went to the defendant's place of business. The defendant then told this witness: "That is a nice place, * * * I will sell it to you, * * * I will fix it and I will have the floors in and the walls painted." He referred to the property as his house. He also said he would have it fixed up by January 1, 1953. Negotiations were carried on and a contract was entered into which was a purchase agreement whereby Sudyka and his wife agreed to purchase the property here involved from the Allied Finance System, the same to be completed in accordance with specifications which were designated on the reverse side of the contract, subject, however, and on condition that the owner thereof had a good and valid title, in fee simple, and would furnish abstract of title down to the date of the sale, and convey said premises by warranty deed, land contract for deed, the purchaser agreeing to pay $14,900, the terms

being $3,000 payment with contract and balance payable at the rate of $72 per month, together with interest on the unpaid balance. All payments made were to apply on interest first and the balance on the principal. Payments of $72 were to start February 1, 1953, and continue until the principal and interest were paid in full. Said property was to be delivered to purchaser free and clear of all encumbrances and taxes due and payable. Then the seller agreed to close the purchase in accordance with the contract, and the date was not designated when the closing would occur. There are other elements of the contract not necessary to mention, except that it shows that Sudyka, on December 6, 1952, paid $3,000 to apply on the purchase price of the property. A check for $3,000, dated December 6, 1952, payable to the Allied Finance System by William L. Sudyka, bearing the endorsement of the Allied Finance System is in evidence as the down payment on the property.

William Sudyka further testified that he believed and relied upon the defendant's representation and defendant's statement that he would sell the house to him; and that at no time during any of these transactions were the names of Mr. or Mrs. Kemler mentioned to him, nor that there was a mortgage on the property, nor that mechanic's liens had been filed against the property. It does appear from the evidence that during the period when the house was being constructed and prior to December 6, 1952, mechanic's liens in the amount of $3,974.07 had been filed against the property. He further testified that he made no payments on the house after December 6, 1952; that he did have a conversation with the defendant in February or March with reference to moving some furniture into the house; that the house was not finished and he did not move the furniture in; and that he did not receive a deed from the defendant or from the Allied Finance System, or receive any part of his money back.

The defendant proceeded to cross-examine this wit-

ness extensively, against the advice of his technical adviser or assistant. This cross-examination revealed very little, if anything, different from the testimony of the witness on direct examination, except to say that the defendant and the witness went to some loan companies to obtain a mortgage which they were unable to obtain, and that the witness' attorney told him not to move into the property.

Louella Sudyka corroborated and substantiated the testimony of her husband, William L. Sudyka, in every detail, and testified that she was with him at all times when he had any transactions with the defendant with reference to the property.

Warren Tunis testified without objection on the part of the defendant, contrary to the advice of his technical adviser or assistant. The testimony of this witness, and of the witness Julius Van Hoenacker which is summarized later, has reference to transactions between these witnesses and the defendant subsequent to the transaction with William L. Sudyka and Louella L. Sudyka, his wife. The court cautioned the jury that this type of testimony would be admitted for one purpose only, that is, with reference to the question of the intent on the part of the defendant in connection with the transaction in question, and the court instructed the jury to the same effect.

This witness testified that in October 1953, he had a conversation with the defendant at defendant's office. He looked at the property in question. The defendant told him it had been built for some time and the transaction did not go through, so it was available if the witness wanted to buy it; that he owned it and built it; and that he would also build a garage and arrange for a mortgage. The name of Kemler was never mentioned when the negotiations were entered into. Nothing was said by defendant about a mortgage or mechanic's liens at that time, nor about a lawsuit being filed to foreclose the liens against the property. On October 3,

1953, an agreement for a warranty deed was entered into by and between this witness and his wife and the Equity Holding Company, Inc., with reference to the purchase of the property in question for $14,900, cost of the house and land, and cost of new improvements and land $2,750, with a down payment of $1,000, and $200 a month. The $1,000 was paid down by this witness by check to the Equity Holding Company at the time of entering into the agreement. He never received a deed from the Equity Holding Company. He moved into the property, took possession, and lived there for a few weeks. On cross-examination by the defendant this witness testified that he endeavored to make cancellation of his agreement for failure on the part of the seller to perform the terms thereof, and adjusted the matter by receiving a refund of $850, allowing a fee for services rendered to date.

A deputy register of deeds testified to the deed from the Jensens to the Kemlers; that the next deed was dated on February 24, 1954; and that no other instrument was filed on that property during the interval of time between the recording of the Jensen-to-Kemler deed and February 24, 1954, with the exception of mechanic's liens and a mortgage.

Julius Van Hoenacker testified that he met the defendant while he was walking around the premises on a Sunday afternoon in the last part of December 1953, or the fore part of January 1954. The defendant and his son were working on the sunporch and invited the witness into the house. Later the defendant told the witness that he was in trouble. The defendant did not tell this witness who owned the property. He said nothing about any mechanic's liens, or about a lawsuit filed with reference to foreclosing some liens. An agreement was entered into January 22, 1954, between this witness and his wife, and the Equity Holding Company for the purchase of the premises for $12,000, $50 at the time the contract was signed, $4,950 on January 25,

1954, and $7,000 after the delivery of the deed. This witness further testified that he did not receive the deed to the premises from the defendant or the Equity Holding Company.

There is a stipulation in the record setting forth the dates of a number of mechanic's liens filed against the property in question on October 15, 1951, and in January, March, August, October, and November 1952. An action was brought to foreclose these liens. A decree of foreclosure was entered, sheriff's sale had, sale confirmed, and all the lienholders were foreclosed of all equity of redemption, right, title, interest in, or lien upon the real estate.

The defendant argues that the State failed to produce any evidence of the defendant's pretense that he had power to execute a conveyance. The evidence shows that the only connection the defendant had with the real estate in question prior to August 4, 1952, was that he contracted to build a house thereon for the owners. Thereafter a dispute arose between the owners and the defendant. On August 4, 1952, the owners and the defendant entered into a contract of purchase, giving the defendant the right to purchase the property within 90 days from the date of the contract. There was nothing said nor done with reference to the contract between the parties to the agreement prior to December 6, 1952. On that date the defendant contracted to sell the property to William L. Sudyka and Louella L. Sudyka, and took a $3,000 payment down. The contract between the defendant and the owners, by its terms, had expired on November 2, 1952. There was no extension of the contract giving the defendant an option to purchase the property from November 2, 1952, to December 6, 1952. The record discloses that there is no evidence that defendant ever intended to exercise the option to purchase the property as provided for by the contract. Obviously the defendant had no title, nor did the Allied Finance System, of any kind to the property involved in

this case on December 6, 1952. The defendant or the Allied Finance System were in no position to sell or contract to sell the property. This being true, the defendant or the Allied Finance System did not have the legal right or power on December 6, 1952, to execute a conveyance of the property to the Sudykas. The written contract of purchase entered into between the Sudykas and the Allied Finance System and defendant specified with reference to the property here involved "that the owner hereof has a good and valid title, in fee simple." The defendant told the Sudykas: "I will sell you my house * * *."

The defendant relies on Graf v. State, 118 Neb. 485, 225 N. W. 466. In that case Graf, defendant, and one Krauss entered into a contract for the exchange of properties. Pursuant thereto Krauss endorsed a note owned by him, secured by a chattel mortgage, and delivered the note and chattel mortgage to the defendant, and also delivered to defendant warranty deeds executed by Krauss and his wife on lands owned by him. At the same time the defendant executed and delivered to Krauss a warranty deed for the lands which defendant claimed he owned. At that time the defendant held a contract for the purchase of the lands he claimed he owned, and had paid thereon the sum of $500. A deed had been executed by the owner of the record title to this land, in which the defendant was named as grantee, and deposited in escrow, to be delivered to the defendant upon payment by him of the balance of the purchase price, amounting to $3,100. Some time after the making of the contract for and exchange of deeds between Krauss and defendant, the defendant voluntarily made payments aggregating more than $1,100 on his contract for the purchase of the land he had agreed and attempted to convey to Krauss. The court indicated that this evidence tended to negative the charge that the defendant had an intent to cheat or defraud, but stated it was a question for the jury. The court went on to what it

considered a more serious question—that it was charged in the information that the defendant represented that he was the owner and holder of the record title to the land which he was to convey to Krauss. The defendant did not state that he was the owner of the record title. At most, the evidence showed that the defendant said he owned the land and referred to it as "my land." The court said: "The word 'owner' is one of wide and extensive meaning when applied to real estate. It includes a rightful proprietor; one who owns the fee; one who has an estate less than a fee; any one who owns an estate in lands; the person entitled to the legal estate; any one who has an equitable right to or interest in land, or one who has any right which, in law or equity, amounts to ownership in the land." Under the facts in the case, the court said: "We think it must be conceded that defendant had an equitable interest in the land by virtue of the contract and deed to him in escrow from the owner of the legal title, * * *. In view of the testimony of Krauss, the complaining witness, that defendant did not at any time represent to him that he was the owner of the record title, * * *." The conviction obtained in the district court was reversed and dismissed.

In the case of Graf v. State, *supra,* the defendant had a valid and enforceable option on which he made two payments in the amount of $1,600. In the instant case the option had expired, and no payments were made on the contract. In the instant case the contract stated that the seller had a good and valid title in fee simple at the time the false representation was alleged to have been made. There was no claim made by the defendant Graf that he had the power to execute a conveyance. The definition of the word "own" or "owner," as set forth in Graf v. State, *supra,* certainly has no application under the facts and circumstances of the instant case. The facts in Graf v. State, *supra,* are distinctively different than those in the instant case. This is likewise true in the cases of Eselin v. State, 113 Neb. 839, 205 N. W. 570,

and State v. Eudaly (Mo.), 188 S. W. 110, relied upon by the defendant, which have been considered and found to be inapplicable to the instant case.

In the instant case the seller did not even have an enforceable right to purchase the property when the money was obtained from the Sudykas, and was in default of any such right and unable to exercise the right to purchase. There were liens totaling nearly $4,000 filed against the property in question, and a mortgage outstanding in the amount of $9,000. None of these facts were revealed to the Sudykas. The evidence substantiates the charge in the information that the defendant and Allied Finance System, which he owned, had no power to execute a conveyance on December 6, 1952.

We said in Potard v. State, 140 Neb. 116, 299 N. W. 362: "When the necessary elements of the crime are sustained by evidence, the question of the intent with which the transaction was carried on is usually one for the jury to determine after a consideration of all the facts and circumstances. The fact that additional representations may have been made relating to future transactions are material only as circumstances to be considered by the jury in determining the question of intent."

Where the essential elements of the crime of obtaining money by false pretenses are present, it is no defense that the defendant had an option to buy the property on which he made default. See, Brennan v. State, *supra;* Hameyer v. State, 148 Neb. 798, 29 N. W. 2d 458; State v. Pierson, 47 Del. 397, 91 A. 2d 541; State v. Stanley, 116 Kan. 449, 227 P. 263; 22 Am. Jur., False Pretenses, § 51, p. 471. We conclude that the evidence was sufficient to submit to the jury the charge filed against the defendant as alleged in the amended information.

The defendant predicates error in the giving of instruction No. 8 by the trial court, which reads as follows: "The words 'power to execute a conveyance' of the real estate involved herein, as used in these instructions, means the present opportunity and ability, under all

the surrounding facts and circumstances which you find to exist in this case, to procure the legal title and to transfer it to another, or the present opportunity and ability to direct and to cause the title to be transferred to another."

The defendant contends that this instruction unduly restricted the definition of "power to execute a conveyance" and thereby created a false issue under the facts in the instant case. The amended information charges that the defendant falsely pretended that he, or a company owned by him, "was the owner of or had the power to execute a conveyance of" certain real estate. There was no objection made by the defendant to the form or substance of the information, and any such objection has been waived. See Thompson v. O'Grady, 137 Neb. 641, 290 N. W. 716.

The instruction complained of relates to the present opportunity and ability to procure and transfer the legal title to the real estate involved on December 6, 1952. The jury was required to determine what representations were made by the defendant on that date and what he was able to do with respect thereto. This was a proper instruction when considered with all the other instructions in the case. The following is applicable.

In Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374, the court said: "Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism." See, also, Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761.

For the reasons given in this opinion, we conclude that the verdict of guilty and judgment entered thereon should be and are hereby affirmed.

AFFIRMED.

CURTIS O. BENNETT ET AL., APPELLANTS, V. HAROLD K. EVANS ET AL., APPELLEES.

74 N. W. 2d 728

Filed February 10, 1956. No. 33842.

1. Easements. In a case resting on a claim of an implied reservation of an easement, the easement must be one that is so open, visible, and apparent that it directs the attention of its existence upon such examination as would ordinarily be given.
2. ———. Where an actual survey is required to determine the fact of an encroachment, the easement is not open, visible, and apparent.
3. ———. Circumstances which may be sufficient to imply the creation of an easement in favor of a conveyee may not be sufficient to imply the creation of one in favor of the conveyor.
4. ———. As a general rule, there is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained.
5. ———. A grantor cannot derogate from his own grant and as a general rule he can retain a right over a portion of his land conveyed absolutely only by express reservation.

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

Perry, Perry & Nuernberger, for appellants.

Sterling F. Mutz, for appellees.

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

SIMMONS, C. J.

This action originated as one in ejectment to secure the possession of the west 3 feet of Lot 9, Block 1, Linwood Manor in Lincoln, Nebraska. The defendants are the owners of Lot 10, Block 1, which is contiguous to Lot 9 and immediately west thereof.

The defendants by answer admitted plaintiffs' ownership of Lot 9 "except the portion thereof which is occupied by the garage and driveway of the defendants on the west side of the plaintiffs' property."

Defendants further alleged that the titles of the parties came from a common owner of both lots who built the garage and driveway where they are now located and thereby established the boundary line between the properties "at a point just east of the garage and driveway"; and that plaintiffs purchased with knowledge of the location of the boundary line and were estopped from claiming a right of possession of the property on which the garage and driveway are situated.

By cross-petition, defendants alleged a right to and prayed for a decree fixing and establishing the boundary line and that defendants be decreed to be the owners of all that portion of Lot 9 "on which the garage and driveway of the defendants extend over and upon the same" or that they be decreed to have a perpetual easement for its use and occupancy appurtenant to the land.

The reply consisted of a general denial and allegations of matters not necessary to a decision here.

The trial court found generally for the defendants. The trial court decreed that defendants had a perpetual easement on the west 3 feet of Lot 9 as a reserved easement and decreed that it be construed as a covenant running with the land.

Plaintiffs appeal.

We reverse the judgment of the trial court and remand the cause with directions to enter a judgment for the plaintiffs.

A jury was waived in the trial court. The action was tried and disposed of as one in equity without objection by the parties.

The material facts out of which this controversy arises are not in substantial dispute.

Evans & Moore, a partnership, owned, platted, and developed this addition. The defendant Evans was a member of the partnership. Moore died in September 1954.

Each of the lots involved here is rectangular in shape,

by plat 60 feet in width facing the street and 120 feet in depth.

Sometime during the month of July 1952, the partnership began the construction of houses, one on each of Lots 9 and 10. The partnership also built a garage, intended to be a part of improvements on Lot 10, but actually encroaching on Lot 9 lengthwise of the garage a distance of approximately 2 feet. The garage was built about two-thirds of the way down the lot, with a concrete floor and foundation, and a frame superstructure. There was an overhang of the eaves of approximately 6 inches beyond the 2 feet. The garage was completed sufficient to be used for storage of personal property by August 15, 1952.

On September 17, 1952, the plaintiffs purchased Lot 9 by contract from the partnership, made a substantial down payment, and were delivered the keys to the property.

Clearly both of the contracting parties understood that the purchase and sale involved the 60-foot by 120-foot lot and improvements. Neither of the contracting parties then knew that the garage encroached upon Lot 9. Neither of the parties contemplated that the garage was involved in the sale.

On October 18, 1952, the partnership conveyed Lot 9 to the plaintiffs by deed of general warranty. The reservation here claimed is not made in the deed. Plaintiffs moved into the property about that time.

On January 14, 1953, the partnership conveyed Lot 10 to the defendants, the defendant Harold K. Evans being a grantor as a member of the partnership and a grantee in the deed.

Sometime after plaintiffs moved into the property, a driveway was constructed along the east side of defendants' property. This driveway encroaches on plaintiffs' property its entire length, beginning with 6 inches at the front of the lot and 2 inches at the garage. It

does not appear that an encroachment was actually intended when this driveway was built.

Subsequent to their purchase of the property, plaintiffs undertook to find the exact location of their west line. They could not locate a stake at the southwest corner. They were told by Evans and Moore or by Moore, to measure from the southeast corner. Sometime after Christmas of 1953, plaintiffs did so and always "came up behind this other garage." They related this fact to Moore. He then had the property surveyed in May 1954, when it became definitely known that the encroachments existed as above set out. Evans did not know of the encroachments until he was shown the results of that survey.

The parties then undertook to negotiate a settlement. That failed. In October 1954, this litigation began.

From the above recital of the limited issues made and the evidence, it is patent that the trial court's decree granting a perpetual easement along the west 3 feet of plaintiffs' property is clearly erroneous. It has neither pleading nor facts to sustain it.

Plaintiffs here rely on our decision in Goozee v. Grant, 81 Neb. 597, 116 N. W. 508. The facts in that case are quite similar to the facts here. That case determined an issue of estoppel, such as defendants pleaded here. While not stated in the opinion, that decision may well have turned upon the rule stated in Lingonner v. Ambler, 44 Neb. 316, 62 N. W. 486, and subsequent cases, that: "To create an estoppel in pais the party in whose favor the estoppel operates must have altered his position in reliance upon the words or conduct of the party estopped." The issue which we have here does not appear to have been presented nor decided in the Goozee case.

We have here a case where the owners of property convey a part of it to a third party without reservation or exception, and retain the remainder. The estate conveyed is now alleged to be the servient estate. The

estate retained is now alleged to be the dominant estate. Stated otherwise, the defendants contend that the partnership, contrary to the terms of its deed, and contrary to the intention of the parties, had in law an implied reservation of the land in Lot 9 upon which the garage and driveway encroach.

The only theory upon which defendants can prevail is that at the time the servient estate was conveyed the partnership reserved from the grant the right to continue the encroachment upon Lot 9. This is in effect to permit the grantor to derogate from its express grant.

It is patent that whatever rights of easement, if any, the defendants have over the property of the plaintiffs, arise as a result of, and at the time of, the conveyance by the partnership to plaintiffs. Prior thereto there could not have been an easement. Subsequent thereto nothing occurred upon which a reserved easement by implication could arise. It accordingly follows that defendants have no easement over the plaintiffs' property insofar as that part is concerned where the driveway is located. Plaintiffs are entitled to prevail as to that part of their action. The trial court erred in its decree granting an easement for the driveway.

Defendants here rely on the rule stated in Fremont, E. & M. V. R. R. Co. v. Gayton, 67 Neb. 263, 93 N. W. 163, where we held: "Where an owner of land by any artificial arrangement effects an advantage for one portion as against another, upon severance of the ownership the grantees of the two portions take them respectively charged with the easement and entitled to the benefit openly and visibly attaching at the time of the severance."

The above is a rule of construction generally stated. 3 Tiffany, Real Property (3d ed.), § 781, p. 255.

Defendants also rely upon the decisions in Znamanacek v. Jelinek, 69 Neb. 110, 95 N. W. 28, 111 Am. S. R. 533; Arterburn v. Beard, 86 Neb. 733, 126 N. W. 379; Seng v. Payne, 87 Neb. 812, 128 N. W. 625; De Conly v. Winter

Creek Canal Co., 110 Neb. 102, 193 N. W. 157. There may be other cases of similar import such as Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560, not cited by the defendant.

The first question is: Was the encroachment on Lot 9 open and visible, or apparent?

Obviously the garage was there for anyone to see when the plaintiffs purchased their property. But was it apparent that it encroached upon the property which the plaintiffs bought? It is shown without dispute that neither the plaintiffs nor Moore nor Evans considered that there was an open, visible, or apparent encroachment. It took a survey to establish that fact. The parties did not know of the encroachment until the survey was made demonstrating the fact.

We now go to Reiners v. Young, 109 N. Y. 648, 16 N. E. 368. For reasons stated in the New York report, the opinion was not printed there. It appears in the North Eastern Reporter. There a building was erected by the owner of a property. The property was sold to different grantees. A survey, made later, disclosed that a portion of the building was on land sold to plaintiffs. They brought ejectment. Defendant relied on Lampman v. Milks, 21 N. Y. 505 (being one of the cases relied on by us in Fremont, E. & M. V. R. R. Co. v. Gayton, *supra*, and Znamanacek v. Jelinek, *supra*). The court refused to apply the Lampman case under the facts presented.

The opinion states that "the elements necessary to constitute an easement or servitude are wanting." The opinion further states that: "In the present case there was certainly nothing in the grant of defendant's premises upon which he can found any claim that an easement was annexed to his estate which constituted a charge upon the plaintiffs' estate in respect of the overlapping wall and the fence. His deed is singularly wanting in those features of a grant usually found in transfers of land upon which buildings have been erected, and to which rights might appertain. The description in his

deed of the premises intended to be conveyed thereby is simply of a lot by its metes and bounds, with no mention of buildings, while the habendum clause does not include appurtenances in its language. We do not think, in such or similar cases, upon the severance of a tenement, a reservation should be implied of an easement or servitude in the premises retained by the grantor. Where the easement or servitude is not contained in the grant, the sign of the servitude should be apparent, or, as it was expressed in some of the authorities, and quoted with approval by Judge Rapallo, in Butterworth v. Crawford, 46 N. Y. 349, the marks of the burden should be open and visible."

Then, quite applicable to this case, the opinion states: "It does not appear that it was known to any one that the buildings extended beyond the line of the defendant's lot, and no ordinary or usual inspection or examination, or anything short of a survey, would probably have revealed that fact. It was undoubtedly the result of inadvertence in the erection of the building and of the fence. It is impossible, therefore, to say that there was here an apparent sign or mark of a servitude in, or of a burden upon, the premises now owned by the plaintiff. * * * I think that it is an untenable view of the situation of the parties when the premises now owned by defendant were transferred, and that what the rule requires is that the fact that the premises retained by the grantor are a servient tenement charged with an easement should be patent as a feature of the land which directs the attention to its existence upon such examination as would be ordinarily given."

The question arose in Ashton v. Buell, 149 Wash. 494, 271 P. 591. There a walk encroached upon adjoining property. The walk was visible for all to see. There the court held: "An inspection of the premises would not disclose the fact that this walk projected over upon the property which respondents were buying. It would require an actual survey to determine that fact. Such a

servitude is not open, visible and apparent. Reiners v. Young, 109 N. Y. 648, 16 N. E. 368; Sloat v. McDougal, 9 N. Y. Supp. 631."

It becomes evident, then, that defendants' evidence does not meet the tests of being open, visible, or apparent under the rule in Fremont, E. & M. V. R. R. Co. v. Gayton, *supra,* and our cases which followed it, and for that reason the trial court's decree is erroneous.

Defendant also relies on Christensen v. Luehrs, 133 Neb. 50, 273 N. W. 839, wherein we cited Fremont, E. & M. V. R. R. Co. v. Gayton, *supra,* and other cases.

The Christensen case was a case dealing with an implied grant of an easement in a common driveway, and was decided on the authorities dealing with implied grants. We there quoted from 19 C. J., Easements, § 103, p. 914, § 104, p. 915. We discussed the degree of necessity required by reference to § 112, p. 919. It is important to note that we did not discuss, cite, or rely on the rule with reference to an "Implied Reservation" which is stated in the same authority, § 113, p. 920. We will refer to that rule later.

We decided Christensen v. Luehrs, *supra,* on the basis that it was one dealing with an "implied grant or dedication" and on the basis of reasonable necessity, tested by the rules stated therein.

It appears then implicit in this case is a recognition of the fact that our rule stated in Fremont, E. & M. V. R. R. Co. v. Gayton, *supra,* is not an all-inclusive rule and that the factor of necessity is involved in cases dealing with implied grants and implied reservations. We here are dealing with an implied reservation.

It does not appear in our decisions heretofore that we have recognized the distinction between an easement based on an implied grant and one based on an implied reservation. The latter, being one in derogation of the grant, is subject to a different rule.

Restatement, Property, § 476, p. 2979, states the rule and the reason in this way: "In construing conveyances

doubts are resolved in favor of the conveyee and against the conveyor. To a greater extent than is true of the conveyee the conveyor controls both the language of the conveyance and the circumstances under which it is made and has the power to make the language of the conveyance express the intention of the parties. To the extent to which this is true, his failure to make it do so is held to operate to his disadvantage rather than to the disadvantage of the conveyee. What is true in construing the language of a conveyance is likewise true in drawing inferences from the circumstances under which the conveyance was made. Accordingly, circumstances which may be sufficient to imply the creation of an easement in favor of a conveyee may not be sufficient to imply the creation of one in favor of the conveyor."

In 1 Thompson on Real Property (Perm. Ed.), § 391, p. 633, it is said: "There is a well-recognized distinction between an implied grant and an implied reservation." Also in section 391, page 634, it is stated: " 'As a grantor can not derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases.' " In section 394, page 642, it is stated: "Implied grants are not favored, however, though more favored than implied reservations * * *."

In 17 Am. Jur., Easements, § 45, p. 956, the reason for the rule and the rule itself are stated in this language: "The doctrine under which the existence of an apparent easement affords the basis for the creation of an implied easement is applied in many jurisdictions to create an easement in a grantor by implied reservation. In some states, the grantor stands upon an equal footing with the grantee and any distinction between implied grants and implied reservations is denied. In the majority of the states, a distinction is recognized

between an implied grant and an implied reservation; and where there is a grant of land with full covenants of warranty, and without express reservation of an easement, it is held that there can be no reservation by implication, unless the easement is strictly necessary, the term 'necessary' being interpreted to signify the absence of any other reasonable mode of enjoying the dominant tenement without the easement. The reasoning upon which this distinction is based is that a grant is taken more strongly against the grantor, and the law will imply an easement in favor of the grantee more readily than it will in favor of the grantor. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant."

In 28 C. J. S., Easements, § 34, p. 694, the rule and the reason are stated in this language: "According to one view, no distinction is made between the circumstances under which an easement may be regarded as impliedly reserved and those under which it may be regarded as impliedly granted; however, according to another view, an easement is impliedly reserved only where one of strict necessity.

"Where the owner of an entire tract of land or of two or more adjoining parcels employs a part thereof so that one derives from the other a benefit or advantage of a continuous, permanent, and apparent nature, and sells the one against which such quasi easement exists, such easement, if necessary to the reasonable enjoyment of the property retained, is, under what is perhaps the more generally accepted rule, impliedly reserved to the grantor, no distinction being made between the circumstances under which an easement is regarded as impliedly granted and those under which one is regarded as impliedly reserved. Other authorities, however, urge that a grantor should not be permitted to derogate from his grant and accordingly in many jurisdictions the rule is established that, where there is a grant of land without express reservation of easements, there can be no

reservation by implication, unless the easement is strictly one of necessity, particularly where the grant is with full covenants of warranty."

Because of our citation of Corpus Juris on implied grants in Christensen v. Luehrs, *supra,* we here quote that text on "Implied Reservations": "As regards implied reservations of easements the matter stands on principle in a position very different from implied grants. If the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from, or render less effectual, his grant, or render that which he has granted less beneficial to his grantee. Accordingly in many jurisdictions the rule is established that where there is a grant of land with full covenants of warranty without express reservation of easements, there can be no reservation by implication, unless the easement is strictly one of necessity, for the operation of a plain grant not pretended to be otherwise than in conformity with the contract between the parties ought not to be limited and cut down by the fiction of an implied reservation." 19 C. J., Easements, § 113, p. 920.

In 1 Thompson on Real Property (Perm. Ed.), § 396, p. 645, the rule is stated in this language: "As a general rule, there is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor, as we have seen, can not derogate from his own grant and as a general rule he can retain a right over a portion of his land conveyed absolutely only by express reservation." Also in section 396, page 647, it is stated: "The essential elements of an easement

reserved by implication are: (1) Unity and subsequent separation of title; (2) obvious benefit to the dominant and burden to the servient tenement existing at the time of the conveyance; (3) use of the premises by the common owner in their altered condition long enough before the conveyance to show that the change was intended to be permanent; and (4) necessity for the easement."

Restatement, Property, § 476, p. 2977, lists eight factors to be considered, and in the comment says: "In determining implications of this character, the tendency is to isolate and to assign a specific value to such factors as frequently recur. Thus, it may be said that where the factor of necessity exists a particular implication arises. Properly, however, the implication involves a consideration of all the factors present. They are variables rather than absolutes. None can be given a fixed value. Each affects the decision as to the implication arising from all in a different degree in different situations. * * * The list of factors here stated is not exhaustive. The circumstances through which the implication of an easement may arise are varied. The factors relevant to the determination of the implication are numerous. Those here considered are those more commonly occurring."

There are a number of decisions of other states dealing with comparable situations where an implied reservation of an easement is claimed. Those that we have examined largely sustain the view that there is no implied reservation of an easement unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained.

The Court of Appeals of Missouri states the reason for the strict necessity rule in this language: "If any other rule than that of strict necessity were adopted, the door would be open to doubt and uncertainty, to disturbance and questioning of title, and to controversies outside the language and limits of the deed. If an estate, granted

without exception or reservation, can be forever incumbered by an easement or right of use by a third party on a finding that such use would be highly convenient, or that it was exercised by a former owner, or that it was notorious, or any other grounds short of strict necessity, the sanctity and security of title by deed, unambiguous in its terms, would be seriously injured." Seested v. Applegate (Mo. App.), 26 S. W. 2d 796. See, also, Foxx v. Thompson, 358 Mo. 610, 216 S. W. 2d 87, where the Seested case is discussed and the authorities reviewed. See, also, Bubser v. Ranguette, 269 Mich. 388, 257 N. W. 845.

We now return to our decision in Fremont, E. & M. V. R. R. Co. v. Gayton, *supra*. A distinction between an implied easement and an implied grant is not mentioned. There the dominant estate was conveyed first with a right-of-way reserved. The servient estate conveyance was made years later subject to the right-of-way of the dominant estate. It was held that the easement over the servient estate was obvious and permanent and could not escape notice. We there quoted from 2 Washburn, Real Property (5th ed.), § 29. That section deals generally with "implied or equitable easements." The same author has a separate section dealing with an "implied reservation." 2 Washburn, Real Property (6th ed.), § 1248, p. 292.

The same author in his Easements and Servitudes (4th ed.), § 3, p. 81, has this to say: "The American annotator of 1 B. & Smith's Reports, in a note to Pearson v. Spencer, says: 'It may be considered as settled in the United States, that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents of property, which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from his general owner-

ship.' And he cites numerous cases as tending to establish that general proposition.

"But while this would seem to sustain and be fully sustained by the case of Pyer v. Carter, the inference to be drawn from Carbrey v. Willis and Randall v. McLaughlin seems to be, that though this would be true where the dominant estate is conveyed and the servient estate reserved, it would not be so where the servient estate is granted and the dominant reserved, unless the easement claimed is one strictly of necessity, and another cannot be substituted at reasonable labor and expense."

He there recognizes the factor of strict necessity in cases of implied reservations. See Thompson, *supra,* § 400, p. 653, for a further like discussion of the earlier decisions.

In Fremont, E. & M. V. R. R. Co. v. Gayton, *supra,* we relied on Lampman v. Milks, 21 N. Y. 505 and Janes v. Jenkins, 34 Md. 1, 6 Am. R. 300. Because of that reliance, we now quote from subsequent decisions of those courts. Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99, was a case involving an implied grant. The court discussed Lampman v. Milks, *supra,* and then said: "In this state the rule of strict necessity is applied to implied reservations but not to implied grants. In the recent case of Wells v. Garbutt (132 N. Y. 430), it was said: 'As a grantor cannot derogate from his own grant while a grantee may take the language of the deed most strongly in his favor the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor.'

"This distinction between implied reservation and implied grants there pointed out is well founded in the law, although in some of the reported cases it has apparently been overlooked."

So it would seem that New York is in accord with the rule herein adopted applicable to implied reservations.

We now refer to the case of Slear v. Jankiewicz, 189

Md. 18, 54 A. 2d 137, certiorari denied, 333 U. S. 827, 68 S. Ct. 453, 92 L. Ed. 1112. There the court held: "Since Mitchell v. Seipel, 53 Md. 251, 36 Am. Rep. 404, a distinction has been made between an implied grant and implied reservation. 'The rule with respect to implied reservations is much more strict than that with respect to implied grants.' * * * In the opinion last quoted (Burns v. Gallagher, 62 Md. 462, 474), Judge Alvey also stated the rule of construction regarding reservation of easements by implication: 'For the principle is well settled, and it is founded in reason and good sense, that no easement or quasi easement can be taken as reserved by implication, unless it be de facto annexed and in use at the time of the grant, and it be shown moreover to be actually necessary to the enjoyment of the estate or parcel retained by the grantor. * * * In order to give rise to the presumption of a reservation of an existing easement or quasi easement, where the deed is silent upon the subject, the necessity must be of such strict nature as to leave no room for doubt of the intention of the parties that the adjoining properties should continue to be used and enjoyed, in respect to existing easements or quasi easements, as before the severance of ownership; for otherwise parties would never know the real purport of their deeds. * * * It is only in cases of the strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, that the principle of implied reservation can be invoked.'"

In Fremont, E. & M. V. R. R. Co. v. Gayton, *supra*, we cited and relied upon Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111. In the later case of Sprenzel v. Windmueller, 286 Ill. 411, 121 N. E. 805, that case is cited as authority for this statement as to an implied grant: "Where the owner of land divides it and sells one part, he by implication includes in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form they

were at the time he transferred the property."

So it would appear that Illinois recognized that the factor of reasonable necessity is applicable to implied grants.

But here we are dealing with an implied reservation. Consistent with the above authorities, we adopt the rule applicable to implied reservations as stated in 1 Thompson, § 396, p. 645, which we again quote: "As a general rule, there is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor, as we have seen, can not derogate from his own grant and as a general rule he can retain a right over a portion of his land conveyed absolutely only by express reservation."

The question then comes: Has the defendant met the test of the factors of the rule applicable to an implied reservation and, specifically, does the evidence meet the test of strict necessity?

There is no evidence that either the encroachment of defendants' driveway or garage on plaintiffs' property is a necessity. The evidence of defendant Evans is that he could move the garage a short distance to the west and solve this problem. In fact his evidence is that he offered to do so during the negotiations after this dispute arose. It appears from the evidence that defendants have ample space for a driveway on their own lot and the entire backyard on which to locate the garage all on their own property.

Bubser v. Ranguette, *supra,* is a comparable case. There, while two lots were in single ownership, a brick building was built on Lot 5. Later a frame addition was built which encroached on Lot 4. Lot 4 was sold to the defendant and Lot 5 was later sold to the plaintiff. The court held: "The servient estate, lot 4, was conveyed some three months before the conveyance of

the dominant estate, lot 5. Hence the only theory upon which plaintiff can claim an easement is that at the time the servient estate was conveyed the then owner of both lots impliedly reserved from the grant the right to continue the encroachment thereon—in short, an easement by implied reservation. To read an implied reservation into a deed is in effect to permit the grantor to derogate from his express grant. We have held that: 'To entitle the complainant to a decree, the burden was upon him to establish that the servitude was apparent, continuous and strictly necessary to the enjoyment of his lands.' " The court held that the servitude of the encroachment of "almost six feet" was apparent and continuous. In this case the one claiming the implied easement relied on a rule comparable to ours as stated in Fremont, E. & M. V. R. R. Co. v. Gayton, *supra,* and Christensen v. Luehrs, *supra.* The court reviewed many authorities, and held: "Having required strict necessity in cases involving stairways, drains, ways and sewers, we prefer to make no exception to that rule in encroachment cases even though, in such a case, the servitude be plainly apparent. To make such an exception, would leave for further litigation the exact amount of encroachment necessary to make the user apparent. Nor should the law favor unrecorded servitudes." The Supreme Court of Michigan, holding that the servitude was not strictly necessary, adopted the language of the trial court as follows: " 'The situation of both premises does not show any strict necessity for plaintiff's continued encroachment upon lot 4. Its use is convenient but not necessary. To withdraw from it will mean some expense but not a heavy one to the plaintiff. He has plenty of room on his own premises to make his building convenient for use at an expense not prohibitive. The question here is one of convenience rather than of strict necessity. Defendant is entitled to have what he bought.' "

The defendants here also advance the contention that

plaintiffs had recognized and acquiesced in the implied reservation of the easement. The evidence does not sustain such a contention.

Consistent with the above authorities, we reverse the judgment of the trial court and remand the cause with directions to enter a judgment for the plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

ALBERTINA J. GUERIN, EXECUTRIX OF THE ESTATE OF JAMES J. GUERIN, DECEASED, APPELLEE, V. CLARENCE W. FORBURGER, APPELLANT.

74 N. W. 2d 870

Filed February 10, 1956. No. 33848.

1. **Highways: Negligence.** The violation of a statute, the design of which is to protect the safety of people in the use of public highways, is evidence of negligence.
2. **Automobiles: Highways.** The violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
3. **Negligence.** Negligence to justify a recovery of damages must have proximately caused or contributed to the injury for which compensation is sought.
4. ———. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
5. ———. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
6. **Negligence: Trial.** It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence that it is proper for the trial

court to instruct the jury to return a verdict for the defendant or dismiss plaintiff's petition.

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

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

9. ———: ———. There is nothing that will excuse his failure to see what was plainly in sight if he had maintained a proper lookout.

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

11. ———: ———. The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances.

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

Wear, Boland & Mullin, for appellant.

Matthews, Kelley, Fitzgerald & Delehant and *John E. Murphy,* for appellee.

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

WENKE, J.

Albertina J. Guerin, as executrix of the estate of James J. Guerin, deceased, brought this action in the district court for Douglas County against Clarence W. Forburger. The purpose of the action is threefold:

First, to recover for loss of support for herself as the widow of the decedent; second, to recover for expenses had in connection with decedent's burial; and third, to recover for damages to decedent's car. The basis on which such recovery is sought is the claim that decedent was killed because of negligence which occurred in the operation of a truck, which consisted of a tractor and trailer, which negligence it is claimed was the proximate cause of his death. Issues were joined, including that of contributory negligence. Trial was had and the jury returned a verdict for the plaintiff as follows: First cause of action, $20,350; second cause of action, $456.50; and third cause of action, $687.50. The trial court entered a judgment on the verdict. Defendant thereupon filed a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. This motion the trial court overruled and this appeal was taken from that ruling.

The first contentions appellant makes arise out of his claim that the trial court erred in overruling his motion for judgment notwithstanding the verdict. They are two in number.

The first is that the trial court erred in submitting to the jury the following issue with reference to negligence on his part, to wit: "In the truck's failing to have properly lighted taillights and warning lights visible at a reasonable distance from the rear of such trailer."

The second is, in submitting to the jury, in view of the evidence adduced, the question of whether or not there was contributory negligence on the part of appellee's decedent, James J. Guerin.

In considering the evidence adduced to determine these questions we apply thereto the following principle: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such

party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

"The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Farr Co. v. Union P. R. R. Co., 106 F. 2d 437. See, also, Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551.

Further: "In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him." Stark v. Turner, *supra*. See, also, Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669.

"In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury." Wiesenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568. See, also, Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235.

The accident in which James J. Guerin was killed happened shortly after 5:30 p. m. on Thursday, December 6, 1951. It occurred on the Dodge Street Highway, which is also designated and known as U. S. Highway No. 30-A, at a point some 18 miles west of Omaha, Nebraska. Dodge Street Highway runs east and west and is a four-lane highway, the north two lanes being for the use of west-bound traffic and the south two lanes being for the use of east-bound traffic. The center of these four lanes is indicated by two yellow lines. The point of the accident was about three-fourths of a mile east of a bridge in the highway built across the

Elkhorn River. At a point about one-fourth of a mile east of this bridge there begins a gradual upgrade in the highway which extends for over a half mile to the east before coming to a crest. There is a slight or gradual curve toward the southeast of this upgrade beginning at what is referred to in the record as the Skyline Road. The accident happened in the south lane of the two east-bound lanes. Both truck and car were traveling east. It resulted from decedent running the right front of his car, a 1949 Chevrolet two-door sedan which he was driving, into and under the left rear of the truck which was being operated by Calvin John Potter. At the point of the accident the surfaced part of the highway is 41 feet wide, the surface material being referred to as black-top and described as black in color.

At the time of the impact decedent made no effort to stop or slow down the car he was driving. He ran into the truck, which was either stopped or moving very slowly, while going at least 50 miles an hour. The impact was of such force that it snapped the 3-inch steel axle under the trailer and drove the left dual wheels out from under it and onto the highway to the left or north of the tractor. The truck came to an immediate stop in the south lane. The car continued on but in a semicircle or arc to the north. It first crossed over into the south lane for west-bound traffic. It then swerved back to the south in front of the truck. It continued across the south shoulder of the highway, coming to a stop in a deep ditch or ravine adjacent thereto. The car, when it stopped in the ditch, was some 65 feet east of the front of the truck. It was badly demolished, particularly the right front and side. Decedent was found lying at about the center of the traveled portion of the highway some 40 feet east of the front of the truck. He died shortly after the accident from injuries suffered therein.

The truck was a 1941 International consisting of a

tractor and trailer, the latter having a flat body. It was owned by the Manhattan Cut Stone Company, a partnership, whose principal place of business was located in Manhattan, Kansas. The partnership, which consisted of appellant and his son John Casper Forburger, was engaged in the business of cutting stone. The driver of the truck was an employee of this partnership and at the time was engaged in business for the partnership and doing work within the scope of his employment. He was hauling a load of about 10 tons of Kansas stone, cut for home veneer use, from Manhattan, Kansas, to Omaha.

The foregoing is a general description of when, where, and how the accident happened. We shall discuss the evidence in more detail as it relates to the several issues raised and herein disposed of.

Appellant contends appellee failed to prove any actionable negligence against him. The issue of negligence for which appellant could be found responsible, insofar as the trial court submitted it to the jury, has already been set forth herein. As stated in Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462: "It is error for the court to submit to a jury a charge of negligence which finds no support in the evidence."

Section 39-778, R. R. S. 1943, provides, insofar as here material, that: "(a) Every motor vehicle upon a highway within this state during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible persons or vehicles upon the highway at a distance of five hundred feet ahead, shall be equipped with lighted front and rear lamps as in this section respectively required for different classes of vehicles. (b) Every motor vehicle, other than a motorcycle, road roller, road machinery or farm tractor, shall be equipped * * * with a lamp on the rear exhibiting a red light visible under normal atmospheric conditions from a distance of at least five hundred

feet to the rear of such vehicle, * * * the tail light shall show red directly to the rear, glass therein shall be unbroken, the lamp shall be securely fastened, and its electric circuit free from grounds or shorts; * * *."

Section 39-735, R. R. S. 1943, provides, insofar as here material, that: "Every vehicle * * * (1) having a width, including load, of eighty inches or more * * * shall display, when driven, pulled, operated, or propelled upon any paved or bituminous surfaced highway, during the period from one half hour after sunset until one half hour before sunrise, and at all other times when there is not sufficient light to render such vehicle clearly discernible, two clearance lights on the left side of such vehicle. * * * The other clearance light shall be located at the rear and display a red light visible, under normal atmospheric conditions, from a distance of three hundred feet to the rear of said vehicle. The light at the rear shall be located at a sufficient distance above the tail light of such vehicle so it will not be confused with such tail light by those approaching from the rear. Such light shall be located on a line with the extreme outer point of such vehicle or the load thereon; * * *."

"The violation of a statute the design of which is to protect the safety of people in the use of public highways is evidence of negligence." Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678.

"The violation of statutes regulating the use and operation of motor vehicles upon the highway is not negligence per se, but evidence of negligence, which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby, * * *." Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612. See, also, Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394.

The evidence shows the rear of the trailer was equipped with electric lights sufficient to meet the foregoing requirements and that, at the time of the accident,

the driver of the truck had turned them on. However from the evidence of Myrtle Jacobsen, who had driven her car past the truck just before the accident happened, and that of Fern Fallon, who was riding in the car with Myrtle Jacobsen, the jury could find the taillight and clearance light located in the left corner of the trailer were not lit.

But appellant contends that even assuming appellee has established sufficient evidence to support a charge of insufficient lighting she has in no way established that it was a proximate cause of the accident; that is, she has failed to prove any causal connection between the absence of the taillight or clearance light and the accident itself.

"Negligence to justify a recovery of damages must have proximately caused or contributed to the injury for which compensation is sought." Ricker v. Danner, 159 Neb. 675, 68 N. W. 2d 338.

"The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. See, also, Ricker v. Danner, *supra*.

Based on the evidence adduced we think it establishes sufficient facts upon which a jury could base a finding that the driver of the truck was guilty of negligence in operating it without a lighted taillight or a lighted left clearance light on the rear of the truck and that such negligence was a proximate cause of the accident. We therefore find the court was not in error in submitting the issue of negligence on the part of appellant that it did.

We come then to the question of whether or not decedent was guilty of such conduct that would, as a matter of law, preclude appellee from recovering on any right she might otherwise have.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty

which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." Mundy v. Davis, *supra*. See, also, Murray v. Pearson Appliance Store, *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 (152 Neb. 681, 42 N. W. 2d 367); Gorman v. Dalgas, supra (151 Neb. 1, 36 N. W. 2d 561)." Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491. See, also, Parsons v. Cooperman, *supra*.

In regard to the situation here involved we have laid down the following principles:

"As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within the range of his vision." Murray v. Pearson Appliance Store, *supra*. See, also, Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra*.

"The basis of this rule is that a driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and that he cannot relieve himself of that duty. And, in conjunction therewith, he must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it." Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106. See, also, Murray v. Pearson Appliance Store, *supra;* Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra*.

"The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has

a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance." Murray v. Pearson Appliance Store, *supra.*

"There is nothing that will excuse his failure to see what was plainly in sight if he had maintained a proper lookout." Buresh v. George, *supra.* See, also, Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra.*

This rule has been applied in numerous situations of which the following are examples: Where an unlighted wagon was crossing a highway, Roth v. Blomquist, 117 Neb. 444, 220 N. W. 572, 58 A. L. R. 1473; where a road maintainer was on the wrong side of the road just over a hill, Most v. Cedar County, 126 Neb. 54, 252 N. W. 465; where an unlighted car had been stopped at night on the traveled portion of the road, Stocker v. Roach, 140 Neb. 561, 300 N. W. 627, Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757, Mundy v. Davis, *supra;* where a truck was stopped on a lighted street at night, Buresh v. George, *supra;* and where a bus had been stopped or was stopping on a highway during the day, Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., *supra.*

However, we have also held that: "* * * the rule that a motorist is guilty of negligence as a matter of law if he drives his automobile so fast that he cannot stop in time to avoid a collision with an object, within the area lighted by the lamps on the automobile, has no application in those cases wherein reasonable minds might differ on the question of whether or not the operator exercised the care, caution, and prudence required of a reasonably careful, cautious, and prudent person under the circumstances of the particular situation." Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422.

And as stated in Miers v. McMaken, *supra:* " 'To the general rule, as pointed out in the opinion in the case

cited (Roth v. Blomquist, supra), there are exceptions, where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. * * *.' (Adamek v. Tilford, 125 Neb. 139, 249 N. W. 300.)"

Because of the factual situation involved we have held it was a question for the jury in cases involving an unlighted car stopping on the traveled portion of a highway, Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, Monasmith v. Cosden Oil Co., 124 Neb. 327, 246 N. W. 623; the same as to a truck, Giles v. Welsh, 122 Neb. 164, 239 N. W. 813; and as to an oil transport, Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622.

It is self evident from the foregoing that each case must necessarily depend upon its own facts and that the court must, in each instance, determine whether or not the situation presents a question of fact for the jury or a question of law for the court.

We shall proceed to discuss the evidence as it relates to various factors which might relieve the decedent from the duty he had to see the truck in time to avoid it, either by stopping or by turning out and passing, there being plenty of space available for that purpose.

Appellee says there were headlights on a car coming from the opposite direction and that these headlights tended to momentarily distract decedent's attention, particularly since he was traveling around a curve at the time.

The evidence adduced does not support appellee's contention. The only car that is shown to have been coming from the east at the time of the accident was that of Warren Safford, the only eyewitness thereto. His testimony was that he had on his parking lights and not his headlights.

Appellee also says it was dark, blustery, and misty, and the visibility was extremely bad. Although there is an extremely wide variation in what the several wit-

nesses testified to in this regard, however, there is competent evidence from which a jury could find the foregoing to be true. But these factors would not help appellee for we have said: "On principle it would appear that the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Fischer v. Megan, 138 Neb. 420, 293 N. W. 287." Fairman v. Cook, 142 Neb. 893, 8 N. W. 2d 315. See, also, Murray v. Pearson Appliance Store, *supra;* Mundy v. Davis, *supra.*

Appellee also refers to the fact that the accident occurred just after the deceased had come off a curve and straightened out his car. There is a slight curve in the highway and the accident did happen some distance east thereof. Although one witness estimated the accident happened about 50 feet east of the point of the curve, however, the exact point of the accident is established on the pictures of the highway and is much more than 50 feet east of the point of the curve, in fact it is several hundred feet. The evidence, particularly the pictures, shows the curve to be very gradual and causes no obstruction to the driver's view as he is driving east. It may be that a driver's lights, as he is traveling around the curve, might not at all times focus exactly down the lane in which he is driving. We said in Most v. Cedar County, *supra:* "He had no right to presume that, beyond his vision, the road on his right-hand or north side would be free from obstructions on the west side of the hill." We think the foregoing has application here.

We also held in Ross v. Carroll, 138 Neb. 1, 291 N. W. 726, that: "This rule (a motorist driving at such speed that he cannot stop or turn aside in time to avoid

an obstruction discernible within the range of his vision is usually negligent) applies to a driver of a motor vehicle when approaching and going around curves."

The trailer was regularly equipped with six electric lights facing the rear. They consisted of a taillight, two clearance lights, one at each corner, and three clearance lights located immediately below the floor of the trailer. These three lights were recessed some 8 inches. The floor of the trailer was about 4 feet above the surface of the highway.

It is contended that the truck did not have a taillight or left rear clearance light burning. This we have already discussed. However, it is shown without dispute that lights were lit on the rear of the truck at the time of the accident. Myrtle Jacobsen was driving her car east on the highway at the time and had driven past the truck just before the accident, which happened after she had returned to the outer lane but before her car passed over the crest of the hill. She was driving about 40 miles an hour. She testified it was dusk so she was driving with her headlights lit but turned down. She said she saw some kind of lights on the rear of the trailer. The same is true of Fern Fallon who was riding with her. She testified she saw some sort of lights although she thought they were reflectors. Warren Safford, who witnessed the accident, said there were lights lit on the back of the truck immediately following the accident. The same was true of Fred Whalen, a trooper for the Nebraska Safety Patrol, who came upon the accident a few minutes after it happened. The lights burning after the accident consisted of the cluster of three clearance lights recessed under the center of the floor of the trailer and the right clearance light. They all faced oncoming traffic. The cluster of three clearance lights was located about 4 inches under the floor of the trailer and covered about an 18-inch spread.

We have not overlooked the testimony of Marvin Heifner and George Witte in this regard but their testi-

mony related to the condition of the rear of the truck when they passed it, which was prior to that of the witnesses hereinbefore referred to. These two witnesses did not testify as to the condition thereof just immediately before, at, or immediately after the accident.

Appellee suggests the rear of the truck and the cluster of lights were covered with debris from the road which tended to blend it with the color of the highway, which was black.

The floor of the trailer was 8 feet wide. There was a channel edge or strip from 6 to 8 inches wide completely across the back of it. This had been painted with black and white diagonal stripes. Cut stone was stacked on the trailer to a height of about 2 feet and held in place by a homemade wooden rack which extended somewhat above the stone. The stone was mixed, being white and yellow in color. It had a tendency to turn yellow when wet. The rear of the truck, including the lights, channel edge, rack, and stone were covered with dirt from the surface of the road which had splashed on it while traveling thereon. The question arises, did this present a situation that would create an exception to the rule and present a jury question?

Marvin Heifner, who apparently was the first witness who saw and passed the truck did so just east of the bridge across the Elkhorn River. It should be here stated that all witnesses placed the truck in the south lane for east-bound travel and it was there when the accident happened. Heifner testified he was returning to Omaha at about 5:30 p. m. on the day of the accident; that he was driving in the south lane for east-bound traffic; that he was going about 50 miles an hour; that he had his lights on; that they were adjusted for country driving; that as he came to the bridge he saw a car some 150 to 175 feet ahead; that he slowed down to 40 to 45 miles an hour to stay behind the car; that about 100 to 150 feet east of the bridge the car ahead turned to the left and exposed

the truck directly ahead; that immediately thereafter he noticed the truck as a dark grey object, although he got the impression it was loaded with heavy white objects; that he thereupon turned out and passed it; that the truck was traveling 2 to 3 miles an hour; and that it did not have its rear lights lit.

George Witte of Valley, Nebraska, testified he was hauling a load of gravel and sand to Omaha and passed the truck at about the point where the accident happened. He testified he was driving about 15 to 20 miles an hour; that it was getting dusk but he was not sure as to whether or not he had on his headlights; that the truck was stopped in the outside lane for eastbound traffic several hundred feet east of the curve; that it did not have its rear lights lit; that he first saw the truck when it was about 100 to 150 feet away; and that he turned out and passed it.

Myrtle Jacobsen, whose testimony we have already referred to, testified further that she first saw the truck after they came around the curve; that it was 2 or 3 car lengths away; and that it appeared as a gray box. We have already referred to the lights which this witness observed on the rear of the trailer. Fern Fallon testified to about the same facts except she thought the lights she observed were reflectors.

On the other hand the only eyewitness to the accident, Warren Safford, a deputy sheriff for Douglas County, said he was driving with his parking lights but had visibility for a quarter of a mile. He testified he saw the accident happen just after he came over the crest of the hill; that the truck had its headlights burning; and that it was traveling from 4 to 5 miles an hour. He described the color of the stone on the truck as "white chalk."

Fred Whalen, a state trooper, who came upon the accident from the west a few minutes after it happened, said that with his headlights on he had visibility as to unlighted objects of from 350 up to 400 feet. We only

mention the latter to show the wide variation in the testimony of the witnesses in this regard.

We have come to the conclusion that the evidence adduced does not present a factual situation creating an exception to the general rule and thus presenting a jury question. This is further evidenced by flash pictures taken of the rear end of the trailer shortly after the accident and the experiences the other drivers had who came upon the truck that same evening.

We think the evidence conclusively shows the decedent was driving his car without lights and drove so close to the truck before he saw it that he could neither stop nor turn out in time to avoid the collision. This is fully shown by the testimony of Warren Safford, the only eyewitness. We are fully aware of the evidence of Fern Fallon that after she heard the impact she looked to the rear and saw the car and that it had headlights burning. She must have been mistaken and thought the truck lights were those of the car for considering the nature of the accident and the condition of the car after the accident, as shown by the pictures taken of it shortly thereafter, it could not have been possible for the headlights thereon to have been burning. However, this fact is not here controlling for the principle applies in either case, that is, whether decedent had his lights lit or not.

While we have come to the conclusion here reached as a matter of law we think the jury's verdict sustains the same result as a matter of fact. Appellee introduced John J. Larkin, a funeral director, to establish the expense had in connection with decedent's burial. This was in support of appellee's second cause of action. He enumerated the items involved, the amounts charged therefor, that they had been paid, and that the amounts charged were the fair and reasonable value thereof. No other evidence was adduced by either side in regard thereto. The total was fixed at $830. The jury returned a verdict therefor in the sum of $456.50 or 55

percent of the amount. In support of appellee's third cause of action it was stipulated and agreed by the parties that the reasonable value of the property damage to decendent's car, which had been badly demolished, was $1,250. The jury returned a verdict on this cause of action for $687.50 or 55 percent. Thus it is self evident the jury reduced the amount of appellee's recovery to the extent of 45 percent. This clearly indicates the jury found decedent to have been guilty of more than slight negligence and in a degree sufficient to defeat any right of recovery herein.

We have fully considered the factual situation herein disclosed and to say it presents a question for a jury would be to completely destroy the principle here controlling. In view of what we have said we find the trial court should have sustained the appellant's motion for judgment notwithstanding the verdict. We therefore reverse the judgment of the trial court refusing to do so and remand the cause with directions that such motion be sustained and the action dismissed.

There are other questions raised by appellant relating to the overruling of his motion for a new trial but in view of the result herein arrived at a discussion and disposition thereof would serve no useful purpose.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., participating on briefs.

ALLIED INVESTMENT COMPANY, A CORPORATION, APPELLANT, V. JAMES ROY SHANEYFELT ET AL., APPELLEES.
74 N. W. 2d 723

Filed February 10, 1956. No. 33869.

1. **Liens.** All liens are created by law or contract, and to establish a lien the contract must be made with the owner of the property on which the lien is sought to be imposed.
2. **Sales: Artisan's Lien.** Generally, the lien of an artisan making repairs to a chattel at the instance of a conditional vendee in

possession is subordinate to the rights of a conditional vendor under a contract of which the artisan has constructive or actual notice.

3. **Automobiles: Sales.** Section 52-201, R. R. S. 1943, giving a possessory lien for repairs on an automobile, does not warrant a presumption that a conditional vendee has authority to encumber the automobile for repairs thereon without consent of the conditional vendor.

4. ———: ———. The repairer of an automobile sold under a conditional sales contract has no possessory lien under section 52-201, R. R. S. 1943, as against an unpaid conditional vendor in the absence of a showing that the repairs were made at the request of or with the consent of the conditional vendor or his assignee.

5. **Automobiles.** The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public.

6. ———. A replacement motor installed in a described automobile cannot be identified and severed therefrom without material injury to the automobile, and such a motor generally merges in and becomes a part of the automobile by accession.

APPEAL from the district court for Hamilton County: H. EMERSON KOKJER, JUDGE. *Reversed and remanded.*

Edgerton & Powell, for appellant.

Charles L. Whitney, Jr., for appellees.

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

CHAPPELL, J.

Plaintiff, Allied Investment Company, a corporation, originally brought this action in the county court of Hamilton County to replevin a 1949 Plymouth Tudor automobile, motor No. P 18-267762, serial No. 12272050, and thereby took possession of it from defendants Vetter, hereinafter called defendants. Plaintiff claimed to be owner of the automobile and entitled to possession thereof as assignee of a conditional sales contract duly executed thereon, which was timely filed and recorded. Defendant James Roy Shaneyfelt, hereinafter called Shaneyfelt, defaulted. Defendants answered, denying

that plaintiff was entitled to possession of the automobile because, while Shaneyfelt was in full possession thereof, he had delivered same to defendants who at his request had repaired it by installing therein a rebuilt motor belonging to them, for which reason they refused to give possession when plaintiff made demand therefor. Defendants prayed for judgment against plaintiffs for redelivery of the motor and damages for removal thereof from their premises, or in the alternative for judgment against plaintiff for $189.74, the amount owing them for improvement of the automobile.

Upon an oral stipulation of facts, the county court rendered judgment substantially finding and adjudging that plaintiff was entitled to possession of the automobile only as against Shaneyfelt and that plaintiff should have judgment against him for costs and $189.74 damages. It also found and adjudged that defendants were owners of the rebuilt motor; assessed damages of one cent against plaintiff for wrongful removal thereof; and ordered that plaintiff should return the motor to defendants or pay them $189.74 and damages.

Therefrom plaintiff appealed to the district court where the cause was heard upon the original pleadings and a written stipulation of facts. Thereafter judgment was rendered, the effect of which was to affirm the judgment rendered by the county court, except that defendants were awarded a judgment against plaintiff for $10.82 as damages for wrongful removal of the motor, and plaintiff was awarded judgment against defendant for $1 as damages for wrongful detention of the automobile exclusive of the rebuilt motor.

Plaintiff's motion for new trial was overruled and it appealed to this court, assigning that the trial court erred in finding and adjudging that the rebuilt motor was the property of defendants, and erred in allowing defendants damages against plaintiff. We sustain the assignments.

In the order overruling plaintiff's motion for new trial the court said: "The question presented does not

involve priority of liens. It is a question of identity of property. It is clear that plaintiff has a valid lien and is entitled to recover anything that is covered by it's (its) lien. This is true even if the property has been repaired. Plaintiff is not entitled to something not covered by it's (its) lien; something which it did not and could not identify as property covered by it's (its) lien." However, as we view the record and applicable law, the trial court's judgment was clearly wrong and such part of the conclusions aforesaid as were adverse to plaintiff's rights were erroneous.

The stipulation of facts disclosed as follows: On February 11, 1954, Shaneyfelt purchased the automobile involved from the Gibreal Auto Sales of Omaha.

On February 11, 1954, Shaneyfelt gave the seller thereof a duly executed conditional sales contract covering same, which described the automobile as a "1949 Plym.-Tudor Motor No. P18-267762 Serial No. 12272050" and provided that title to the described automobile "and any additions thereto or substitution therefor" was retained by the seller "until all amounts payable" thereunder were "fully paid" by Shaneyfelt who assumed "risk of loss."

Also on February 11, 1954, the seller assigned said conditional sales contract to plaintiff for valuable consideration, and plaintiff was at all times thereafter the owner and holder thereof.

On February 23, 1954, a certificate of title, No. 23-25830, was duly issued in the name of Shaneyfelt in Boone County, showing thereon that the automobile was subject to the conditional sales contract owned and held by plaintiff in the amount of $650. Also, the original conditional sales contract executed by Shaneyfelt, which contained the assignment thereof to plaintiff, was attached to the certificate of title and filed therewith, which thereby recorded the title together with the conditional sales contract under which plaintiff retained ownership of the automobile. Copies of the certificate

of title and conditional sales contract, with all endorsements thereon, were attached to and made a part of the stipulated facts.

Subsequently, Shaneyfelt removed the automobile from Boone County and placed it in possession of defendants for the purpose of having certain repairs made thereon. Sometime late in March 1954, at a time when Shaneyfelt was in default in his payments under plaintiff's conditional sales contract, and plaintiff was seeking to find his whereabouts and locate the automobile, defendants, at Shaneyfelt's request, installed therein a rebuilt motor, the reasonable value of which installation was $189.74.

On March 25, 1954, plaintiff, while seeking information about the automobile and Shaneyfelt, first learned that the automobile was in the possession of defendants, and on March 26, 1954, plaintiff demanded possession of it from them. However, defendants refused to give possession to plaintiff, and this action was instituted.

Although concededly a replacement motor was installed by defendants, the number thereof was at all times for some unexplained reason identical with the number thereof on February 11, 1954, when the automobile was sold to Shaneyfelt, and as described in both the certificate of title and plaintiff's conditional sales contract when they were filed and recorded on February 23, 1954.

We find no evidence in this record that the condition of the automobile required a replacement motor, and there is no explanation of what became of the original motor. Therefore, we conclude that plaintiff clearly and correctly identified the automobile belonging to it by the serial number and the motor number thereof.

The evidence simply showed that defendants refused to deliver possession of the automobile to plaintiff when it made demand therefor. There is no evidence that defendants refused to deliver possession of the automobile upon the ground that they owned the replacement

motor or in any effective manner had title thereto. It is true that a person in exclusive possession of personal property is presumed to be the owner thereof. However, such presumption does not exist in the absence of exclusive possession, and such a presumption if existent is overcome when met by opposing proof, as in the case at bar. Booknau v. Clark, 58 Neb. 610, 79 N. W. 159. Defendants in this case were not in exclusive possession of the replacement motor installed in the automobile, and at all times they had constructive notice of the plaintiff's right to possession thereof. In such a situation, plaintiff argued that under the stipulated facts defendants had no artisan's lien as against plaintiff under the provisions of section 52-201, R. R. S. 1943, and that under the provisions of section 60-110, R. R. S. 1943, defendants' claim was not valid as against plaintiff who was the record owner and entitled to possession of the automobile with the rebuilt motor therein. We sustain plaintiff's contention.

Section 52-201, R. R. S. 1943, provides in part: "Any person who makes, alters, repairs or in any way enhances the value of any * * * automobile * * * *at the request of or with the consent of the owner, or owners thereof,* shall have a lien on such * * * automobile * * * while in his possession, for his reasonable or agreed charges for the work done or material furnished, and shall have the right to retain such property until such charges are paid." (Italics supplied.) It will be noted that plaintiff, as conditional vendor, was at all times the record owner of the automobile here involved, and the installation of the rebuilt motor by defendants was not done at plaintiff's request or with its consent. Rather, it was concededly done only at the request of Shaneyfelt, in which event defendants had no valid possessory artisan's lien as against plaintiff.

In General Motors Acceptance Corp. v. Sutherland, 122 Neb. 720, 241 N. W. 281, this court held: "All liens are created by law or contract, and to establish a lien

the contract must be made with owner of property on which the lien is sought to be imposed.

"Generally, lien of artisan making repairs to chattel at instance of conditional vendee in possession is subordinate to rights of conditional vendor under contract of which artisan has constructive or actual notice.

"Section 52-201, Comp. St. 1929, giving possessory lien for repairs on automobile, does not warrant presumption that conditional vendee has authority to incumber automobile for repairs thereon without consent of vendor.

"Repairer of automobile sold under conditional sales contract had no possessory lien under section 52-201, Comp. St. 1929, as against unpaid conditional vendor, in absence of showing that repairs were made at request of or with consent of conditional vendor or assignee." In that connection, section 52-201, Comp. St. 1929, is now section 52-201, R. R. S. 1943. Such case was cited and reviewed with approval, but distinguished upon the facts and applicable law, in National Bond & Inv. Co. v. Haas, 124 Neb. 631, 247 N. W. 563, 88 A. L. R. 1180.

We turn then to section 60-110, R. R. S. 1943, a part of the Certificate of Title Act, which provides in part: "Any mortgage, conveyance intended to operate as a mortgage, trust receipt, *conditional sales contract* or other similar instrument covering a motor vehicle, if such instrument is accompanied by delivery of such manufacturer's or importer's certificate and followed by actual and continued possession of same by the holder of said instrument *or, in the case of a certificate of title, if a notation of same has been made by the county clerk on the face thereof, shall be valid as against the creditors of the mortgagor, whether armed with process or not, and subsequent purchasers, mortgagees and other lienholders or claimants but otherwise shall not be valid against them. All liens, mortgages and encumbrances, noted upon a certificate of title, shall take priority according to the order of time in which the same are noted thereon by the county clerk.*" (Italics supplied.)

In Bank of Keystone v. Kayton, 155 Neb. 79, 50 N. W. 2d 511, this court held: "The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding liens thereon, and the public."

The circumstances presented here are controlled by the provisions of sections 52-201 and 60-110, R. R. S. 1943. Defendants had actual notice that plaintiff did not request or consent to the motor replacement, and defendants had constructive notice that plaintiff at all times retained ownership of the automobile together with "any additions thereto or substitution therefor"; and that Shaneyfelt assumed any "risk of loss." In such a situation, defendants could not prevail as against plaintiff whose rights as record owner were superior to those claimed by defendants who had no valid artisan's lien as against plaintiff which would permit defendants to retain possession until charges for installation of the rebuilt motor were paid.

In that regard, the effect of defendants' argument was to concede that plaintiff was entitled to possession of the automobile without the rebuilt motor in it, or, in the alternative, with such motor therein as installed by defendants upon payment to them of $184.79 and damages for wrongful removal of same from their premises. Such argument was predicated upon their conclusion that defendants owned the replacement motor and upon their contention that although it was installed in the automobile by them, it did not become a part thereof by accession because it could be readily identified and severed therefrom without material injury thereto or to the automobile. Defendants' contention should not be sustained.

It cannot be logically argued that a motor in an automobile can be identified and severed or removed therefrom without material injury to the automobile. The motor is in fact a vital, integral part, the very life and substance of an automobile. An automobile chassis and body without a motor is not an automobile. The one is

ordinarily as indispensable as the others. An automobile is used for transportation, and without a motor it can serve no useful purpose. In that regard, defendants have cited no authority directly in point to support their contention. There is some confusion in cases, involving other assessories or parts placed or replaced upon automobiles and other machinery, but the authorities relied upon by defendants are clearly distinguishable from the case at bar upon the facts and applicable law. To discuss them further here would serve no useful purpose.

In that connection, Twin City Motor Co. v. Rouzer Motor Co., 197 N. C. 371, 148 S. E. 461, is a case in point, submitted upon stipulated facts, comparable in material respects with those at bar. Therein defendant Rouzer Motor Company sold a described Ford automobile to a buyer who duly executed to defendant a conditional sales contract thereon comparable with that at bar, in order to secure the balance of the purchase price. Such contract was then duly recorded and assigned to Commercial Finance Corporation, another defendant. Subsequently, while in default, the buyer moved to another city where he employed plaintiff, Twin City Motor Company, to and it did place a new motor in the automobile described in the conditional sales contract given to defendant, Rouzer Motor Company, and assigned to defendant, Commercial Finance Corporation. On the same day that the new motor was installed, the buyer executed to plaintiff, Twin City Motor Company, a conditional sales note and chattel mortgage upon the replacement motor to cover the price and installation thereof in the automobile, which instruments were duly recorded. A balance of $89.15 due thereon remained unpaid to plaintiff by the buyer. In an action brought by plaintiff, Twin City Motor Company, against defendant, Rouzer Motor Company and its assignee, the court said: "Is the description in the conditional sales agreement sufficient for the purpose of identifying the property in question? We think so. * * * Do the improvements or

repairs placed on said car become the property of the defendants under the terms of their duly registered agreement, and also by the doctrine of accession? We think so. * * * The lien of defendants is superior to that of plaintiff."

In the case at bar we conclude that in the light of stipulated facts and applicable law, the replacement motor installed by defendants in the automobile became the property of plaintiff who was entitled to possession thereof under the terms of its conditional sales contract and by the doctrine of accession. Further, as heretofore concluded, defendants had no artisan's lien which could be valid as against plaintiff.

For reasons heretofore stated, the judgment of the trial court was clearly wrong. Therefore, it should be and hereby is reversed and the cause is remanded for new trial in conformity with this opinion. All costs are taxed to defendants.

REVERSED AND REMANDED.

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39. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects. *Johnson v. Nathan* 399

40. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. *Johnson v. Nathan* 399

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Generally, the lien of an artisan making repairs to a chattel at the instance of a conditional vendee in possession is subordinate to the rights of a conditional vendor under a contract of which the artisan has constructive or actual notice. *Allied Inv. Co. v. Shaneyfelt* 840

Attorney and Client.

1. A lawyer is admitted to practice with the understanding that he will faithfully discharge his duties, uphold and obey the Constitution and laws of the state, observe established standards and codes of professional ethics, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on courts and the profession of law. *State ex rel. Nebraska State Bar Assn. v. Feehan* 9
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1. The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. *Shields v. County of Buffalo* 34
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3. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. *Shields v. County of Buffalo* 34
4. In an action by a guest against the driver of the motor vehicle in which he was riding and also against the driver of a truck with which the motor vehicle collided, the reversal of a judgment against one driver does not require reversal of judgment in favor of the other driver in the absence of special circumstances. *Fick v. Herman* 110
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9. Right-of-way rule governing situation where two motorists approach an intersection at or about the same time stated. *Griess v. Borchers* 217

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12. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed by statute is determined by the further test of whether the speed is greater than was reasonable and prudent under the conditions then existing. *Griess v. Borchers* 217

13. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Parsons v. Cooperman* 292

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15. A driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. He must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. *Fridley v. Brush* 318
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16. Even though driver of automobile has the right-of-way, he must keep a lookout ahead and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance. *Fridley v. Brush* 318

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19. Any person aggrieved by an order suspending driver's license to operate a motor vehicle may, within 10 days after notice thereof, file a petition in the district court of the county where the aggrieved party resides for review of the proceedings had before the department. *Montgomery v. Blazek* 349

20. If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening will be effective even though vision of the railroad track is restricted. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451

21. It is the duty of the driver of a motor vehicle approaching a railroad crossing to have it under such control that when he arrives at a place where it is possible to see and hear an approaching train he can stop and avoid a collision with it. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451

22. Generally, a person who drives a motor vehicle on a railroad track at a highway crossing in front of an approaching train, which he could have seen, had he looked, or could have heard, had he listened, is in law guilty of contributory negligence, and cannot

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24. Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection is required by statute to yield the right-of-way to vehicles upon the highway. *Carman v. Hartnett* 576

25. One who crosses a street at any point other than a pedestrian crossing, crosswalk, or intersection is required to keep a constant lookout for his own safety in all directions of anticipated danger. *Carman v. Hartnett* 576

26. Where a person crossing a street at a point other than a pedestrian crossing, crosswalk, or intersection fails to look to his right for approaching traffic and is struck by an automobile coming from that direction, he is guilty of negligence sufficient to bar a recovery of damages as a matter of law. *Carman v. Hartnett* 576

27. There is nothing that will excuse the failure of a motorist to see what was plainly in sight if he had maintained a proper lookout. *Guerin v. Forburger* 824

28. Exceptions have been recognized to the general rule requiring a motorist to stop within the range of his vision where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. *Guerin v. Forburger* 824

29. The statute giving a possessory lien for repairs on an automobile does not warrant a presumption that a conditional vendee has authority to encumber the automobile for repairs thereon without consent of the conditional vendor. *Allied Inv. Co. v. Shaneyfelt* 840

30. The repairer of an automobile sold under a conditional sales contract has no possessory lien as against an unpaid conditional vendor in the absence of a showing that the repairs were made at the request of or with the consent of the conditional vendor or his assignee. *Allied Inv. Co. v. Shaneyfelt* 840

31. The Certificate of Title Act was enacted for the protection of owners of motor vehicles, those holding

liens thereon, and the public. *Allied Inv. Co. v. Shaneyfelt* 840

32. A replacement motor installed in a described automobile cannot be identified and severed therefrom without material injury to the automobile, and such a motor generally merges in and becomes a part of the automobile by accession. *Allied Inv. Co. v. Shaneyfelt* 840

Banks and Banking.

1. A deposit in a bank of this state made in the name of two or more persons and deliverable or payable to either or the survivor is a joint account of the payees with right of survivorship and the funds represented thereby may be withdrawn in whole or in part by either of the payees or the survivor of them. *Minahan v. Waldo* 78
2. The property right of the payees named in a joint deposit is fixed by statute, unless a contrary intention affirmatively appears from the terms of the deposit. *Minahan v. Waldo* 78
3. If a payee of a joint deposit is given and has a present interest in it, his status in reference to it is not changed by the fact that he does not use any part of the deposit during the life of the other payee. *Minahan v. Waldo* 78

Bills and Notes.

1. In a contest between the parties to a promissory note, a partial failure of consideration may cause a pro tanto avoidance or discharge of an undertaking on the note. *Norton v. Dosek* 554
2. A promissory note may be supported by valuable consideration and to that extent be valid, but void as to any excessive amount for which it was drawn. *Norton v. Dosek* 554

Burglary.

1. If an information for burglary sufficiently identifies the building allegedly entered, an allegation of ownership is not necessary in order that an offense be stated. *Liakas v. State* 130
2. The gist of the crime of burglary is the breaking and entering into any building described in the statute defining the offense with intent to steal property of any value. It is not necessary to allege in charging the commission of the crime that there was prop-

erty in the building at the time of the breaking and entry which could have been stolen by the accused. *Larson v. State* 339

Children Born Out of Wedlock.

1. The uncorroborated testimony of the mother of a child born out of wedlock is not sufficient to support a verdict or finding that the alleged father is the actual father. *State ex rel. Klostermeier v. Klostermeier* 247
2. Rule for determination of sufficiency of corroboration of testimony of mother in paternity case stated. *State ex rel. Klostermeier v. Klostermeier* 247
3. In an action to establish the paternity of a child born out of wedlock, the defense of sterility is one of fact for a jury. *State ex rel. Klostermeier v. Klostermeier* 247
4. In an action to establish the paternity of a child born out of wedlock, only a preponderance of the evidence is necessary to sustain a conviction. *State ex rel. Klostermeier v. Klostermeier* 247
5. In an action to establish the paternity of a child born out of wedlock, a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong. *State ex rel. Klostermeier v. Klostermeier* 247
6. A child born out of wedlock is considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child. *Peetz v. Masek Auto Supply Co.* 588
7. In order to establish a child born out of wedlock as an heir it is necessary to establish (1) that such child was born out of wedlock, (2) that a particular person was the father, and (3) that the father recognized the child agreeable to the requirements of statute. *Peetz v. Masek Auto Supply Co.* 588
8. A writing sufficient as an acknowledgment to establish heirship of a child born out of wedlock must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged. *Peetz v. Masek Auto Supply Co.* 588
9. The statement in former opinions of this court that "the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity," is overruled. *Peetz v. Masek Auto Supply Co.* 588

Common Law.

The common law of England has been adopted in this state where it is not inconsistent with the Constitution or statute. *Brunson v. Ranks Army Store* 519

Compromise and Settlement.

1. Where one party agrees to pay and the other to accept a certain sum in full satisfaction and discharge of a disputed claim, such agreement constitutes a valid contract between the parties. *Schroeder v. Ely* 252
2. In the absence of fraud, mistake, or duress, a compromise settlement is binding on the parties. In order to avoid the effect of such a compromise settlement it is necessary to plead and prove fraud, mistake, or duress which resulted in an unconscionable settlement. *Schroeder v. Ely* 252

Constitutional Law.

1. The rights guaranteed to an accused in a criminal prosecution by Article I, section 11, of the Constitution of Nebraska, are all personal privileges and not having been conferred from any consideration of public policy are not inalienable but may be insisted upon or abandoned at pleasure. *Lingo v. Hann* 67
2. Due process of law requires only that the accused is given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *Lingo v. Hann* 67
3. Requirements stated for consideration of full faith and credit to be given to divorce decree granted in a sister state. *Yost v. Yost* 164
   Zenker v. Zenker 200
4. The full faith and credit clause of the federal Constitution does not operate to make a judgment of a sister state a judgment in this state except where it can be shown that the court purporting to render the original judgment had the necessary jurisdiction to decide it on the merits. The presumption is that the foreign decree is valid. *Yost v. Yost* 164
   Zenker v. Zenker 200
5. The final determination of the question as to whether or not a foreign judgment must be given full faith and credit under the federal Constitution rests with the Supreme Court of the United States. *Zenker v. Zenker* 200

6. Purpose and effect of the Motor Vehicle Safety Responsibility Act stated. *Montgomery v. Blazek* 349
7. A license to operate an automobile upon the highways of the state is a privilege and not a property right. The power given to the Department of Roads and Irrigation to suspend such operating privileges is an administrative and not a judicial function. *Montgomery v. Blazek* 349
8. A municipality which invades the right conferred upon a property owner by the Constitution which assures him that his property will not be taken for a public purpose without compensation is liable for any damages caused thereby. *Gruntorad v. Hughes Bros., Inc.* 358
9. Negligence or a wrongful act is immaterial to a cause of action based on the constitutional provision to the effect that the property of no person shall be taken or damaged for public use without just compensation therefor. *Gruntorad v. Hughes Bros., Inc.* 358
10. The action of the Legislature in confirming or rejecting a nomination or appointment by the Governor is an executive rather than a legislative act. *State ex rel. Johnson v. Hagemeister* 475
11. Under the Constitution, the Legislature is empowered to determine the rules of its procedure. This authority extends to the determination of the propriety and effect of any action it may take. *State ex rel. Johnson v. Hagemeister* 475
12. When the Legislature finally confirms an appointment made by the Governor it is without power thereafter to revoke the confirmation. However, the Legislature, under its rules, may reconsider confirmation of an appointment so made. *State ex rel. Johnson v. Hagemeister* 475

Continuances.

Amendments of pleadings should be allowed whenever such amendments appear to be in furtherance of justice. When such amendments make a continuance necessary or otherwise increase the costs, such terms should be imposed as are just under the circumstances. *Dixon v. Coffey* 487

Contracts.

1. It is the duty of persons holding confidential relations with others to put themselves on terms of perfect equality by furnishing full, exact, and truth-

ful information of all matters which enter into a negotiation between them. *Schroeder v. Ely* 252
2. When a contract is of such a nature as to justify the conclusion that a party has been imposed upon by cunning, artifice, or undue influence, a court of equity will not hesitate to set the contract aside. *Schroeder v. Ely* 252
3. The law presumes that a person who makes a contract understands its meaning and effect and that he has the intention which its terms manifest. *Frentzel v. Siebrandt* 505
4. A written contract expressed by clear and unambiguous language is not subject to interpretation or construction. *Frentzel v. Siebrandt* 505
5. The intention of the parties to a written contract expressed by clear and unambiguous language must be determined from its contents. *Frentzel v. Siebrandt* 505
6. Mental anguish is not considered as an element of recovery in an action on an ordinary contract. *Brunson v. Ranks Army Store* 519
7. Damages for mental anguish for breach of contract are not generally recoverable for the reason that they are too remote and could not have been within the contemplation of the parties when the contract was made. *Brunson v. Ranks Army Store* 519
8. A court of equity leaves the parties to an illegal and void contract just where they placed themselves and as the court found them. *Abramson v. Abramson* 782

Corporations.

1. A tax on the shares is not a tax on the capital of the corporation. *Peter Kiewit Sons' Co. v. County of Douglas* 93
2. Domestic corporations are the agents of their stockholders for the purpose of assessing their stock in such corporation for taxation and paying the tax assessed thereon. *Peter Kiewit Sons' Co. v. County of Douglas* 93
3. Shares of stock and capital stock represent different property rights and may be separately assessed. *Peter Kiewit Sons' Co. v. County of Douglas* 93
4. A state may impose a tax upon the stockholders' interests in a corporation, measured by the value of its corporate assets, without making any deduction on account of United States securities held by the cor-

poration. *Peter Kiewit Sons' Co. v. County of Douglas* 93
5. Policy of state to avoid double taxation is recognized in statute providing for taxation of shares of stock of domestic corporations. *Peter Kiewit Sons' Co. v. County of Douglas* 93
6. The method authorized by statute for valuing shares of stock of domestic corporations results in discrimination against United States obligations. *Peter Kiewit Sons' Co. v. County of Douglas* 93
7. Principles announced in companion case were controlling and disposed of issues. *Missouri Valley Constr. Co. v. County of Douglas* 109

Costs.

If the representative of an estate makes reasonable expenditures for costs or the services of counsel in the prosecution of a claim of the estate, he is entitled to be reimbursed therefor even though his efforts are partly or wholly unsuccessful. *Minahan v. Waldo* 78

Counties.

1. A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions that may be hazardous, unless the duty to exercise reasonable and ordinary care would require it to do so at a particular location. *Shields v. County of Buffalo* 34
Clouse v. County of Dawson 544
2. At common law there was no right of action against a county for damages resulting from a defective or insufficient highway or bridge. Any liability for such in this state is statutory. *Shields v. County of Buffalo* 34
Clouse v. County of Dawson 544
3. Duty of county in the construction, maintenance, and repair of its highways and bridges stated. *Shields v. County of Buffalo* 34
Clouse v. County of Dawson 544
4. In an action to recover damages from a county by virtue of the statute the burden is on the plaintiff to establish negligence of the county and that the negligence was the proximate cause of the injury or that it was a cause that proximately contributed to it. *Shields v. County of Buffalo* 34
5. A county is not an insurer of the safety of a user of its roads and bridges or of the safety of the roads

and bridges maintained by it for the use of the public. *Clouse v. County of Dawson* 544

6. The duty of a county in reference to marginal and external hazards does not extend beyond the requirement that the highway shall be kept in a reasonably safe condition as against such incidents as are likely to and actually do occur in the use of the highway for purposes of travel by persons using it while in the exercise of reasonable care. *Clouse v. County of Dawson* 544

7. The duty of a county to warn against hazards beyond the limits of the highway exists only where such hazards are adjacent to the highway, or in such close proximity thereto as to be in themselves dangerous, under ordinary circumstances, to travelers thereon who are using reasonable care. *Clouse v. County of Dawson* 544

8. It is the duty of the county to keep a highway safe for such use as should reasonably be anticipated. There is no duty to warn of dangers that cannot reasonably be foreseen. *Clouse v. County of Dawson* 544

Courts.

1. All presumptions are in favor of the regularity of proceedings had in a court of general jurisdiction. If a judgment rendered by such a court recites findings of fact material to the issue heard and determined it will be presumed that they were justified by evidence submitted to the court. *Minahan v. Waldo* 78

2. The Supreme Court, in a proper case, is empowered to make any order that the district court is authorized to make. *Fick v. Herman* 110

3. Consent of the parties does not confer jurisdiction of the subject matter upon a court which it otherwise does not have. *Zenker v. Zenker* 200

4. The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. *Schroeder v. Ely* 262

5. The Supreme Court has the inherent power in the exercise of its appellate jurisdiction to award a temporary restraining order, to impound the subject of the litigation, and to appoint an interim receiver. *State ex rel. Beck v. Associates Discount Corp.* 410

6. The inherent powers of the Supreme Court to grant a temporary restraining order will not be exercised unless it is indispensable to the protection of the rights of the party asking it and the means are at hand to fully protect the rights of adverse parties. *State ex rel. Beck v. Associates Discount Corp.* 410
7. Where it appears necessary, in the interests of justice, the Supreme Court may, upon a proper showing, exercise its inherent powers ex parte or upon its own motion, to prevent irreparable damage to the litigants or the public. *State ex rel. Beck v. Associates Discount Corp.* 410
8. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. *Peetz v. Masek Auto Supply Co.* 588
9. Courts should not usurp the functions of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization. *LeDioyt v. County of Keith* 615

Covenants.

1. Property owners in a restricted subdivision are not estopped from preventing a flagrant violation of restrictive covenants on account of their previous failure to stop a slight deviation from the strict letter of such restrictions. *Hogue v. Dreeszen* 268
2. The change in the character of certain sections of property bordering on a street does not affect a large neighborhood bordering on that street, where the lot owners in such neighborhood have strictly adhered to the restrictive covenants in their deeds. *Hogue v. Dreeszen* 268
3. Where the owners of a tract of land have platted the same into lots and formed and carried out a plan to sell the lots subject to covenants restricting them to the construction of homes of a certain character, equity will protect the rights of other grantees who have accepted deeds in the same locality with similar restrictions. *Hogue v. Dreeszen* 268
4. A restrictive covenant is to be construed in connection with the surrounding circumstances which the parties are supposed to have had in mind at the time they made it. If there was a general building scheme the purpose of which was to restrict a district to single residences, so far as the purpose is

definitely stated in the covenant, that purpose should control. *Hogue v. Dreeszen* 268
5. Restrictions as to the erection or use of buildings or other structures and improvements will be so construed as, if possible, to effectuate the intention of the parties. *Hogue v. Dreeszen* 268
6. A covenant restricting the erection of any building, except for dwelling house purposes, applies to the use as well as to the character of the building. *Hogue v. Dreeszen* 268
7. A mandatory injunction may be issued directing the removal or alteration of a building or structure erected in violation of a restrictive covenant. *Hogue v. Dreeszen* 268

Criminal Law.
1. The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same. *Lingo v. Hann* 67
2. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of Article I, section 11, of the Constitution of Nebraska. *Lingo v. Hann* 67
3. Statutory provision that a witness may be interrogated as to his previous conviction for a felony does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions. *Liakas v. State* 130
4. If a person accused of crime testifies in his own behalf, he is to be treated as any other witness. *Liakas v. State* 130
5. In a criminal case, the credibility of witnesses and the weight of their testimony are for the jury to determine, and the conclusion of the jury will not be disturbed unless it is clearly wrong. *Liakas v. State* 130
Larson v. State 339
Birdsley v. State 581
6. Where the accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible. It is a circumstance which the jury may consider. *Liakas v. State* 130
7. In determining the sufficiency of circumstantial evidence to support a conviction, each case must be

determined on its own peculiar circumstances. *Larson v. State* 339

8. To justify a conviction on circumstantial evidence, the facts and circumstances essential to the conclusion must be of such character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence. *Larson v. State* 339

9. The prosecution of an aider, abettor, or procurer is governed by the same rule as is applicable to a principal. *Larson v. State* 339

10. In criminal cases, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Grandsinger v. State* 419
Birdsley v. State 581

11. In a criminal case the Supreme Court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that the court can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Grandsinger v. State* 419
Birdsley v. State 581

12. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. *Grandsinger v. State* 419

13. There are exceptions to the rule with respect to evidence of other crimes where a defendant is charged with a crime involving the essential elements of motive, intent, or guilty knowledge. Such evidence is admissible if it falls within one or more of such recognized exceptions. *Grandsinger v. State* 419

14. When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness. He may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him. *Grandsinger v. State* 419

15. Rules stated with respect to latitude of cross-examination of witness in a criminal case. *Grandsinger v. State* 419

16. A defendant in a criminal action may not predicate error on an instruction that is more favorable to

him than is required by the law applicable to the charge made. *Grandsinger v. State* 419

17. All instructions given should be considered in determining whether a particular instruction is prejudicial. Where instructions considered as a whole state the law fully and correctly, error may not be predicated thereon merely because a separate instruction, considered by itself, might be subject to a criticism or is incomplete. *Grandsinger v. State* 419

18. It is not error to refuse instructions requested by defendant where the court on its own motion has given the substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms, it meets all the requirements of the law. *Grandsinger v. State* 419

19. The mere fact that a witness in a criminal prosecution is a regular law enforcement officer does not entitle an accused to an instruction that the jury in weighing his testimony should exercise greater care than in weighing the testimony of other witnesses. *Grandsinger v. State* 419

20. The rule that in weighing the testimony of informers and detectives greater care and closer scrutiny should be exercised than in considering the testimony of witnesses who are disinterested is generally not applicable to public law enforcement officers. *Grandsinger v. State* 419

21. In a prosecution for obtaining money under false pretenses, the question of the intent with which the transaction was carried on is usually one for the jury. The fact that additional representations may have been made relating to future transactions is material only as a circumstance to be considered by the jury in determining the question of intent. *Dwoskin v. State* 793

Damages.

1. Funeral expenses cannot be recovered in the absence of proof that they represent the fair and reasonable value of the materials furnished and the services rendered. *Shields v. County of Buffalo* 34

2. If proof is offered of what was paid for materials furnished and services rendered in conducting a funeral, and no objection is made thereto on the ground that the amount so paid is not the proper

basis for recovery, it will be presumed the objection thereto on that basis is waived and that the amount so paid is the fair and reasonable value thereof. *Shields v. County of Buffalo* 34

3. Measure of damages in an action to recover for the wrongful death of a child stated. *Shields v. County of Buffalo* 34

4. Economic conditions, including the low purchasing power of money for the necessities of life, is a factor in determining the amount of a verdict. *Shields v. County of Buffalo* 34

5. The fixing of the damages is the function of the jury and unless it can be shown to be so exorbitant as to indicate passion, prejudice, mistake, or a complete disregard of the law and evidence, its judgment will be sustained. *Shields v. County of Buffalo* 34

6. A joint tortfeasor is liable for all damages to which his conduct has contributed. It is no defense that such damages would not have occurred without the concurring conduct of another person. *Fick v. Herman* 110

7. In an action for wrongful death, recovery must be measured by the pecuniary loss suffered by the statutory beneficiaries in being deprived of what they would have received from the earnings of the deceased had he lived out his full expectancy. *Kroeger v. Safranek* 182

8. Recovery for wrongful death is restricted to the pecuniary value lost to the family. This, however, is not necessarily limited to the amount in money which the deceased would probably have expended upon his family if he had lived. The jury may properly consider his services in the superintendence and attention to and care of his family and the education of his children. *Kroeger v. Safranek* 182

9. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict. *Kroeger v. Safranek* 182

10. In an action for wrongful death, medical or funeral expenses are recoverable as damages in a separate cause of action when the beneficiaries for whom the action is being brought have paid or have legally obligated themselves to pay such expenses. *Kroeger v. Safranek* 182

11. While in a personal injury action the better practice is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error to state the amount for which the action is brought. *Griess v. Borchers* 217

12. When a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not. *Griess v. Borchers* 217

13. Where the law furnishes no legal rule for measuring damages, the amount to be awarded rests largely in the sound discretion of the jury. The courts are reluctant to interfere with a verdict so rendered. *Benedict v. Eppley Hotel Co.* 280
Fridley v. Brush 318

14. A verdict may be set aside as excessive only (1) when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or (2) where it is clear that the jury disregarded the evidence or controlling rules of law. *Benedict v. Eppley Hotel Co.* 280
Fridley v. Brush 318

15. All damages, immediate and prospective, which result from the taking of property by the exercise of eminent domain or on account of proper construction and future operation of the improvement for which the taking is had must be compensated in the condemnation proceeding. *Gruntorad v. Hughes Bros., Inc.* 358

16. In a condemnation proceeding, the owner of property taken or damaged is entitled to have all proper elements of damage considered by the appraisers, and, if they fail to do so, he cannot afterwards maintain an action to recover damages omitted which were necessarily involved in the condemnation proceeding. *Gruntorad v. Hughes Bros., Inc.* 358

17. When the amount of damages allowed by the jury is clearly inadequate under the evidence, it is error for the trial court to refuse to set aside such verdict. However, where the recovery awarded is sufficient to probably do justice to the injured party, an appellate court should not interfere. *Dixon v. Coffey* 487

18. Mental anguish is not considered as an element of recovery in an action on an ordinary contract. *Brunson v. Ranks Army Store* 519

19. Damages for mental anguish for breach of contract are not generally recoverable for the reason that they are too remote and could not have been within the contemplation of the parties when the contract was made. *Brunson v. Ranks Army Store* 519

Death.

1. Measure of damages in an action to recover for the wrongful death of a child stated. *Shields v. County of Buffalo* 34
2. In an action for wrongful death, recovery must be measured by the pecuniary loss suffered by the statutory beneficiaries in being deprived of what they would have received from the earnings of the deceased had he lived out his full expectancy. *Kroeger v. Safranek* 182
3. Recovery for wrongful death is restricted to the pecuniary value lost to the family. This, however, is not necessarily limited to the amount in money which the deceased would probably have expended upon his family if he had lived. The jury may properly consider his services in the superintendence and attention to and care of his family and the education of his children. *Kroeger v. Safranek* 182
4. In an action for wrongful death, medical or funeral expenses are recoverable as damages in a separate cause of action when the beneficiaries for whom the action is being brought have paid or have legally obligated themselves to pay such expenses. *Kroeger v. Safranek* 182

Dedication.

1. A plat of dedication is taken as a mere offer to dedicate which must be accepted before the dedication is complete. *Village of Maxwell v. Booth* 300
2. Unless controlled by statute, acceptance of a dedication within a reasonable time is sufficient. In general, acceptance prior to revocation and prior to acquisition of adverse rights is sufficient. *Village of Maxwell v. Booth* 300
3. Ordinances and resolutions authorizing the construction of public works on the property constitute a sufficient acceptance of the dedication. *Village of Maxwell v. Booth* 300
4. In the absence of controlling statutes, construction and maintenance of public works constitute an ac-

ceptance by the municipality. *Village of Maxwell v. Booth* 300
5. Generally speaking official acceptance may consist in any positive conduct of the proper public officers evincing their consent on behalf of the public. *Village of Maxwell v. Booth* 300
6. Offers of dedication may be accepted by long continued use or by acts of governmental officials exercising control of the property. Formal action is not required. *Village of Maxwell v. Booth* 300
7. After dedication of property as a street and acceptance thereof by a municipality, private proprietors of adjoining land are powerless to vacate or change the dedication. *Village of Maxwell v. Booth* 300

Deeds.

1. Whether or not a deed has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case. *Milligan v. Milligan* 499
2. No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient. *Milligan v. Milligan* 499
3. When a grantor deposits a deed with a third person, without reserving dominion or control over it, and with directions to hold the deed during the lifetime of the grantor and upon grantor's death to deliver it to the grantee, such a delivery is effectual to pass the title to the grantee. *Milligan v. Milligan* 499
4. Where a grantor has effectually conveyed his property, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed. *Milligan v. Milligan* 499
5. Acts and declarations of the grantor in hostility to a deed subsequent to the time of alleged delivery are incompetent as against the grantee. But acts and declarations in support thereof are admissible, because they are adverse to the interests of the only person who at the time has any interest in overthrowing such deed. *Milligan v. Milligan* 499
6. An instrument in the form of an absolute deed will be construed as a mortgage if it was intended and made as security for the payment of a debt of the maker thereof. *Norton v. Dosek* 554

7. Whether a deed, absolute in form, is a sale or a mortgage depends upon the intention of the parties. The intention must be ascertained from their declarations, their conduct, and from any papers they or either of them subscribed. *Norton v. Dosek* 554

8. If it is sought to vary the effect of a conveyance, absolute in form, by parol testimony to establish it as a mortgage, the evidence must be clear, convincing, and satisfactory to justify a court in granting the relief sought. *Norton v. Dosek* 554

9. In determining if a deed, absolute in form, was given as security for the payment of a debt of the maker, inadequacy of consideration is an important indication that the parties did not consider the conveyance as absolute. *Norton v. Dosek* 554

10. If instruments are made at approximately the same time to effectuate an identical purpose, they will be construed as though they were one instrument. *Campbell v. Ohio National Life Ins. Co.* 653

11. If a deed, absolute in form, is accompanied by a defeasance in writing and is intended as security for the payment of a debt, it is a mortgage and the legal title to the real estate does not pass to the grantee. *Campbell v. Ohio National Life Ins. Co.* 653

12. A deed, absolute in form, is a mortgage if it is given to secure the payment of a debt notwithstanding the parties to the transaction agreed that upon default of payment the deed should become an absolute conveyance of the real estate described in it. *Campbell v. Ohio National Life Ins. Co.* 653

13. A test to determine if a conveyance, absolute in form, is a sale or a mortgage is whether or not the relation of the parties toward each other as debtor and creditor continues. If it does, the conveyance is in legal effect a mortgage. *Campbell v. Ohio National Life Ins. Co.* 653

14. If it is established that a deed, absolute in form, was intended as a mortgage the relative rights of the parties are determined by the law governing the relation of mortgagor and mortgagee. *Campbell v. Ohio National Life Ins. Co.* 653

Dismissal and Nonsuit.

The final dismissal of a litigant from a pending action with prejudice takes him out of court and his status as to all pending matters in the case is the same as

if he had not been a party to the litigation. *Campbell v. Ohio National Life Ins. Co.* 653

Divorce.

1. In a divorce action the decree for child support is at all times subject to review in the light of changing conditions. Either party may, upon sufficient showing of changed conditions, apply to the district court for modification of the decree. *Griess v. Griess* 1
2. An application for modification of an allowance for support and maintenance of minors made at any time after the decree of divorce has been entered must be founded upon new facts or circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. *Griess v. Griess* 1
3. Preliminary to making the order for the appointment of a receiver of the husband's property, there must be an order requiring the husband to give security for payments of alimony or child support, according to the terms of the decree, and a failure or refusal upon his part to give such security. *Griess v. Griess* 1
4. A divorce obtained in another jurisdiction is of no force and effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced. *Yost v. Yost* 164
5. Requirements stated for consideration of full faith and credit to be given to divorce decree granted in a sister state. *Yost v. Yost* 164
Zenker v. Zenker 200
6. A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had jurisdiction to render the judgment. A divorce decree of a foreign state is subject to collateral attack where constructive process only has been had in the state granting the divorce. *Yost v. Yost* 164
7. The burden of undermining the verity which the divorce decree of a sister state imports rests upon the party attacking its validity. *Yost v. Yost* 164
8. A bona fide domicile in the state in which a decree of divorce is obtained is necessary for such court to attain jurisdiction and consequently a holding that such a domicile was established is subject to

collateral attack by the spouse domiciled in another state. *Yost v. Yost* 164
9. Where a divorce decree is held to be void for want of jurisdiction by the court granting it, a purported subsequent marriage by the party obtaining it is also void. *Yost v. Yost* 164
10. Where a wife is conclusively found to be occupying an adulterous relationship with a man not her husband, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged. *Yost v. Yost* 164
11. Where in a suit for divorce adultery on the part of the defendant is conclusively proved, the trial court is required to grant a divorce to the plaintiff on that ground. *Yost v. Yost* 164
12. Where adultery of a wife is established, she is not entitled to an award of alimony or attorneys' fees. The costs of the action in such a case are taxable to the wife. *Yost v. Yost* 164
13. A reasonable attorney's fee in an action for divorce is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys. *Hardy v. Hardy* 175
14. Jurisdiction to grant a divorce depends upon the domicile of at least one of the parties being in the state of the forum and a procedural due process over the person of the defendant. If either is lacking, the court has no power to act. *Zenker v. Zenker* 200
15. In the absence of an actual domicile of one of the parties within the jurisdiction, an appearance in a divorce suit cannot give validity to a divorce decree since the court does not have jurisdiction of the subject matter. *Zenker v. Zenker* 200
16. In a suit for a divorce, jurisdiction of the subject matter and of the person of the defendant must both exist. Proof of one does not supply a defect in the other. *Zenker v. Zenker* 200
17. Where the record establishes that neither of the parties had a bona fide domicile in the state in which a decree of divorce was obtained and that service of summons personally on the defendant was obtained by fraud, the court did not obtain jurisdiction of the subject matter of the person, and was without

authority to enter a decree which is entitled to full faith and credit in this state. *Zenker v. Zenker* 200

18. Except where jurisdictional requirements have been met and the court of another state has thereby acquired power to act, the right of the state of the actual domicile of the parties to control the marital status and domestic relations of its own inhabitants has precedence over the attempt of any other state to interfere therewith. *Zenker v. Zenker* 200

19. If a motion to set aside or modify a decree of divorce is made pursuant to statute, the court may in the exercise of a sound discretion grant it or modify the decree. *Moran v. Moran* 372

20. To exercise a sound judicial discretion in vacating or modifying a decree of divorce, good reason therefor must be shown and it must also be shown that such action would not produce an unconscionable result. *Moran v. Moran* 372

21. Rule for determination of alimony in divorce case stated. *Pestel v. Pestel* 468

22. The court in a divorce action retains jurisdiction of the subject matter and the parties for the enforcement or modification of a judgment for maintenance of children, and prescribes the method by which a decree for child support may be modified. *Ruehle v. Ruehle* 691

23. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments. *Ruehle v. Ruehle* 691

24. A proceeding in a divorce case with reference to an adjudication of child support is a continuation of the divorce suit and one of its incidents, and an attorney's fee for services rendered in the Supreme Court may be allowed and taxed as costs. *Ruehle v. Ruehle* 691

25. An allowance for counsel fees and suit money in a divorce suit is, like an award of alimony, dependent upon the existence of the marriage relation. If this is denied and the wife fails to refute such denial, her application must be refused owing to her failure to make out a prima facie case. *Abramson v. Abramson* 782

Domicile.

1. A divorce obtained in another jurisdiction is of no force and effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced. *Yost v. Yost* 164
2. A bona fide domicile in the state in which a decree of divorce is obtained is necessary for such court to attain jurisdiction and consequently a holding that that such a domicile was established is subject to collateral attack by the spouse domiciled in another state. *Yost v. Yost* 164
3. Where the record establishes that neither of the parties had a bona fide domicile in the state in which a decree of divorce was obtained and that service of summons personally on the defendant was obtained by fraud, the court did not obtain jurisdiction of the subject matter or of the person, and was without authority to enter a decree which is entitled to full faith and credit in this state. *Zenker v. Zenker* 200
4. Except where jurisdictional requirements have been met and the court of another state has thereby acquired power to act, the right of the state of the actual domicile of the parties to control the marital status and domestic relations of its own inhabitants has precedence over the attempt of any other state to interfere therewith. *Zenker v. Zenker* 200

Drains.

1. Portion of land actually appropriated and taken by drainage district for right-of-way of a ditch should not be subject to special assessments against the landowner from whose premises it is taken. *Petersen v. Thurston* 758
2. The validity of drainage classification and assessment of benefits can be questioned only by those parties who are prejudiced or injured thereby. *Petersen v. Thurston* 758
3. Upon appeal to the district court, all original objections made to the classification and assessment of benefits of a drainage district are heard and determined in a summary manner as in equity. Upon appeal therefrom to the Supreme Court, the cause is tried de novo. *Petersen v. Thurston* 758
4. Upon an appeal to the district court, the drainage district has the burden of proving the validity of the

classification and the amount of the benefits by a preponderance of the evidence. *Petersen v. Thurston* 758

5. Report of engineers on classification and assessment of benefits was sufficient to sustain judgment of drainage district board. *Petersen v. Thurston* 758
6. In assessing benefits for construction of a drainage district it is sufficient if the classification and assessment of benefits to each tract of land is made upon a uniform plan which is fair and just under the evidence with relation thereto. However, the court will intervene to protect against an arbitrary and unreasonable assessment. *Petersen v. Thurston* 758
7. In determining the assessment of benefits accruing to land by reason of the construction of a drainage ditch, the true and final test is what will be the influence of the proposed improvement on the market value of the property. *Petersen v. Thurston* 758

Easements.

1. In a case resting on a claim of an implied reservation of an easement, the easement must be one that is so open, visible, and apparent that it directs the attention of its existence upon such examination as would ordinarily be given. *Bennett v. Evans* 807
2. Where an actual survey is required to determine the fact of an encroachment, the easement is not open, visible, and apparent. *Bennett v. Evans* 807
3. Circumstances which may be sufficient to imply the creation of an easement in favor of a conveyee may not be sufficient to imply the creation of one in favor of the conveyor. *Bennett v. Evans* 807
4. As a general rule, there is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a privilege in favor of the land he retains, unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. *Bennett v. Evans* 807
5. A grantor cannot derogate from his own grant and as a general rule he can retain a right over a portion of his land conveyed absolutely only by express reservation. *Bennett v. Evans* 807

Eminent Domain.

1. The mere fact that the taking of property for a public use will result in greater benefit to some persons than others or that private persons contribute

to the expense of such taking or to the cost of the public improvement for which the taking was had does not affect the character of the use or render it any less public. *Gruntorad v. Hughes Bros., Inc.* 358

2. A person whose connection with a public improvement is that he assisted in securing it, made contributions to the construction, and as a member of the public enjoys its benefits is not liable for damages caused by its existence and operation. *Gruntorad v. Hughes Bros., Inc.* 358

3. A municipality which invades the right conferred upon a property owner by the Constitution which assures him that his property will not be taken for a public purpose without compensation is liable for any damages caused thereby. *Gruntorad v. Hughes Bros., Inc.* 358

4. Negligence or a wrongful act is immaterial to a cause of action based on the constitutional provision to the effect that the property of no person shall be taken or damaged for public use without just compensation therefor. *Gruntorad v. Hughes Bros., Inc.* 358

5. A landowner who fails to appeal from the award of appraisers in a condemnation proceeding is conclusively bound by it. *Gruntorad v. Hughes Bros., Inc.* 358

6. A final award in a condemnation proceeding for the acquisition of a right-of-way is conclusive upon the parties thereto as to all matters necessarily within the issues of the proceeding. *Gruntorad v. Hughes Bros., Inc.* 358

7. All damages, immediate and prospective, which result from the taking of property by the exercise of eminent domain or on account of proper construction and future operation of the improvement for which the taking is had must be compensated in the condemnation proceeding. *Gruntorad v. Hughes Bros., Inc.* 358

8. In a condemnation proceeding, the owner of property taken or damaged is entitled to have all proper elements of damage considered by the appraisers, and, if they fail to do so, he cannot afterwards maintain an action to recover damages omitted which were necessarily involved in the condemnation proceeding. *Gruntorad v. Hughes Bros., Inc.* 358

9. In fixing the damages sustained by a landowner in consequence of the exercise of the power of eminent domain, the jury may take into account every

element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property. *City of Lincoln v. Marshall* 680

10. Where a part of a tract of land is taken for a public purpose, the fact that the remainder may thereafter be subjected to assessment for public improvements does not constitute an element of damage in condemnation proceedings. *City of Lincoln v. Marshall* 680

11. In a condemnation proceeding, evidence of the price at which other similar lands in the locality have been sold is admissible on the question of damages as a part of the case in chief where a sufficient foundation has been laid therefor. *City of Lincoln v. Marshall* 680

Equity.

1. It is the duty of persons holding confidential relations with others to put themselves on terms of perfect equality by furnishing full, exact, and truthful information of all matters which enter into a negotiation between them. *Schroeder v. Ely* 252

2. When a contract is of such a nature as to justify the conclusion that a party has been imposed upon by cunning, artifice, or undue influence, a court of equity will not hesitate to set the contract aside. *Schroeder v. Ely* 252

3. An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. It is not an estate or property in the thing itself, nor is it a right to recover the thing, but it is merely a charge upon it. *Schroeder v. Ely* 252

4. In the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. *Schroeder v. Ely* 252

5. The district courts of this state, being courts of general equity jurisdiction, are not limited in the exercise of such jurisdiction by statute. *Schroeder v. Ely* 262

6. Where the owners of a tract of land have platted the same into lots and formed and carried out a

plan to sell the lots subject to covenants restricting them to the construction of homes of a certain character, equity will protect the rights of other grantees who have accepted deeds in the same locality with similar restrictions. *Hogue v. Dreeszen* 268

7. Laches does not, like limitation, grow out of the mere passage of time, but is founded upon the inequity of permitting claims to be enforced where there have been changes of condition resulting from delay which operate to the prejudice of the party asserting it as a defense. *Uptegrove v. Elsasser* 527
8. Laches is not a defense in an equity case where there has been no material change in defendant's position. *Uptegrove v. Elsasser* 527
9. Equity in interpreting a transaction and determining the rights of the parties to it regards the substance of it and not the form. *Campbell v. Ohio National Life Ins. Co.* 653
10. The defense of laches is not a favored one and it will be sustained only if the litigant has been guilty of inexcusable neglect in protecting a right to the prejudice of his adversary. *Campbell v. Ohio National Life Ins. Co.* 653
11. A grantor who solicits the aid of equity to declare a deed, absolute in form, a mortgage is subject to the rule that he who seeks equity must do equity. Accordingly he must pay the debt secured as a condition of his redemption of the property involved. *Campbell v. Ohio National Life Ins. Co.* 653
12. A court of equity leaves the parties to an illegal and void contract just where they placed themselves and as the court found them. *Abramson v. Abramson* 782

Estoppel.

1. In a proper case, a party may be estopped from collaterally attacking a void judgment induced by his own fraudulent conduct. Such an estoppel may be asserted only by the party injured and those in privity with him. *Zenker v. Zenker* 200
2. The doctrine of equitable estoppel is frequently applied to transactions where it would be unconscionable to permit a person to maintain an inconsistent position. The acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, may also create an estoppel. *Schroeder v. Ely* 252

Evidence.

1. Circumstantial evidence is insufficient to warrant a recovery in a civil case unless the circumstances proved are of such a nature and so related to each other that only one conclusion can be reasonably drawn therefrom. *Mullikin v. Pedersen* 22
2. The question of the admissibility of evidence as to the speed of a vehicle shortly prior to the time of an accident rests largely in the discretion of the court. *Shields v. County of Buffalo* 34
3. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. *Shields v. County of Buffalo* 34
4. Funeral expenses cannot be recovered in the absence of proof that they represent the fair and reasonable value of the materials furnished and the services rendered. *Shields v. County of Buffalo* 34
5. If proof is offered of what was paid for materials furnished and services rendered in conducting a funeral, and no objection is made thereto on the ground that the amount so paid is not the proper basis for recovery, it will be presumed the objection thereto on that basis is waived and that the amount so paid is the fair and reasonable value thereof. *Shields v. County of Buffalo* 34
6. Where the accused is identified as having been at or near the scene of a crime about the time of its commission, evidence showing that he owned, possessed, or had access to any tools with which the crime was or might have been committed is admissible. It is a circumstance which the jury may consider. *Liakas v. State* 130
7. Maps, drawings, and diagrams illustrating the scenes of a transaction and the relative location of objects, if shown to be reasonably accurate and correct, are admissible in evidence. *Kroeger v. Safranek* 182
8. The circumstantial evidence rule in negligence cases requires that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Griess v. Borchers* 217

9. When a statute requires service upon a designated person or persons and no method of service is prescribed, and the question of whether or not service has been had comes into dispute, the burden devolves upon the party making the service to make due proof thereof. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387
10. As against clear and unequivocal evidence that notice was not received, proof that notice was placed in the mail addressed to the party to be served may not be accepted as due proof of service. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387
11. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. *Grandsinger v. State* 419
12. However, there are exceptions to the rule with respect to evidence of other crimes where a defendant is charged with a crime involving the essential elements of motive, intent, or guilty knowledge. Such evidence is admissible if it falls within one or more of such recognized exceptions. *Grandsinger v. State* 419
13. When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness. He may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him. *Grandsinger v. State* 419
14. Rules stated with respect to latitude of cross-examination of witness in a criminal case. *Grandsinger v. State* 419
15. If it is sought to vary the effect of a conveyance, absolute in form, by parol testimony to establish it as a mortgage, the evidence must be clear, convincing, and satisfactory to justify a court in granting the relief sought. *Norton v. Dosek* 554
16. Rules stated as to when physical facts may be accepted as ground for refusal to submit case to jury. *Birdsley v. State* 581

Executors and Administrators.

1. A person who has no beneficial interest in or claim against the estate of a decedent may not appear

and object to the final account of the representative of the estate. *Minahan v. Waldo* 78

2. The representative of an estate is authorized to and should prosecute an action if he in good faith believes it is necessary for the recovery of a debt owing the estate. *Minahan v. Waldo* 78

3. If the representative of an estate makes reasonable expenditures for costs or the services of counsel in the prosecution of a claim of the estate, he is entitled to be reimbursed therefor even though his efforts are partly or wholly unsuccessful. *Minahan v. Waldo* 78

4. Proceedings to administer and settle the estate of a decedent are in rem. Every person interested therein is a party thereto whether he is named or not and is bound by the action of the court having jurisdiction thereof whether he actually appears in the proceeding or is absent therefrom. *Minahan v. Waldo* 78

False Pretenses.

1. In a prosecution for obtaining money by false pretenses the gist of the offense consists in obtaining the money of another by false pretenses with the intent to cheat and defraud. *Dwoskin v. State* 793

2. Where the essential elements of the crime of obtaining money by false pretenses are present, it is no defense that the defendant had an option to buy the property on which he made default. *Dwoskin v. State* 793

Fraud.

1. Allegations and proof required to maintain an action for damages for false representations stated. *Cook Livestock Co., Inc. v. Reisig* 640

2. In order to found an action in nature of deceit, false representations must consist of representations of known existing facts. *Cook Livestock Co., Inc. v. Reisig* 640

3. Fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. *Cook Livestock Co., Inc. v. Reisig* 640

Habeas Corpus.

1. Habeas corpus is a collateral and not a direct pro-

ceeding when regarded as a means of attack upon a judgment sentencing a defendant. *Lingo v. Hann* 67

2. The judgment or order of a court or a judge thereof may be questioned collaterally if for any reason the judgment or order is void. A defendant who is imprisoned under such judgment or order may be discharged on habeas corpus. *Lingo v. Hann* 67

3. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. *Lingo v. Hann* 67

4. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. *Williams v. Williams* 686

Highways.

1. A county is not obligated to erect and maintain safety warning signs along its highways apprising the public of conditions that may be hazardous, unless the duty to exercise reasonable and ordinary care would require it to do so at a particular location. *Shields v. County of Buffalo* 34
Clouse v. County of Dawson 544

2. At common law there was no right of action against a county for damages resulting from a defective or insufficient highway or bridge. Any liability for such in this state is statutory. *Shields v. County of Buffalo* 34
Clouse v. County of Dawson 544

3. Duty of county in the construction, maintenance, and repair of its highways and bridges stated. *Shields v. County of Buffalo* 34
Clouse v. County of Dawson 544

4. If an act of a municipality can only be rightfully done on a highway, it is regarded as acceptance of that highway. *Village of Maxwell v. Booth* 300

5. It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. If he fails without a reasonable excuse to exercise such precautions, he is guilty of contributory negligence more than slight as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451

6. A county is not an insurer of the safety of a user

of its roads and bridges or of the safety of the roads and bridges maintained by it for the use of the public. *Clouse v. County of Dawson* 544

7. When a source of danger situated outside the limits of the highway is of itself a direct menace to travel and is susceptible to remedial measures which can be reasonably applied within the boundaries of the highway, the failure to employ such measures will be regarded as an insufficiency or a want of repair, or a want of reasonable care for the safety of travelers. *Clouse v. County of Dawson* 544
8. The duty of a county in reference to marginal and external hazards does not extend beyond the requirement that the highway shall be kept in a reasonably safe condition as against such incidents as are likely to and actually do occur in the use of the highway for purposes of travel by persons using it while in the exercise of reasonable care. *Clouse v. County of Dawson* 544
9. The duty of a county to warn against hazards beyond the limits of the highway exists only where such hazards are adjacent to the highway, or in such close proximity thereto as to be in themselves dangerous, under ordinary circumstances, to travelers thereon who are using reasonable care. *Clouse v. County of Dawson* 544
10. It is the duty of the county to keep a highway safe for such use as should reasonably be anticipated. There is no duty to warn of dangers that cannot reasonably be foreseen. *Clouse v. County of Dawson* 544
11. The duty to keep roads safe for ordinary travel does not include a duty to warn of dangers which arise from unusual and extraordinary occurrences. *Clouse v. County of Dawson* 544
12. The violation of a statute, the design of which is to protect the safety of people in the use of public highways, is evidence of negligence. *Guerin v. Forburger* 824
13. The violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence. *Guerin v. Forburger* 824

Homesteads.

1. All that the law requires to establish a homestead is that the homestead claimant and his family reside in the habitation or dwelling house, whatever

be its character, on the premises claimed as a homestead. *Schroeder v. Ely* 262

2. Under the homestead law a judgment is a lien only on the debtor's interest in lands, impressed with the character of a homestead, in excess of $2,000. *Schroeder v. Ely* 262
3. Where homestead selected cannot be segregated from remainder of property without material injury, entire property may be sold and from the proceeds of sale the amount of the homestead interest should be set aside for the judgment debtor. *Schroeder v. Ely* 262

Homicide.

1. The penalty to be inflicted upon conviction of murder in the first degree rests in the judgment and conscience of the jury. The doctrine of reasonable doubt has no application in the jury's determination of the penalty to be imposed. *Grandsinger v. State* 419
2. In a homicide prosecution it is not proper to give an instruction as to assault in any of its grades unless such instruction is applicable and authorized by the evidence. *Grandsinger v. State* 419
3. Pardon or parole is not a matter of concern for the jury. Its decision should not rest upon whether pardon or parole is easy or difficult to secure. *Grandsinger v. State* 419
4. In a homicide case, a prosecutor has a right to urge the jury to fix the penalty at death if the accused is found guilty of murder in the first degree, and the scope of his argument in that regard should be given a broad latitude provided it is predicated upon the evidence or reasonable inferences therefrom. *Grandsinger v. State* 419
5. It is improper and error for the prosecutor to make any statements in his closing argument with regard to pardon or parole, although it is not prejudicial error to make remarks which are simply a statement of existing constitutional or statutory law, if the statement is unaccompanied by other related objectionable or prejudicial remarks. *Grandsinger v. State* 419
6. Whoever causes the death of another without malice while engaged in the unlawful operation of a motor vehicle is deemed guilty of motor vehicle homicide. *Birdsley v. State* 581

7. In a prosecution for motor vehicle homicide, it is required that the unlawful operation of the motor vehicle shall be a proximate cause of the death of another. *Birdsley v. State* 581

Husband and Wife.

Rule stated for construction of property settlement between husband and wife. *Moran v. Moran* 392

Indictments and Informations.

1. Where a statute states the elements of a crime, it is generally sufficient in an information or indictment to describe such crime in the language of the statute. *Liakas v. State* 130
Larson v. State 339
2. If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment as well as constitutional requirements. *Liakas v. State* 130
3. The prosecution of an aider, abettor, or procurer is governed by the same rule as is applicable to a principal. *Larson v. State* 339

Infants.

1. Juvenile courts do not have the sole or exclusive jurisdiction of children under 18 years of age who have violated our laws. *Lingo v. Hann* 67
2. The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same. *Lingo v. Hann* 67
3. There apparently are no accommodations at the State Penitentiary to care for and handle children under 16 years of age. It is the duty of the State to provide such accommodations but the fact that none are available does not take from a trial court its authority, in a proper case, to sentence a child under 16 years of age thereto. *Lingo v. Hann* 67
4. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. *Williams v. Williams* 686

Injunction.

1. A mandatory injunction may be issued directing the removal or alteration of a building or structure erected in violation of a restrictive covenant. *Hogue v. Dreeszen* 268
2. Injunction may be properly used for the protection of public rights, property, or welfare. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387
3. Whether an order is a temporary restraining order or a temporary injunction is ordinarily determined by whether or not a further hearing was contemplated by the order. If a further hearing is contemplated it is a temporary restraining order. If further hearing is not contemplated it is a temporary injunction. *State ex rel. Beck v. Associates Discount Corp.* 410
4. An order restraining a litigant until the right to a temporary injunction can be determined on the merits of an appeal is a temporary restraining order and not a temporary injunction. *State ex rel. Beck v. Associates Discount Corp.* 410
5. A temporary restraining order is in aid only, and not a part of the main action. Its office is only to hold matters in statu quo for the time being, and until parties can be heard as to the propriety of issuing a temporary injunction. *State ex rel. Beck v. Associates Discount Corp.* 410

Insurance.

1. Statutory exemption of the proceeds of an insurance policy on the life of an insured is not applicable where the cost was paid in whole or in part by funds of another wrongfully, illegally, or fraudulently procured by the insured. *Mullikin v. Pedersen* 22
2. Under statute providing that every action must be prosecuted in the name of the real party in interest, if the insurance paid by an insurer covers only a portion of the loss, the right of action against a wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name. *Dixon v. Coffey* 487

Joint Tenancy.

1. A deposit in a bank of this state made in the name of two or more persons and deliverable or payable to either or the survivor is a joint account of the payees with right of survivorship and the funds

represented thereby may be withdrawn in whole or in part by either of the payees or the survivor of them. *Minahan v. Waldo* 78

2. The property right of the payees named in a joint deposit is fixed by statute, unless a contrary intention affirmatively appears from the terms of the deposit. *Minahan v. Waldo* 78

3. If a payee of a joint deposit is given and has a present interest in it, his status in reference to it is not changed by the fact that he does not use any part of the deposit during the life of the other payee. *Minahan v. Waldo* 78

Judgments.

1. The judgment or order of a court or a judge thereof may be questioned collaterally if for any reason the judgment or order is void. A defendant who is imprisoned under such judgment or order may be discharged on habeas corpus. *Lingo v. Hann* 67

2. Proceedings to administer and settle the estate of a decedent are in rem. Every person interested therein is a party thereto whether he is named or not and is bound by the action of the court having jurisdiction thereof whether he actually appears in the proceeding or is absent therefrom. *Minahan v. Waldo* 78

3. All matters in issue in a judicial proceeding that are judicially determined therein are conclusively put at rest by a judgment rendered in it and may not again be litigated. *Minahan v. Waldo* 78

4. The doctrine of res judicata applies, except in special cases, not only to points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every matter which properly belonged to the subject of litigation and which the parties might have brought forward therein. *Minahan v. Waldo* 78

5. All presumptions are in favor of the regularity of proceedings had in a court of general jurisdiction. If a judgment rendered by such a court recites findings of fact material to the issue heard and determined it will be presumed that they were justified by evidence submitted to the court. *Minahan v. Waldo* 78

6. The vacation of a judgment against one of two or more defendants does not require its vacation as to the others, unless it appears that because of an in-

terdependence of the rights of the defendants, or because of other special factors, it would be prejudicial and inequitable to leave the judgment standing against them. *Fick v. Herman* 110

7. A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had jurisdiction to render the judgment. A divorce decree of a foreign state is subject to collateral attack where constructive process only has been had in the state granting the divorce. *Yost v. Yost* 164

8. The full faith and credit clause of the federal Constitution does not operate to make a judgment of a sister state a judgment in this state except where it can be shown that the court purporting to render the original judgment had the necessary jurisdiction to decide it on the merits. The presumption is that the foreign decree is valid. *Yost v. Yost* 164
Zenker v. Zenker 200

9. The burden of undermining the verity which the divorce decree of a sister state imports rests upon the party attacking its validity. *Yost v. Yost* 164

10. In a proper case, a party may be estopped from collaterally attacking a void judgment induced by his own fraudulent conduct. Such an estoppel may be asserted only by the party injured and those in privity with him. *Zenker v. Zenker* 200

11. A judgment rendered by a court that did not have jurisdiction of the subject matter or of the person is not res judicata of any issue purported to have been raised therein, and is subject to collateral attack. *Zenker v. Zenker* 200

12. The final determination of the question as to whether or not a foreign judgment must be given full faith and credit under the federal Constitution rests with the Supreme Court of the United States. *Zenker v. Zenker* 200

13. A landowner who fails to appeal from the award of appraisers in a condemnation proceeding is conclusively bound by it. *Gruntorad v. Hughes Bros., Inc.* 358

14. A final award in a condemnation proceeding for the acquisition of a right-of-way is conclusive upon the parties thereto as to all matters necessarily within the issues of the proceeding. *Gruntorad v. Hughes Bros., Inc.* 358

Juries.

It will not be presumed that passion and prejudice influenced the action of jurors, but it must be affirmatively shown before a verdict will be disturbed. *Johnson v. Nathan* 399

Liens.

1. An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. It is not an estate or property in the thing itself, nor is it a right to recover the thing, but it is merely a charge upon it. *Schroeder v. Ely* 252
2. In the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. *Schroeder v. Ely* 252
3. All liens are created by law or contract. To establish a lien the contract must be made with the owner of the property on which the lien is sought to be imposed. *Allied Inv. Co. v. Shaneyfelt* 840

Limitations of Actions.

1. An action upon an oral agreement for the feeding and care of livestock on shares, which is continuing in its nature without a fixed termination date, is barred in 4 years from the date the action accrues. *Uptegrove v. Elsasser* 527
2. Where the nature of the contract and the situation of the parties require that it be adjudged that the obligation is a continuing one which is not violated or broken until there is a refusal to honor a demand, the demand creates the liability and the statute of limitations runs from such demand. *Uptegrove v. Elsasser* 527

Marriage.

1. Where a divorce decree is held to be void for want of jurisdiction by the court granting it, a purported subsequent marriage by the party obtaining it is also void. *Yost v. Yost* 164
2. A person who remarries after obtaining a void decree of divorce in another state and cohabits thereafter with the purported spouse as man and wife,

even though a ceremonial marriage was had, is an occupant of an adulterous relationship with such purported spouse. *Yost v. Yost* 164

3. The validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere and conversely if invalid by the lex loci contractus, it will be invalid wherever the question may arise. *Abramson v. Abramson* 782
4. A meretricious relationship does not necessarily bar claims to property acquired during the period of such relationship, where the claim is based on general principles of law without respect to a marital status. *Abramson v. Abramson* 782

Master and Servant.

1. It is the duty of a master to use ordinary and reasonable care to furnish appliances reasonably safe for the use of his servants in carrying on his business, and a failure to exercise such reasonable and ordinary care upon his part renders him liable, if the servant suffers any injury by reason of his negligence in that behalf. *Lownes v. Furman* 57
2. The master is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his servants with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect. *Lownes v. Furman* 57
3. Ordinarily, in providing his employees with tools and appliances with which to work, an employer is bound to exercise reasonable care to insure the safety of such employees. The foregoing duty is a continuing one. The employer is also bound to keep such tools and appliances in a reasonably safe condition, and to make seasonable inspection with that end in view. *Lownes v. Furman* 57
4. The duty of the master as to working conditions includes a duty to supply competent supervisors of the operative details of the business where this is reasonably necessary to prevent undue risk of harm to his servants. *Lownes v. Furman* 57
5. Contributory negligence by an employee is the failure to use such precautions for his own safety as ordinary prudence requires under the circumstances

presented. He 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. *Lownes v. Furman* 57

6. Where the inference is clear as to a master and servant relationship, the determination is made by the court; otherwise the jury determines the question after instruction by the court as to the matters of fact to be considered. *Peetz v. Masek Auto Supply Co.* 588

Mechanics' Liens.

1. The right to a mechanic's lien is of statutory origin. It did not exist in common law or in equity. *Krotter & Sailors v. Pease* 774
2. A claimant to be entitled to the benefit of the Mechanic's Lien Act must bring himself within its terms and comply with the procedure required to perfect a lien. *Krotter & Sailors v. Pease* 774
3. If a claimant is within the specifications of the statute granting the right and has complied with the procedure required to perfect a lien, the provisions of the statute will be liberally interpreted to accomplish the purposes of the legislation. *Krotter & Sailors v. Pease* 774
4. The Mechanic's Lien Act provides security exclusively for materialmen and laborers. *Krotter & Sailors v. Pease* 774
5. The mechanic's lien statute does not extend to a person who supplies money with which the cost of the work or material is paid. *Krotter & Sailors v. Pease* 774
6. The right to a lien by virtue of the Mechanic's Lien Act is created immediately material is furnished or labor is performed within the provisions of the act if a claim is made therefor as required by the statute. *Krotter & Sailors v. Pease* 774

Mortgages.

1. An instrument in the form of an absolute deed will be construed as a mortgage if it was intended and made as security for the payment of a debt of the maker thereof. *Norton v. Dosek* 554
2. Whether a deed, absolute in form, is a sale or a mortgage depends upon the intention of the parties. The intention must be ascertained from their declar-

ations, their conduct, and from any papers they or either of them subscribed. *Norton v. Dosek* 554

3. In determining if a deed, absolute in form, was given as security for the payment of a debt of the maker, inadequacy of consideration is an important indication that the parties did not consider the conveyance as absolute. *Norton v. Dosek* 554

4. If instruments are made at approximately the same time to effectuate an identical purpose, they will be construed as though they were one instrument. *Campbell v. Ohio National Life Ins. Co.* 653

5. If an instrument is intended by the parties to be security for a debt it is in equity, without regard to its form or name, a mortgage. *Campbell v. Ohio National Life Ins. Co.* 653

6. If a deed, absolute in form, is accompanied by a defeasance in writing and is intended as security for the payment of a debt, it is a mortgage and the legal title to the real estate does not pass to the grantee. *Campbell v. Ohio National Life Ins. Co.* 653

7. If an instrument is a mortgage in legal effect when executed and delivered, its character as such is not changed by the effluence of time. *Campbell v. Ohio National Life Ins. Co.* 653

8. A deed, absolute in form, is a mortgage if it is given to secure the payment of a debt notwithstanding the parties to the transaction agreed that upon default of payment the deed should become an absolute conveyance of the real estate described in it. *Campbell v. Ohio National Life Ins. Co.* 653

9. A test to determine if a conveyance, absolute in form, is a sale or a mortgage is whether or not the relation of the parties toward each other as debtor and creditor continues. If it does, the conveyance is in legal effect a mortgage. *Campbell v. Ohio National Life Ins. Co.* 653

10. If it is established that a deed, absolute in form, was intended as a mortgage the relative rights of the parties are determined by the law governing the relation of mortgagor and mortgagee. *Campbell v. Ohio National Life Ins. Co.* 653

11. A grantor who solicits the aid of equity to declare a deed, absolute in form, a mortgage is subject to the rule that he who seeks equity must do equity. Accordingly he must pay the debt secured as a condition of his redemption of the property involved. *Campbell v. Ohio National Life Ins. Co.* 653

12. A mortgagee of real estate in possession before foreclosure, in the absence of an agreement upon the subject, is not entitled to credit for permanent improvements made by him but he is liable for the net rents and profits which he has received or which he might have received by the exercise of reasonable care. *Campbell v. Ohio National Life Ins. Co.* 653
13. A mortgagee in possession who claims ownership hostile to the mortgagor is not entitled in an accounting for rents and profits from the land to credit for compensation for services rendered by him in managing or supervising the real estate encumbered by the mortgage. *Campbell v. Ohio National Life Ins. Co.* 653

Motor Carriers.

1. The State Railway Commission is without power to revoke a certificate of convenience and necessity in the absence of evidence of a willful failure of the holder thereof to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate. *Caudill v. Lysinger* 235
2. Where a certificate of convenience and necessity is not dormant it may be transferred on approval of the State Railway Commission under reasonable rules and regulations to be prescribed by it, if the transfer will be consistent with public interest, if it will not unduly restrict competition, and if the transferee is fit, willing, and able to perform the service proposed. *Caudill v. Lysinger* 235
3. The statute governing the transfer of certificates of convenience and necessity is permissive in terms and not mandatory, and action of the State Railway Commission in refusing a transfer will be sustained unless it appears that the refusal was unreasonable and arbitrary. *Caudill v. Lysinger* 235
4. The State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the specific statute. *Abler Transfer, Inc. v. Lyon* 378
5. The term "willful failure," as used in the motor carrier act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. *Abler Transfer, Inc. v. Lyon* 378

Municipal Corporations.

1. It is not necessary that a municipality accept and open a street for public use until the public necessity requires it. *Village of Maxwell v. Booth* 300
2. If an act of a municipality can only be rightfully done on a highway, it is regarded as acceptance of that highway. *Village of Maxwell v. Booth* 300
3. The use of streets for telephone or telegraph purposes is a use for a public purpose. *Village of Maxwell v. Booth* 300
4. Evidence of the acceptance of streets by a city is found in the affirmative act of taking possession thereof for the purpose of placing therein water mains, sewers, and surface drains. *Village of Maxwell v. Booth* 300
5. The authority granted to the board of trustees of a village to locate and open streets is administrative in its character. *Village of Maxwell v. Booth* 300
6. It is entirely proper to act by resolution, if the action taken is merely declaratory of the will of the corporation in a given matter and is in the nature of a ministerial act. *Village of Maxwell v. Booth* 300
7. The statutory provision that no street, avenue, or alley shall be graded unless the same shall be ordered to be done by the affirmative vote of two-thirds of the city council or board of trustees, is limited to orders for the grading of streets. *Village of Maxwell v. Booth* 300
8. The streets that proprietors may vacate are those only in which no adverse interest has been acquired. If accepted by the municipality, and improved so that the conveyance has been effective in passing the fee thereto, it is beyond the reach of the proprietors of a part of a plat. *Village of Maxwell v. Booth* 300
9. An action to recover on a contract entered into with a village contrary to statutory prohibition may not be maintained. *Heese v. Wenke* 311
10. Where a contract has been entered into with a village contrary to statutory prohibition and payments have been made for materials furnished or service performed thereunder, the amounts so paid may be recovered in an action by the village or by a taxpayer on behalf of the village. *Heese v. Wenke* 311
11. A contract entered into with a village contrary to statutory prohibition is void. *Heese v. Wenke* 311

Negligence.

1. In an action to recover damages from a county by virtue of the statute the burden is on the plaintiff to establish negligence of the county and that the negligence was the proximate cause of the injury or that it was a cause that proximately contributed to it. *Shields v. County of Buffalo* 34
2. The existence or presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. *Shields v. County of Buffalo* 34
Guerin v. Forburger 824
3. Negligence is a question of fact and 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. *Shields v. County of Buffalo* 34
4. In order to constitute actionable negligence there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. *Lownes v. Furman* 57
5. It is the duty of a master to use ordinary and reasonable care to furnish appliances reasonably safe for the use of his servants in carrying on his business, and a failure to exercise such reasonable and ordinary care upon his part renders him liable, if the servant suffers any injury by reason of his negligence in that behalf. *Lownes v. Furman* 57
6. The master is not an insurer of the safety of the appliances which he furnishes. If he exercises the reasonable care which a prudent man would ordinarily take for his own safety, under like circumstances, in furnishing his servants with instruments reasonably safe for the particular purpose for which they are used, he has fulfilled his whole duty in that respect. *Lownes v. Furman* 57
7. Ordinarily, in providing his employees with tools and appliances with which to work, an employer is

bound to exercise reasonable care to insure the safety of such employees. The foregoing duty is a continuing one. The employer is also bound to keep such tools and appliances in a reasonably safe condition, and to make seasonable inspection with that end in view. *Lownes v. Furman* 57

8. The duty of the master as to working conditions includes a duty to supply competent supervisors of the operative details of the business where this is reasonably necessary to prevent undue risk of harm to his servants. *Lownes v. Furman* 57

9. Contributory negligence by an employee is the failure to use such precautions for his own safety as ordinary prudence requires under the circumstances presented. He 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. *Lownes v. Furman* 57

10. Where different minds may reasonably draw different conclusions or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Price v. King* 123

11. 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 to dismiss the plaintiff's petition. *Price v. King* 123
Parsons v. Cooperman 292
Guerin v. Forburger 824

12. Negligence must be proved by direct evidence or by facts from which negligence can reasonably be inferred. In the absence of such proof negligence will not be presumed. *Price v. King* 123

13. The burden of proof is on the plaintiff to prove negligence on the part of the defendant by a preponderance of the evidence. The burden of proof is on the defendant to prove contributory negligence on the part of the plaintiff by a preponderance of the evidence. An instruction to this effect cannot afford any basis for error. *Price v. King* 123

14. As a general rule it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in

time to avoid a collision with an object within the range of his vision. *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.* 152
Fridley v. Brush 318
Guerin v. Forburger 824
15. Proximate cause is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened. *Kroeger v. Safranek* 182
16. Doctrine of efficient intervening cause stated. *Kroeger v. Safranek* 182
17. 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. *Kroeger v. Safranek* 182
18. A cause of an injury may be the proximate cause notwithstanding it acted through successive instruments or a series of events, if the instruments or events were combined in one continuous chain or train through which the force of the cause operated to produce the injury. *Kroeger v. Safranek* 182
19. Trial court should sustain motion for directed verdict when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Griess v. Borchers* 217
20. Rule for application of doctrine of comparative negligence stated. *Griess v. Borchers* 217
21. The circumstantial evidence rule in negligence cases requires that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the negligent act of which complaint is made. *Griess v. Borchers* 217
22. Duty of driver of an automobile entering an intersection of two streets or highways stated. *Griess v. Borchers* 217
Parsons v. Cooperman 292
23. Right-of-way rule governing situation where two motorists approach an intersection at or about the same time stated. *Griess v. Borchers* 217
Parsons v. Cooperman 292
24. A vehicle which has entered an intersection and is

passing through it at a lawful speed has the right-of-way over a vehicle approaching the intersection from a different direction into its path. *Griess v. Borchers* 217

25. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances, nor is he thereby relieved from the duty of exercising ordinary care to avoid accidents. *Griess v. Borchers* 217

26. The lawfulness of the speed of a motor vehicle within the prima facie limits fixed by statute is determined by the further test of whether the speed is greater than was reasonable and prudent under the conditions then existing. *Griess v. Borchers* 217

27. Rule governing instructions on burden of proof of contributory negligence stated. *Griess v. Borchers* 217

28. Essentials of doctrine of res ipsa loquitur stated. *Benedict v. Eppley Hotel Co.* 280

29. If facts are shown to which the doctrine of res ipsa loquitur has application, an inference of negligence arises and a question is presented for the jury as to liability. *Benedict v. Eppley Hotel Co.* 280

30. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the ordinary care required of him under the circumstances of the particular situation, the issue of negligence on the part of the operator is one of fact to be determined by a jury. *Parsons v. Cooperman* 292

31. Rule as to pleading and proof of contributory negligence stated. *Fridley v. Brush* 318

32. Under general allegations of contributory negligence supported by evidence, the trial court, without request, should submit to and properly instruct the jury on such charges. However, where the trial court has instructed the jury on a specific charge of contributory negligence pleaded in the defendant's answer, such instruction is sufficient. *Fridley v. Brush* 318

33. A driver of an automobile is legally obligated to keep such a lookout that he can see what is plainly visible before him and he cannot relieve himself of that duty. He must so drive his automobile that when he sees the object he can stop his automobile in time to avoid it. *Fridley v. Brush* 318
Guerin v. Forburger 824

34. Even though driver of automobile has the right-of-way, he must keep a lookout ahead and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance. *Fridley v. Brush* 318

35. Railroad companies may provide lights and gates at crossings for the protection of those crossing, but their presence does not excuse one passing who fails to exercise precaution for his own safety. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451

36. Neither open gates nor failure of the railroad company to give signals at a railroad crossing relieves one about to cross the tracks from the duty to use due care to look and listen for an approaching train. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451

37. When a source of danger situated outside the limits of the highway is of itself a direct menace to travel and is susceptible to remedial measures which can be reasonably applied within the boundaries of the highway, the failure to employ such measures will be regarded as an insufficiency or a want of repair, or a want of reasonable care for the safety of travelers. *Clouse v. County of Dawson* 544

38. A reasonable anticipation of consequences is a necessary element in determining whether a particular act or omission is actionable negligence. If the danger was one not reasonably to be anticipated, no duty on the part of the county to warn arises. *Clouse v. County of Dawson* 544

39. Where there is evidence upon which the minds of reasonable men may differ as to whether or not a party was guilty of negligence which caused or proximately contributed to the death of a person killed in an accident, the question of negligence is one for a jury. *Bailey v. Spindler* 563

40. The violation of a statute relating to the operation of a motor vehicle on a public highway is evidence of negligence. *Bailey v. Spindler* 563

41. In the absence of evidence of the conduct of a person killed in an accident, a presumption obtains that he was in the exercise of due care for his own safety. *Bailey v. Spindler* 563

42. In a negligence case wherein it is pleaded as an affirmative defense that a party other than the defendant was guilty of negligence which was the proximate cause of the accident and there is evidence

to support the pleading, it is error for the court to refuse to instruct on such issue. *Bailey v. Spindler* 563

43. In a negligence action, the burden of proof is on the plaintiff to prove defendant's negligence and that such negligence was the proximate cause of the injury of which complaint is made. *Carman v. Hartnett* 576

44. Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk, or intersection is required by statute to yield the right-of-way to vehicles upon the highway. *Carman v. Hartnett* 576

45. One who crosses a street at any point other than a pedestrain crossing, crosswalk, or intersection is required to keep a constant lookout for his own safety in all directions of anticipated danger. *Carman v. Hartnett* 576

46. Where a person crossing a street at a point other than a pedestrian crossing, crosswalk, or intersection fails to look to his right for approaching traffic and is struck by an automobile coming from that direction, he is guilty of negligence sufficient to bar a recovery of damages as a matter of law. *Carman v. Hartnett* 576

47. The violation of a statute, the design of which is to protect the safety of people in the use of public highways, is evidence of negligence. *Guerin v. Forburger* 824

48. Negligence to justify a recovery of damages must have proximately caused or contributed to the injury for which compensation is sought. *Guerin v. Forburger* 824

49. The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *Guerin v. Forburger* 824

50. Contributory negligence is defined. *Guerin v. Forburger* 824

51. There is nothing that will excuse the failure of a motorist to see what was plainly in sight if he had maintained a proper lookout. *Guerin v. Forburger* 824

New Trial.

1. Upon motion for new trial, the alleged errors that may be considered in the district court are those which appear in the record of the proceedings which

resulted in the verdict and judgment and which are called to its attention by the motion or appropriate pleading. *Dixon v. Coffey* 487

2. Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. *Dixon v. Coffey* 487

3. The district court is required to consider and determine motions for a new trial by the exercise of its judicial discretion, which means the application of statutes and legal principles to all of the facts in a case. *Dixon v. Coffey* 487

4. Rule for exercise of judicial discretion by trial court in granting or refusing a motion for new trial stated. *Dixon v. Coffey* 487

Officers.

One who sues to recover a public office has the burden of proving every fact essential to his title. His recovery depends upon the strength of his own title and not upon the weakness of the claim of his adversary. *State ex rel. Johnson v. Hagemeister* 475

Parent and Child.

1. Where a wife is conclusively found to be occupying an adulterous relationship with a man not her husband, she is an unfit person as a matter of law to have the care and custody of her minor children as against the husband she has wronged. *Yost v. Yost* 164

2. 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. *Williams v. Williams* 686

3. The natural rights of a parent to the custody of his child must yield to the best interests of the child where the preferential right has been forfeited. *Williams v. Williams* 686

4. Where a parent commits an infant child to the care and custody of others who properly care for the child in a suitable home for many years without compensation, and thereby permits strong mutual attachments to develop, the parent forfeits his natural right to its custody. The controlling consideration in a subsequent proceeding by the father to regain its custody is the welfare and best interests of the child. *Williams v. Williams* 686

Parties.

Under statute providing that every action must be prosecuted in the name of the real party in interest, if the insurance paid by an insurer covers only a portion of the loss, the right of action against a wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name. *Dixon v. Coffey* 487

Pleading.

1. The office of the ad damnum in a pleading is to fix the amount beyond which a party may not recover on the trial of his action. *Kroeger v. Safranek* 182
2. A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleaders' conclusions of law or fact. *Montgomery v. Blazek* 349
3. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *Montgomery v. Blazek* 349
4. The law of amendments should be liberally construed. Except as otherwise provided by statute or rule of court, a party seeking to amend the pleadings is not required to do so in any particular form or manner nor to support his application therefor by affidavit if the court is in some appropriate manner informed of the nature and purpose of the proposed amendments. *Dixon v. Coffey* 487
5. Amendments of pleadings should be allowed whenever such amendments appear to be in furtherance of justice. When such amendments make a continuance necessary or otherwise increase the costs, such terms should be imposed as are just under the circumstances. *Dixon v. Coffey* 487
6. Rule for consideration of general demurrer stated. *Brunson v. Ranks Army Store* 519
7. Demurrers to amended petition based upon alleged violation of right of privacy were properly sustained. *Brunson v. Ranks Army Store* 519
8. 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. *Babin v. County of Madison* 536

9. 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. *Babin v. County of Madison* 536
10. Allegations and proof required to maintain an action for damages for false representations stated. *Cook Livestock Co., Inc. v. Reisig* 640

Process.

1. Personal service of summons, if procured by fraud, trickery, or artifice is not sufficient to give a court jurisdiction over the person thus served. A service of summons through such improper means is invalid. *Zenker v. Zenker* 200
2. When a statute requires service upon a designated person or persons and no method of service is prescribed, and the question of whether or not service has been had comes into dispute, the burden devolves upon the party making the service to make due proof thereof. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387
3. As against clear and unequivocal evidence that notice was not received, proof that notice was placed in the mail addressed to the party to be served may not be accepted as due proof of service. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387

Public Service Commissions.

1. An order of the State Railway Commission is not reviewable by the Supreme Court unless and until the order imposes an obligation, denies a right, or fixes some legal relationship as a consummation of an administrative process. *Houk v. Beckley* 143
2. Basis for review of administrative ruling stated. *Houk v. Beckley* 143
3. On appeal to the Supreme Court from the State Railway Commission, the evidence presented before the commission, as certified by the official stenographer and the chairman of the commission, together with the pleadings and filings duly certified in the case under the seal of the commission, make up the record. *Caudill v. Lysinger* 235
4. The State Railway Commission is without power to revoke a certificate of convenience and necessity in the absence of evidence of a willful failure of the

holder thereof to observe and comply with the Motor Carrier Act or any lawful order or regulation of the commission or any term, condition, or limitation of the certificate. *Caudill v. Lysinger* 235

5. Where a certificate of convenience and necessity is not dormant it may be transferred on approval of the State Railway Commission under reasonable rules and regulations to be prescribed by it, if the transfer will be consistent with public interest, if it will not unduly restrict competition, and if the transferee is fit, willing, and able to perform the service proposed. *Caudill v. Lysinger* 235

6. The statute governing the transfer of certificates of convenience and necessity is permissive in terms and not mandatory, and action of the State Railway Commission in refusing a transfer will be sustained unless it appears that the refusal was unreasonable and arbitrary. *Caudill v. Lysinger* 235

7. On an appeal to the Supreme Court from an order of the State Railway Commission, administrative and legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Abler Transfer, Inc. v. Lyon* 378

8. Unless an order of the State Railway Commission is shown to be unreasonable or arbitrary, the Supreme Court is not authorized to interfere with the power of the commission to regulate common carriers. *Abler Transfer, Inc. v. Lyon* 378

9. The State Railway Commission, in order to revoke, change, or suspend a certificate of public convenience and necessity, must proceed in accordance with the specific statute. *Abler Transfer, Inc. v. Lyon* 378

10. The term "willful failure," as used in the motor carrier act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. *Alber Transfer, Inc. v. Lyon* 378

Railroads.

1. If the operator of a motor vehicle is familiar with a railroad crossing and the surrounding conditions, it is his duty in approaching it to look and listen at a time and place where looking and listening

will be effective even though vision of the railroad track is restricted. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451

2. It is the duty of the driver of a motor vehicle approaching a railroad crossing to have it under such control that when he arrives at a place where it is possible to see and to hear an approaching train he can stop and avoid a collision with it. *Milk House Cheese Corp v. Chicago, B. & Q. R. R. Co.* 451
3. It is the duty of a traveler on a highway, when approaching a railroad crossing, to look and listen for the approach of trains. If he fails without a reasonable excuse to exercise such precautions, he is guilty of contributory negligence more than slight as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451
4. Generally, a person who drives a motor vehicle on a railroad track at a highway crossing in front of an approaching train, which he could have seen, had he looked, or could have heard, had he listened, is in law guilty of contributory negligence, and cannot recover damages from the railroad company. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451
5. Railroad companies may provide lights and gates at crossings for the protection of those crossing, but their presence does not excuse one passing who fails to exercise precaution for his own safety. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451
6. Neither open gates nor failure of the railroad company to give signals at a railroad crossing relieves one about to cross the tracks from the duty to use due care to look and listen for an approaching train. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451

Reformation of Instruments.

A preponderance of evidence sufficient to justify reformation of a written instrument requires proof that is clear, convincing, and satisfactory. *Frentzel v. Siebrandt* 505

Right of Privacy.

1. The doctrine of the right of privacy was not recognized or enforced in the ancient English common law. *Brunson v. Ranks Army Store* 519
2. There is no statutory provision in this state with

reference to the doctrine of the right of privacy. *Brunson v. Ranks Army Store* 519

Sales.

1. Evidence was insufficient to prove either an express or an implied warranty under Uniform Sales Act. *Cook Livestock Co., Inc. v. Reisig* 640
2. Generally, the lien of an artisan making repairs to a chattel at the instance of a conditional vendee in possession is subordinate to the rights of a conditional vendor under a contract of which the artisan has constructive or actual notice. *Allied Inv. Co. v. Shaneyfelt* 840
3. The statute giving a possessory lien for repairs on an automobile does not warrant a presumption that a conditional vendee has authority to encumber the automobile for repairs thereon without consent of the conditional vendor. *Allied Inv. Co. v. Shaneyfelt* 840
4. The repairer of an automobile sold under a conditional sales contract has no possessory lien as against an unpaid conditional vendor in the absence of a showing that the repairs were made at the request of or with the consent of the conditional vendor or his assignee. *Allied Inv. Co. v. Shaneyfelt* 840

Statutes.

1. Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning. *Montgomery v. Blazek* 349
2. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. *Montgomery v. Blazek* 349
3. The petition on which this case was tried describes an employment agency as such agency is defined by statute. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387
4. Penal statutes are inelastic, must be strictly construed, and may not be extended by implication. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387
5. The maintenance of an employment agency has a relation to the public welfare. *State ex rel. Weasmer v. Manpower of Omaha, Inc.* 387

6. Where a statute is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed or proper. *Peetz v. Masek Auto Supply Co.* 588
7. A liberal interpretation of a statute is one which seeks for and fairly and reasonably effectuates the legislative intent as to the purposes of the legislation. *Krotter & Sailors v. Pease* 774
8. The 1947 Legislature passed the Uniform Judicial Notice of Foreign Law Act. *Abramson v. Abramson* 782
9. The Uniform Judicial Notice of Foreign Law Act was not intended to remove the necessity of pleading and presenting the common law or statutes of another jurisdiction of the United States. It only removes the requirement of proving it. *Abramson v. Abramson* 782

Taxation.

1. Domestic corporations are the agents of their stockholders for the purpose of assessing their stock in such corporation for taxation and paying the tax assessed thereon. *Peter Kiewit Sons' Co. v. County of Douglas* 93
2. By statute, a county board of equalization is authorized to meet in special session at any time after the close of the annual meeting for the purpose of equalizing assessments of omitted and undervalued property. *Peter Kiewit Sons' Co. v. County of Douglas* 93
3. Shares of stock and capital stock represent different property rights and may be separately assessed. *Peter Kiewit Sons' Co. v. County of Douglas* 93
4. A tax on the shares is not a tax on the capital of the corporation. *Peter Kiewit Sons' Co. v. County of Douglas* 93
5. A state may impose a tax upon the stockholders' interest in a corporation, measured by the value of its corporate assets, without making any deduction on account of United States securities held by the corporation. *Peter Kiewit Sons' Co. v. County of Douglas* 93
6. Policy of state to avoid double taxation is recognized in statute providing for taxation of shares of stock of domestic corporations. *Peter Kiewit Sons' Co. v. County of Douglas* 93
7. The method authorized by statute for valuing the

shares of stock of domestic corporations results in discrimination against United States obligations. *Peter Kiewit Sons' Co. v. County of Douglas* 93

8. Principles announced in companion case were controlling and disposed of issues. *Missouri Valley Constr. Co. v. County of Douglas* 109

9. Individual discrepancies and inequalities must be corrected and equalized by the county board of equalization. The duties of the State Board of Equalization and Assessment are unrelated thereto. *Babin v. County of Madison* 536
LeDioyt v. County of Keith 615

10. The statute requiring notice to the landowner of any increase in the assessed value of his realty over the last previous assessment is mandatory. A tax levied on such increase, made without notice to the owner, is void and its collection may be enjoined. *Babin v. County of Madison* 536

11. A real estate classification and reappraisal committee does not put a binding value upon any property. It merely makes recommendations to the county assessor and furnishes evidence for the use of the county board of equalization. *LeDioyt v. County of Keith* 615

12. Approximation both as to value and uniformity is all that can be accomplished. Substantial compliance with the requirements of equalization and uniformity in taxation laid down by the federal and state constitutions is all that is required, and such provisions are satisfied when designed and manifest departures from the rule are avoided. *LeDioyt v. County of Keith* 615

13. The sale price of property may be taken into consideration in determining the actual value thereof for tax purposes. However, sale price standing alone is not conclusive and other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. *LeDioyt v. County of Keith* 615

14. The burden of proof is upon the taxpayer to establish that the value of his property has been arbitrarily or unlawfully fixed at an amount greater than its actual value. *LeDioyt v. County of Keith* 615

15. Burden of proof imposed on taxpayer complaining of unlawful assessment stated. *LeDioyt v. County of Keith* 615

16. Generally, the valuation of property for tax pur-

poses by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. *LeDioyt v. County of Keith* 615

17. Mere errors of judgment by tax officials will not support a claim of discrimination. The good faith of such officers and the validity of their actions are ordinarily presumed, and when assailed, the burden of proof is upon the complaining party. *LeDioyt v. County of Keith* 615

18. Courts should not usurp the functions of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization. *LeDioyt v. County of Keith* 615

Torts.

1. A joint tortfeasor is liable for all damages to which his conduct has contributed. It is no defense that such damages would not have occurred without the concurring conduct of another person. *Fick v. Herman* 110

2. Ordinarily the jury in an action against several tortfeasors may return a verdict in favor of one and against the others. *Fick v. Herman* 110

Trial.

1. It is the duty of the trial court to present to the jury those issues that are raised by the pleadings and find support in the evidence. *Shields v. County of Buffalo* 34
Kroeger v. Safranek 182
Johnson v. Nathan 399

2. It is error, which may be prejudicial, to instruct on issues which find no support in the evidence. *Shields v. County of Buffalo* 34

3. Ordinarily the jury in an action against several tortfeasors may return a verdict in favor of one and against the others. *Fick v. Herman* 110

4. Where different minds may reasonably draw different conclusions or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Price v. King* 123

5. It is only where the evidence shows beyond reason-

able dispute that plaintiff's negligence is more than slight as compared with the negligence of the defendant that it is proper for the trial court to instruct the jury to return a verdict for the defendant or to enter a judgment notwithstanding the verdict in his behalf. *Price v. King* 123

6. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of witnesses and the weight to be given their testimony are solely for the consideration of the jury. *Price v. King* 123

7. Negligence must be proved by direct evidence or by facts from which negligence can reasonably be inferred. In the absence of such proof negligence will not be presumed. *Price v. King* 123

8. Instructions given to a jury must be construed together, and if when considered as a whole they properly state the law they are sufficient. *Price v. King* 123
Liakas v. State 130
Benedict v. Eppley Hotel Co. 280

9. The burden of proof is on the plaintiff to prove negligence on the part of the defendant by a preponderance of the evidence. The burden of proof is on the defendant to prove contributory negligence on the part of the plaintiff by a preponderance of the evidence. An instruction to this effect cannot afford any basis for error. *Price v. King* 123

10. The trial court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.* 152

11. Where two conflicting instructions are given on a question, one containing an incorrect and the other a correct statement of law, the latter will not cure the former. *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.* 152

12. The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong. *Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp.* 152
Griess v. Borchers 217
Johnson v. Nathan 399

13. The proper method of presenting a case to the jury is a clear and concise statement by the court of those issues which find support in the evidence

and not by substantially copying the pleadings of the parties. If, by doing the latter, prejudice results to the complaining party it is sufficient ground for reversal. *Kroeger v. Safranek* 182

14. The instructions of the trial court to the jury should be confined to the issues presented by the pleadings and supported by evidence. *Kroeger v. Safranek* 182

15. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict. *Kroeger v. Safranek* 182

16. Rule for consideration of motion for directed verdict stated. *Griess v. Borchers* 217
Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co. 451
Cook Livestock Co., Inc. v. Reisig 640

17. Trial court should sustain motion for directed verdict when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence. *Griess v. Borchers* 217

18. Rule for application of doctrine of comparative negligence stated. *Griess v. Borchers* 217

19. While in a personal injury action the better practice is to state to the jury in suitable words that plaintiff sues for an amount sufficient to compensate him for the loss sustained, it is not ordinarily prejudicial error to state the amount for which the action is brought. *Griess v. Borchers* 217

20. Rule governing instructions on burden of proof of contributory negligence stated. *Griess v. Borchers* 217

21. Instructions should be considered together in order that they may be properly understood. When, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside for harmless error in one of them. *Griess v. Borchers* 217

22. The determination of the issue of whether or not the evidence at a retrial is different from that presented at an earlier trial is for the court and not the jury. *Benedict v. Eppley Hotel Co.* 280

23. In deciding whether or not there is error in a sentence or phrase of an instruction, it will be considered with the instruction of which it is a part and the remainder of the charge to the jury. The

meaning thereof will be determined not from the sentence or phrase alone but by consideration of all that is said upon the subject. *Benedict v. Eppley Hotel Co.* 280

24. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury and courts are reluctant to interfere with a verdict so rendered. *Benedict v. Eppley Hotel Co.* 280

25. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that the jury disregarded the evidence or controlling rules of law. *Benedict v. Eppley Hotel Co.* 280

26. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. *Parsons v. Cooperman* 292

27. Rule stated as to pleading and proof of contributory negligence. *Fridley v. Brush* 318

28. Under general allegations of contributory negligence supported by evidence, the trial court, without request, should submit to and properly instruct the jury on such charges. However, where the trial court has instructed the jury on a specific charge of contributory negligence pleaded in the defendant's answer, such instruction is sufficient. *Fridley v. Brush* 318

29. The true meaning of instructions is to be determined not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case. *Fridley v. Brush* 318

30. The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of an instruction is reasonably clear. *Fridley v. Brush* 318

31. An instruction will not be held to be prejudicially erroneous merely because of a harmless imperfection which cannot reasonably be said to have confused or misled the jury to the prejudice of the party complaining. *Fridley v. Brush* 318

32. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. *Fridley v. Brush* 318

33. A verdict may be set aside as excessive only (1) when it is so clearly exorbitant as to indicate that it

was the result of passion, prejudice, or mistake, or (2) where it is clear that the jury disregarded the evidence or controlling rules of law. *Fridley v. Brush* 318

34. Where the law furnishes no legal rule for measuring damages, the amount to be awarded rests largely in the sound discretion of the jury. The courts are reluctant to interfere with a verdict so rendered. *Fridley v. Brush* 318

35. It will not be presumed that passion and prejudice influenced the action of jurors, but it must be affirmatively shown before a verdict will be disturbed. *Johnson v. Nathan* 399

36. The giving of a cautionary instruction generally rests within the judicial discretion of the trial court. *Johnson v. Nathan* 399

37. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects. *Johnson v. Nathan* 399

38. A supplemental instruction is sufficient if it contains a correct statement when considered in connection with the main charge. *Johnson v. Nathan* 399

39. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. *Johnson v. Nathan* 399

40. A statute requiring that instructions be in writing is not to be so construed as to require the court to reduce to writing all the admonitions which it may be proper to give the jury while the trial is in progress. *Grandsinger v. State* 419

41. Subject to general rules, the trial court may orally give its opinion on a motion to exclude testimony; in ruling on the admissibility of evidence, may explain its rulings; and may state for what purpose evidence is admitted, limit its application, or direct the jury to disregard it. *Grandsinger v. State* 419

42. A defendant in a criminal action may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made. *Grandsinger v. State* 419

43. All instructions given should be considered in determining whether a particular instruction is preju-

dicial. Where instructions considered as a whole state the law fully and correctly, error may not be predicated thereon merely because a separate instruction, considered by itself, might be subject to a criticism or is incomplete. *Grandsinger v. State* 419

44. It is not error to refuse instructions requested by defendant where the court on its own motion has given the substance of such requests. The trial court is not required to instruct in the exact language of a requested instruction. If the point is covered by an instruction couched in proper terms, it meets all the requirements of the law. *Grandsinger v. State* 419

45. The mere fact that a witness in a criminal prosecution is a regular law enforcement officer does not entitle an accused to an instruction that the jury in weighing his testimony should exercise greater care than in weighing the testimony of other witnesses. *Grandsinger v. State* 419

46. The rule that in weighing the testimony of informers and detectives greater care and closer scrutiny should be exercised than in considering the testimony of witnesses who are disinterested is generally not applicable to public law enforcement officers. *Grandsinger v. State* 419

47. In a homicide prosecution it is not proper to give an instruction as to assault in any of its grades unless such instruction is applicable and authorized by the evidence. *Grandsinger v. State* 419

48. Pardon or parole is not a matter of concern for the jury. Its decision should not rest upon whether pardon or parole is easy or difficult to secure. *Grandsinger v. State* 419

49. In a homicide case, a prosecutor has a right to urge the jury to fix the penalty at death if the accused is found guilty of murder in the first degree, and the scope of his argument in that regard should be given a broad latitude provided it is predicated upon the evidence or reasonable inferences therefrom. *Grandsinger v. State* 419

50. It is improper and error for the prosecutor to make any statements in his closing argument with regard to pardon or parole, although it is not prejudicial error to make remarks which are simply a statement of existing constitutional or statutory law, if the statement is unaccompanied by other related objectionable or prejudicial remarks. *Grandsinger v. State* 419

51. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. *Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co.* 451
52. As a general rule, an actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled that no proof upon that issue will be received. *Dixon v. Coffey* 487
53. Where the court properly instructs upon an issue presented by the pleadings or evidence, it is not error to refuse to give a tendered instruction covering the same subject matter. *Bailey v. Spindler* 563
54. It is not error for the court to refuse to instruct upon issues pleaded but which find no support in the evidence. *Bailey v. Spindler* 563
55. In a negligence case wherein it is pleaded as an affirmative defense that a party other than the defendant was guilty of negligence which was the proximate cause of the accident and there is evidence to support the pleading, it is error for the court to refuse to instruct on such issue. *Bailey v. Spindler* 563
56. It is error for the court to instruct upon the provisions of a statute on a subject neither in issue nor proper to be presented to a jury, but the error is without prejudice if the issues on the trial are clearly defined and the embodiment of the provisions could not in any way mislead the jury. *Bailey v. Spindler* 563
57. It is error without prejudice to instruct on questions not raised by pleadings or applicable evidence when the instructions do not have a tendency to mislead the jury. *Bailey v. Spindler* 563
58. Rule stated as to when physical facts may be accepted as ground for refusal to submit case to jury. *Birdsley v. State* 581
59. In criminal cases, it is not the province of the court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Birdsley v. State* 581
60. Where the inference is clear as to a master and servant relationship, the determination is made by the court; otherwise the jury determines the ques-

tion after instruction by the court as to the matters of fact to be considered. *Peetz v. Masek Auto Supply Co.* 588

61. A verdict will be set aside as excessive if it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. *Peetz v. Masek Auto Supply Co.* 588

62. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. *Cook Livestock Co., Inc. v. Reisig* 640

63. Where instructions, considered as a whole, state the law fully and correctly, error will not be predicated therein merely because a separate instruction, considered by itself, might be subject to criticism. *Dwoskin v. State* 793

64. It is only where the evidence shows beyond dispute that plaintiff's negligence is more than slight as compared with defendant's negligence that it is proper for the trial court to instruct the jury to return a verdict for the defendant or dismiss plaintiff's petition. *Guerin v. Forburger* 824

Trusts.

1. The burden of establishing a constructive trust is upon the person who bases his right thereon and he must do so by evidence that is clear, satisfactory, and convincing. *Mullikin v. Pedersen* 22

2. The beneficiaries of a trust created by contract who are legally competent may authorize the trustee of the trust to extend it as they desire and upon such conditions as the creators of the trust designate. *Frentzel v. Siebrandt* 505

Vendor and Purchaser.

1. The burden of proof is on the litigant who alleges he is an innocent purchaser of property for value and without notice. *Campbell v. Ohio National Life Ins. Co.* 653

2. A good faith purchaser of real estate is one who buys it for a valuable consideration and without

notice of a suspicious circumstance which would put a prudent man on inquiry. *Campbell v. Ohio National Life Ins. Co.* 653

Wills.

1. There is a presumption that a person who makes a testamentary disposition of his property does not intend it to be divided as though he died intestate. *Wehrer v. Baker* 241
2. In the construction of a will the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument. *Wehrer v. Baker* 241
3. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain. *Wehrer v. Baker* 241
4. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarfiy the ambiguity, the words must be given their generally accepted literal and grammatical meaning. *Wehrer v. Baker* 241
5. In construing a will the term "children" does not include grandchildren unless an intention to that effect can clearly be gathered from the language of the will. *Wehrer v. Baker* 241
6. The general rule is that the time for ascertaining the members of a class depends upon the intention of the testator. Ordinarily the members of the class are to be determined as of the time the gift is to take effect. *Wehrer v. Baker* 241
7. Since a will speaks as of the date of a testator's death, the members of the class will be determined as of that date, unless a contrary intent is shown by the will. *Wehrer v. Baker* 241
8. A gift "to my children to be theirs absolutely, share and share alike" is a gift to the children of the testator living at the time fixed by the will, when the word "children" is not qualified or given a different meaning by the will. *Wehrer v. Baker* 241
9. A provision in a will, "should any of my said children die before my death," the issue of such deceased children shall share by representation, shows the intent of testatrix that the class shall be ascertained as of the date of the will and not as of her

death. Otherwise the provision would have no meaning. *Wehrer v. Baker* 241

Witnesses.

1. Statutory provision that a witness may be interrogated as to his previous conviction for a felony does not limit the inquiry to a single conviction or prevent a proper inquiry as to the number of his convictions. *Liakas v. State* 130
2. If a person accused of crime testifies in his own behalf, he is to be treated as any other witness. *Liakas v. State* 130
3. In a criminal case, the credibility of witnesses and the weight of the evidence are for the jury to determine. The conclusion of the jury will not be disturbed by this court unless it is clearly wrong. *Larson v. State* 339
4. The credibility of witnesses and the weight of their testimony are for the jury to determine in a criminal case, and the conclusion of the jury should not be disturbed unless it is clearly wrong. *Birdsley v. State* 581

Workmen's Compensation.

1. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. *Jones v. Yankee Hill Brick Manuf. Co.* 404
2. A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. *Jones v. Yankee Hill Brick Manuf. Co.* 404
3. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury. *Jones v. Yankee Hill Brick Manuf. Co.* 404
4. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Jones v. Yankee Hill Brick Manuf. Co.* 404
5. Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability,

it does not constitute a compensable accidental injury. *Jones v. Yankee Hill Brick Manuf. Co.* 404

6. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Jones v. Yankee Hill Brick Manuf. Co.* 404

7. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation nor does it permit a court to award compensation where the requisite proof is lacking. *Jones v. Yankee Hill Brick Manuf. Co.* 404