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DEWEY CHAMBERS, APPELLEE, V. DOLORES MARTIN, APPELLANT.

86 N. W. 2d 49

Filed November 22, 1957. No. 34246.

1. **Deeds: Cancellation of Instruments.** A deed to valuable land, if procured for no consideration by fraudulent misstatements of facts, may be canceled in equity where the circumstances are such that the grantor was justified in relying on the statements and did so in good faith.
2. **Fraud: Equity.** Where the party seeking relief is wholly guilty of fraud, or the grantor and grantee equally acted wrongfully or illegally, i. e., are in pari delicto, a court of equity will leave him or them where they are, to abide the consequences of the wrongdoing. When that is not the case and there has been the imposition of duress, fraud, threats, or undue influence, the party thus imposed upon, although participating in the illegal or fraudulent transaction, may be relieved as against the other.

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

Beber & Richards and *William B. Woodruff*, for appellant.

Max Fromkin and *M. Robert Fromkin*, for appellee.

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

SIMMONS, C. J.

This is an action in equity whereby plaintiff seeks to have voided a deed to certain real estate, to have himself declared to be the sole owner of an automobile, and to secure possession of furniture which he alleges he owns, which is in the possession of the defendant. Plaintiff pleaded fraud, threats of bodily harm, and duress. Defendant denied generally, and claimed that the real estate was conveyed to her as a gift; likewise that an undivided half interest in the automobile was a gift; and that the furniture was a gift.

Issues were made and trial was had. The court decreed that the deed be canceled and voided, and quieted

title to the real estate in the plaintiff. The court held that the ownership of the automobile was solely in the plaintiff, and that the defendant had no interest therein. The court ordered the defendant to deliver the furniture involved in the action to the plaintiff. Not involved in the pleadings, but in the evidence, was a matter of personal clothing of plaintiff which the defendant was ordered to turn over to the plaintiff. Defendant appeals.

We affirm the judgment of the trial court as to all matters except the ownership of the furniture. We decree title to the furniture to be in the defendant.

The action is here for trial de novo. Plaintiff at time of trial was a man 58 years of age and for many years had been gainfully employed in a packing plant at Omaha. He owned the residence property involved in this litigation. It was subject to a mortgage of $450. He had revenue from renting rooms in it. He also operated a beauty parlor in it. He had been divorced. He was required to make child support payments. He was delinquent in those payments in a substantial amount in August 1955, although he claimed he had made the payments but had not secured receipts.

Defendant was 29 years of age, had secured a decree of divorce which was not final, and was gainfully employed.

Plaintiff and defendant met in August 1955. Shortly thereafter plaintiff became a roomer in defendant's home. About that time the furniture involved here was delivered by the plaintiff to defendant's home. We discuss it later herein. On August 31, 1955, the first of two automobiles was purchased. We return to that later herein.

On September 19, 1955, plaintiff suffered a broken leg at his work. He was ambulatory but restricted in movement for some time. He resided at defendant's home. Prior thereto plaintiff had given defendant money to pay bills. He now began to sign his checks and deliver them to her, and to give her the rent money. She paid

his bills and at least some of hers from that source. This payment of money from plaintiff to defendant in various ways continued well into the summer of 1956.

Early in this acquaintanceship the parties began to talk of marriage. Defendant was not then free to contract a marriage. This marriage discussion continued until about a week before this action was filed.

Defendant was advised of the mortgage on plaintiff's home and the delinquent support payments. She testified that she was concerned as to what her rights would be if they became married. She consulted a lawyer. She advised plaintiff that the lawyer said he (plaintiff) could use an "heirs deed" which would protect the plaintiff and his heirs. A few days later on October 24, 1955, she brought a lawyer to the home with a warranty deed prepared wherein the property was conveyed to the defendant in fee simple, subject only to the mortgage.

Plaintiff wanted to make the payment of the child support delinquencies. He had talked to the mortgagee about increasing the mortgage to secure the money. He asked the lawyer if the giving of this deed would interfere with the getting of the new loan. He was told that it would. He then asked defendant to withhold recording the deed until the new loan was consummated. Defendant agreed. She retained the deed. The new loan was consummated and the papers recorded December 9, 1955. Plaintiff paid or caused to be paid the amounts due on the child support payments. Plaintiff returned to live in his own house in December 1955. Defendant, without advising plaintiff of it, recorded the deed to her on January 10, 1956. Plaintiff found out about it from friends who read about it in the papers. It did not cause plaintiff's regular calls on defendant to cease.

Plaintiff remained in possession of the home as before. Defendant claims she received the rents. She did, apparently, both before and after the deed, receive

money, the source of which was rents. It was not, however, paid to her as rent money to which she claimed to be entitled.

It should be stated that there is evidence, both before and after the giving of the deed, of threats of defendant to inflict bodily injury on the plaintiff by the use of a knife or a pistol. These are not related with any positiveness to the giving of the deed. They were interesting interludes along the way.

All of this came to an end in August 1956 at the beginning of the week in which plaintiff says they were supposed to get married. One evening defendant took plaintiff for a blood test, which he apparently had. The evidence as to events of the rest of the evening is in conflict. Anyway, the next morning plaintiff sought sanctuary in the police station and defendant surrendered a pistol to the authorities. This litigation followed.

It is patent that defendant started on a plan to secure title to plaintiff's property. She used his delinquent child support situation as a vehicle. She misrepresented a material fact to him as to the purpose and effect of the deed which she proposed he would execute. He wanted to protect, and did protect, the payment of his child support obligation. She wanted to and did secure title to the real estate. She paid no consideration or other valuable thing for it. There is no evidence of an intent of plaintiff to make a gift of his real estate to the defendant.

A deed to valuable land, if procured for no consideration by fraudulent misstatements of facts, may be canceled in equity where the circumstances are such that the grantor was justified in relying on the statements and did so in good faith. Armstrong v. Randall, 93 Neb. 722, 141 N. W. 829.

It appears to be true that plaintiff participated in a scheme to enable him to protect his property from future obligations. But it is not shown that he had any that were of pressing concern.

The Court of Appeals of Kentucky has held: "It is where the party seeking relief is wholly guilty of fraud, or the grantor and grantee equally acted wrongfully or illegally, i. e., are in pari delicto, that a court of equity will leave him or them where they are to abide the consequences of the wrongdoing. When that is not the case and there has been the imposition of duress, fraud, threats, or undue influence, the party thus imposed upon, although participating in the illegal or fraudulent transaction, may be relieved as against the other." Carpenter v. Arnett, 265 Ky. 246, 96 S. W. 2d 693. See, also, Grider v. Manisera, 11 Cal. App. 2d 355, 53 P. 2d 982; Meyer v. Barde, 112 Ore. 197, 228 P. 121.

We affirm the judgment of the trial court in holding the deed to be void and quieting title in the plaintiff.

We go next to the question of ownership of the automobile. On August 31, 1955, plaintiff and defendant signed a contract for the purchase of a new automobile. Both participated in its selection. Plaintiff furnished all or substantially all of the money for the down and monthly payments. In January 1956 defendant negotiated the exchange of this automobile for a 1956 model car. Plaintiff participated in the selection of the car and made most of the down payment. Title was taken in the name of plaintiff and defendant or survivor. Plaintiff never drove either car. He did not have a driver's license. Defendant had the possession and use of the car. Plaintiff claims ownership of the car. Defendant claims to own an undivided half interest.

It is in evidence, without dispute, that the payments on the car became delinquent in the summer of 1956, and that the finance company repossessed the car and gave possession to the plaintiff, who has since been making the payments. Defendant's interest in the car being divested, she is in no position to complain of a decree vesting title, as to her, in the plaintiff. The decree of the trial court on that matter is affirmed.

This brings us to the furniture. As above pointed

out, it was moved to defendant's home by the plaintiff early in the period here involved. The uncontradicted evidence is that plaintiff told defendant she could "have it." We think this sufficient to show a gift.

The trial court erred in ordering defendant to return the furniture to the plaintiff. We decree that ownership of the furniture is in the defendant.

Plaintiff testified that defendant was keeping certain items of his personal clothing. The court directed its delivery to plaintiff. The defendant testified that plaintiff was welcome to come and get his clothes. There does not seem to be any area of dispute there.

The decree of the trial court is affirmed as to all matters save that of ownership of the furniture. We decree title to be in the defendant as to the furniture involved, and the district court is directed to modify its decree accordingly.

All costs are taxed to the defendant.

AFFIRMED AS MODIFIED.

ROBERT D. MCFARLAND, COUNTY JUDGE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA ET AL., DEFENDANTS IN ERROR.

86 N. W. 2d 182

Filed November 22, 1957. No. 34272.

1. **Mandamus.** Any private person may on his own relation sue out writs of mandamus without application to the prosecuting attorney. § 25-2168, R. R. S. 1943.
2. **Contempt.** A contempt proceeding in a civil case is really but an incident to the principal cause, and all the papers relating to it should be filed with the other papers in the case.
3. ———. A criminal contempt is one that has for its purpose the preservation of the power and the vindication of the dignity of courts, and to punish for the disobedience of their orders. Such a contempt is criminal and punitive in its nature, and is affected with the public interest.
4. ———. A civil contempt has for its purpose the preservation

and enforcement of the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce private rights to which the court has found them to be entitled. Such a contempt is remedial and coercive in its nature, and affects the parties whose private rights and remedies are involved.

5. ———. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a civil contempt.

6. **Appeal and Error.** Where, on the hearing of an error proceeding, it is disclosed that the record presents nothing but a moot question for the determination of the Supreme Court, ordinarily the proceeding will be dismissed or the judgment of the district court will be affirmed.

ERROR to the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Error proceeding dismissed.*

Wright, Simmons & Harris, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for defendants in error.

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

WENKE, J.

This opinion involves separate motions, one by relators Bern R. Coulter, C. Palmer Dunlap, and May D. Anderson, defendants in error, and the other by the State of Nebraska, also included in these proceedings as a defendant in error. Both motions raise the question of whether or not the respondent, plaintiff in error, has, by involuntarily complying with the mandamus order, so purged himself of contempt that any questions relating to the correctness thereof are now moot. The State raises the further contention that inasmuch as the proceedings are private in their character that any contempt arising in relation thereto could only involve the question of civil contempt to which the State is neither a necessary or proper party.

The factual situation out of which this error proceeding had its origin is as follows: Christina D. Dugger, a

resident of Morrill County, died on September 21, 1956. She was thought to have died intestate so two of her heirs at law filed a petition for the administration of her estate in the county court of Morrill County. They were relators C. Palmer Dunlap, a nephew, and May D. Anderson, a niece, both of Chehalis, Washington. Their petition was filed on September 27, 1956, by relator Bern R. Coulter, an attorney at law. Coulter was appointed and qualified to act as administrator of the estate and letters of administration were issued to him on November 5, 1956. These proceedings were had prior to respondent becoming county judge.

After respondent became county judge he found an instrument in his office on April 11, 1957, which appeared to be a will of Christina D. Dugger, deceased. On the same day respondent called Coulter on the telephone and advised him of that fact, and later that day turned the will over to Coulter. Thereafter, at about 11 a.m., on April 18, 1957, Jack E. Lyman and Marvin L. Holscher, attorneys at law, filed a petition in behalf of Agnes D. Lynn of Coopersville, Michigan, a sister of decedent, asking for the probate of this will, and that the court fix a time and place for a hearing, and to publish the necessary notice thereof as is by law required. This the county judge did, fixing the time for hearing at 10 a.m., on May 17, 1957, in his office, and caused notice thereof to be published accordingly. On the same day (April 18, 1957), at about 4:30 p.m., relator Coulter left with respondent a petition asking to have the will probated, which was signed by the other two relators, and submitted with it two orders for the respondent to sign. The first order was captioned as an "Order Fixing Date for Hearing on Will" and the second as a "Notice of Hearing." The first of these orders set the date for hearing at 9 a.m., on May 13, 1957, in the county courtroom and directed the notice to be published in the Bridgeport News-Blade. The respondent filed the petition but refused to sign the order fixing a time, date,

and place for hearing on the application for the allowance of the will and also refused to sign a notice to be published pursuant thereto. This was apparently done on the basis that such an order had already been issued. The mandamus action followed immediately, being filed on April 19, 1957.

On April 20, 1957, the district court issued a peremptory writ of mandamus, granting relators the relief they had asked for. Respondent did not comply with the command thereof. Consequently, on April 27, 1957, an alias peremptory writ of mandamus was issued by the district court commanding and directing respondent to comply, nunc pro tunc, with the previous writ issued on April 20, 1957, by signing the order hereinbefore referred to as of April 20, 1957. When respondent refused to do so he was ordered committed to jail until he complied. It was only after this latter order was issued that respondent complied, doing so involuntarily. After respondent's motion for new trial had been overruled, this error proceeding was taken.

The transcript recites the following with reference to what happened in the court below on April 27, 1957, insofar as it is material here: "The Court then directed the respondent to comply with the Alias Peremptory Writ of Mandamus, and to sign and file an order fixing a time for hearing on the petition for the probate of the Will in the matter of the estate of Christina D. Dugger, deceased, and to further sign and file a notice of hearing in said matter. The respondent in open Court announced through his attorney, Robert G. Simmons, Jr., that he would not comply with either the original Peremptory Writ of Mandamus or the Alias Peremptory Writ of Mandamus. The Court, being fully advised in said matter, finds the respondent guilty of contempt of court and orders that the respondent, Robert D. McFarland, County Judge, be committed to the county jail in Morrill County, Nebraska, until he has purged himself of contempt by signing the order and notice

above referred to. The costs of this proceeding are hereby taxed to the respondent. * * * Respondent then filed a written compliance with the order of the Court. The Court, being fully advised, finds that the respondent has involuntarily complied with the Alias Peremptory Writ of Mandamus, and execution of the jail sentence is hereby suspended."

Section 25-2168, R. R. S. 1943, provides: "Any private person may on his own relation sue out writs of mandamus without application to the prosecuting attorney."

As held in Burdette v. Munger, 144 Ill. App. 164, citing Winslow v. Nayson, 113 Mass. 411: A contempt proceeding in a civil case is really but an incident to the principal cause, and all the papers relating to it should be filed with the other papers in the case.

"Proceedings for contempts are of two classes,—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce." In re Nevitt, 117 F. 448. See, also, Maryott v. State, 124 Neb. 274, 246 N. W. 343; Wright v. Wright, 132 Neb. 619, 272 N. W. 568; Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A. N. S. 874. As stated in Maryott v. State, *supra:* "Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that

such act is, ordinarily, a mere civil contempt, * * *." And, as stated in Gompers v. Bucks Stove & Range Co., *supra:* "If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

This is clearly a case of civil contempt to which the State is neither a necessary nor proper party. As stated in In re Nevitt, *supra:* "But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

We come then to the question, are the issues moot? We said in Deines v. Schwind, 89 Neb. 122, 130 N. W. 1051, that: "Where, on the hearing of an appeal, it is disclosed that the record presents nothing but a moot question for the determination of the supreme court, ordinarily the proceeding will be dismissed or the judgment of the district court will be affirmed." The same

would be true on the hearing of an error proceeding.

It was held in Stark v. Hamilton, 149 Ga. 44, 99 S. E. 40, that: "* * * the only relief that the plaintiff in error could gain by a reversal of the judgment would be a discharge from custody; and it appearing that he has already been discharged, the question raised by the bill of exceptions is moot, and the writ of error should be dismissed." See, also, McCallum v. McCallum, 162 Ga. 84, 132 S. E. 755; Wools v. Reberger, 209 Ind. 99, 198 N. E. 65. As stated in Wools v. Reberger, *supra:* "* * * the cause was submitted to the court for trial which resulted in a judgment entered on July 19, 1933, finding appellant guilty and committing him to the Indiana State Farm so long and until he removed the obstructions from said right of way. * * * 'The court being advised that the defendant Grover Wools, has complied with the order and judgment of the court, made and entered June 15, 1931, in this cause by removing and causing to be removed all obstructions from the way recognized and referred to in said order and decree, the Sheriff of Clay County, Indiana, is now and hereby ordered to release from his custody, said Grover Wools.' * * * From the foregoing it appears clearly that the question is now moot and there is nothing for the court to pass upon. The obstruction in the right of way has been removed, and the appellant has been discharged from the custody of the sheriff."

In view of what has already been said of civil and criminal contempt, and the purposes thereof, it is self evident that no issue remains to be decided here. Nothing could be gained by our holding that the commitment was improper for respondent is no longer in jail. He has not been found guilty of criminal contempt, in which case he would be entitled to have his conviction reviewed. Here the purpose of the order to jail was to coerce respondent to comply with the mandamus order of the court. Whether or not that order is correct can properly be determined in an appeal taken

therefrom. Both motions should be and are sustained and the error proceeding is dismissed. Costs resulting from this error proceeding are taxed to respondent.

ERROR PROCEEDING DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. HERBERT FRANCIS HONEY ET AL., APPELLANTS.

86 N. W. 2d 187

Filed November 29, 1957. No. 34209.

1. **Bail.** The object of bail in a criminal case is to relieve the accused of imprisonment before his trial; to save the county the expense incident to his confinement before trial; to insure his attendance to answer the charge against him; and that he will abide the judgment of the court.
2. ———. If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law, or to procure his attendance in court, as the bond requires, the liability of the surety for the penalty of the bond becomes absolute and the bond should be forfeited.
3. ———. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him, and the surety, upon failure of the principal to so appear, becomes the absolute debtor of the State for the amount of the bond.
4. ———. The fact that the county attorney and sheriff of the county in which the principal in the bail bond was charged with the crime, when they were solicited by the surety, refrained from assisting it in its effort to secure the return of the principal from another state to the one in which the charge was pending did not exonerate the surety on the bond.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

O'Sullivan & O'Sullivan, for appellants.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellee.

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

BOSLAUGH, J.

Herbert Francis Honey, herein referred to as appellant, was charged with the crime of robbery in the district court for Douglas County. The court, on his application, fixed and required bail in the sum of $2,500 for his release from custody. He tendered an appearance bond in that amount signed by him as principal and The Summit Fidelity & Surety Co. of Akron, Ohio, as surety. It was approved and accepted by the court, placed of record in the office of the clerk of the court, and appellant was thereupon released from custody. The condition of the bond was that appellant would personally appear in the district court for Douglas County, Nebraska, from day to day and from term to term until final judgment or as directed by the court, until finally discharged, to answer the crime of robbery; that he would do what should be by the court enjoined upon him; and that he would not depart the court without leave.

Appellant was arraigned, pleaded not guilty to the charge made against him, and the trial of the offense was at that time by the court, in the presence and with the knowledge of appellant, ordered to begin at 9:30 o'clock in the forenoon of November 7, 1955. Appellant did not appear in court at that time and on request of the surety a hearing for forfeiture of the bond was continued until and was set for November 11, 1955. The surety filed objections to forfeiture of the bond to which reference will hereafter be made to the extent proper in the consideration and disposition of this appeal.

The hearing in reference to the forfeiture of the bond was had and on November 18, 1955, the court adjudged that it should be and it was forfeited in the sum of $2,500. The court, after a further hearing on the motion of the county attorney for a judgment on the forfeiture

of the bond and the objections of the surety, found on February 17, 1956, that judgment should be rendered against the surety for the amount of the bond and judgment was then rendered and entered against the surety for the sum of $2,500 and costs. A motion for a new trial was denied and this appeal was taken.

The only assignment of error is that the court erred in forfeiting the bond and entering judgment against the surety for the amount of it. The existence, validity, effectiveness, and breach of the bond were established. Appellant did not appear in court when the trial of the case was to have been commenced. He was at that time under arrest and in custody of the authorities of the State of Missouri. It was then believed that he was fleeing from the State of Iowa to evade prosecution for a crime he was suspected of having committed in that state. He was returned to Iowa and convicted of a felony. He has remained there. A case for forfeiture of the bond and a judgment against the surety for its penalty was complete and the action taken by the district court was inescapable.

It is provided by statute that if there is a breach of condition of a bail bond the court shall declare a forfeiture of the bail and when a forfeiture has been made the court shall on motion enter a judgment of default and execution may issue thereon. §§ 29-1106 and 29-1108, R. R. S. 1943.

In State ex rel. Smith v. Western Surety Co., 154 Neb. 895, 50 N. W. 2d 100, this court said: "The object of bail in a criminal case is to relieve the accused of imprisonment before his trial; to save the county the expense incident to his confinement before trial; and to insure his attendance to answer the charge against him and that he will abide the judgment of the court. * * * If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law, or to procure his attendance in court, as the bond requires, the liability of the surety for the penalty of

the bond becomes absolute and the bond should be forfeited."

The bond was a contract between the surety and the State of Nebraska that if the latter would release the principal from custody the surety would undertake that the principal would appear personally at any specified time and place to answer the charge made against him. The surety upon failure of the principal to so appear became the absolute debtor of the State for the amount of the bond. When the surety made the bond it assumed the risk involved if its faith in the principal was misplaced. United States v. Davis, 202 F. 2d 621.

The objections of the surety to the forfeiture of the bond were in substance:

That the Governor of Iowa had requested extradition of appellant from this state and the Governor of Nebraska honored the request and issued a warrant for the arrest and extradition of appellant to Iowa; that the county attorney of Douglas County had knowledge thereof, made no objection or resistance thereto, and put forth no effort to detain appellant in Nebraska. The extradition warrant made by the Governor of Nebraska was not executed. There was no action taken affecting appellant or the surety because of it.

That appellant was arrested and detained in Kansas City, Missouri; that the surety, by its representative, made persistent and repeated efforts to secure the return of appellant to Omaha; that the surety solicited the assistance of the county attorney and sheriff of Douglas County, Nebraska, in an attempt to secure the return of appellant to Omaha from Kansas City, Missouri, and they each refused to cooperate in any way to accomplish that result; and that if the said officers of Douglas County had cooperated with and assisted the surety, appellant could and would have been returned to Omaha and produced in court.

It was not important that Nebraska officers did not assist the surety in its attempt to secure the return of

appellant. They had no duty to do so. Their refusal was not an interference with or an obstacle to the performance of the obligation of the surety as provided in the bond.

In Ward v. State ex rel. Carman, 200 Okl. 51, 196 P. 2d 856, 4 A. L. R. 2d 436, the court said: "While defendants contend the county attorney interfered with their efforts to secure custody of their principal, by advising the Federal authorities that if custody and control of the principal was obtained then Osage county expected to retain custody for all purposes, we do not think that the declaration of the county attorney constituted inerference as urged by defendants."

It is stated in United States v. Marrin, 170 F. 476: "It is contended his failure to appear resulted from the failure of the United States district attorney to urge Judge Chatfield to release him. Upon entering into the recognizance Marrin was delivered into the custody of his surety, who was thereafter responsible for his appearance. Upon this contract the government had a right to rely, and it is not required to go out of the jurisdiction in which the recognizance was given to help the cognizor to extricate himself from a situation in which he of his own motion became entangled."

The responsibility to have appellant in court when his presence was required was solely that of the surety. The essence of the complaint of the surety is that the officers did not do or assist in doing what the bond required of the surety. There is no showing that the officers or the State did anything to interfere with performance by the surety. The facts in reference to the efforts of the surety to apprehend and produce appellant for trial as the bond obligated it to do were immaterial to the matter of forfeiting the bond and the rendition of a judgment against the surety for the penalty of it. State ex rel. Smith v. Western Surety Co., *supra.*

The judgment should be and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALVIN GEORGE KONVALIN ET AL., APPELLANTS.
86 N. W. 2d 361

Filed November 29, 1957. No. 34210.

1. Bail. The discretion implicit in section 29-1109, R. R. S. 1943, is committed to the district court and its exercise by that court will not be interfered with by this court unless the action of the former is arbitrary and capricious.
2. ———. The authority given to the district court to remit a part or all of the penalty of a bail bond is a sound discretion to be exercised not arbitrarily or capriciously but with regard as to what is right and equitable under the circumstances and the law, directed by reason and conscience to a just result.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

O'Sullivan & O'Sullivan, for appellants.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellee.

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

BOSLAUGH, J.

Alvin George Konvalin, herein referred to as appellant, was charged with the crime of burglary in the district court for Douglas County. The court, on his application, fixed and required bail in the sum of $3,000 for his release from custody. He tendered an appearance bond in that amount signed by him as principal and The Summit Fidelity & Surety Co. of Akron, Ohio, as surety. It was approved and accepted by the court, placed of record in the office of the clerk of the court, and appellant was thereupon released from custody. The condition of the bond was that appellant would personally appear in the district court for Douglas County from day to day and from term to term until final judgment or as directed by the court, until finally discharged, to answer the crime of burglary; that he

would do what should be by the court enjoined upon him; and that he would not depart the court without leave. Later he was accused by an amended information of the crime of burglary and a second count charged him with being a habitual criminal.

Appellant was arraigned, pleaded not guilty to each count, and the trial of the case was, in the presence and with the knowledge of appellant and the surety, ordered by the court to begin on February 6, 1956. Appellant did not appear in court at that time. His default was duly taken and entered of record and the bond furnished by appellant was by order of the court forfeited. A capias was issued 2 days later for his arrest and the county attorney filed a motion for judgment against the surety for the penalty of the bond. The surety made a request that the court remit the "full amount of said bond or such part thereof as may seem just and equitable, as provided for by law."

Appellant was brought into the district court for Douglas County in the custody of the sheriff on February 13, 1956. He withdrew his plea of not guilty, pleaded guilty to each of the counts of the information, and he was adjudged to be confined in the Nebraska State Penitentiary. Hearing was had on the motion of the State for judgment against the surety and on its request to have liability on the bond remitted. The court found that the liability of the surety on the bond was the sum of $900 and rendered judgment for that amount against the surety and in favor of the State. A motion for a new trial was denied and this appeal was taken.

It was shown at the hearing referred to above that: Appellant went from Nebraska to Council Bluffs, Iowa, a few days before the time he knew he was obligated to appear in the district court for Douglas County to attend the trial of the charges against him pending in that court. He was a participant in or the victim of a fight in that city in which he was so seriously beaten and injured that he became insensible and it was be-

lieved that he was dead. He survived and recovered consciousness. He said he was taken from there to Kansas City, Missouri, against his will. He was threatened with violence and possible extinction. He was ill and remained in a hotel room in that city for some time. The representative of the surety was attempting to locate appellant during this time and finally learned he had been seen in Kansas City. The representative of the surety gave this information to his associates in that city and shortly thereafter appellant was located and taken into custody. He was wanted there for a felony and because of that the Missouri authorities detained him. The representative of the surety went to Kansas City, induced appellant to waive extradition, and obtained his agreement to return to Nebraska if he was permitted to do so. The representative secured the consent of the Missouri officers for the return of appellant to Nebraska if he furnished an appearance bond in the court where the charge against him in Missouri was pending. The representative of the surety furnished the required bond in Missouri. Appellant was then permitted to return to Nebraska in the custody of an officer from Omaha. He arrived there during the night of February 12, 1956, and appeared in the district court the following day. The representative of the surety incurred an expense in excess of $700 in locating, apprehending, and securing the return of appellant. The evidence does not show the amount of any expense incurred by the State because of the breach of the conditions of the bond of appellant.

The court was fully advised as to all facts important to forfeiting the bond and rendering judgment against the surety. It determined the amount of the recovery on the bond as stated above and rendered judgment therefor. The contention made on this appeal is that there is no evidence to support the judgment. It is said that the State did not furnish evidence as to any damages sustained or expenses incurred by it because

appellant failed to appear in court on the trial date. The State was not obligated to do so. The liability of the surety on the bond for the whole amount thereof had become absolute. State ex rel. Smith v. Western Surety Co., 154 Neb. 895, 50 N. W. 2d 100; State v. Honey, *ante* p. 494, 86 N. W. 2d 187. The State was demanding judgment against the surety for the entire penalty of the bond. The surety invited the exercise of the discretion of the court to remit the whole or a part of the amount of the bond. It cannot base error on the action of the court which it induced. The surety benefited by the determination made that the amount of the judgment should be less than one-third of the amount of the bond. The essence of the decision of the district court is that it acted as it did in the exercise of allowable discretion guided by appropriate standards. It was therefore not without a supporting basis. The statute makes it the duty of the court, if there is a breach of conditions of a recognizance, to declare a forfeiture of the bail and, on motion, to render judgment. The court may remit the amount of the penalty in whole or in part if it appears that justice does not require the exaction of all of it. §§ 29-1106, 29-1107, 29-1108, and 29-1109, R. R. S. 1943. The discretion implicit in the statute is bestowed upon and is to be exercised by the district court. This court should not substitute its discretion for that of the district court.

In The Styria v. Morgan, 186 U. S. 1, 22 S. Ct. 731, 46 L. Ed. 1027, it is said: "The term discretion implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action." In Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, the court said with reference to the exercise of discretion the following: "When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but

with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." See, also, United States v. Davis, 202 F. 2d 621.

The judgment should be and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEAN LIAKAS ET AL., APPELLANTS.
86 N. W. 2d 373

Filed November 29, 1957. No. 34211.

1. **Bail.** The surety on a bail bond may at any time he elects before its breach relieve himself of all obligation by surrendering the principal in the bond to the court or the proper officer.
2. ———. The giving and acceptance of a bail bond and the release of the accused are effective to transfer his custody from the State to the surety who becomes the keeper or jailer of the accused by his selection and the dominance of the surety over the accused is a continuance of the original imprisonment.
3. ———. There is an implied covenant in the contract between the surety and the State that it will not interfere with the right of the former to retain the principal in his custody or with the right of the surety to discharge himself as bail by surrendering the principal in a legal manner in satisfaction and discharge of the bond.
4. ———. Generally, a surety on a bail bond is excused from liability and responsibility if performance of the obligation of the bond is made impossible in a legal sense by an act of God, of the public enemy, of the law, or of the obligee.
5. **Extradition.** The Governor of a state is obliged by the Constitution of the United States to have delivered to the executive authority of any state of the United States any person charged in the latter state with a crime who is a fugitive from justice and is in the former state.
6. ———. However, if at the time a requisition is made the fugitive is in the custody of the court of the asylum state under a charge of offense against its laws, the Governor thereof is not required and cannot be compelled to surrender the fugitive until the laws of that state are satisfied.
7. ———. The Governor of the asylum state may, in the situation

above recited, honor the requisition and surrender the fugitive to a sister state in which event the asylum state waives its jurisdiction over the fugitive.

8. **Bail: Principal and Surety.** A surety in a bail bond is discharged from further liability if the sovereignty whose jurisdiction first attaches surrenders the accused, who is the principal in the bond, to another sovereignty.

9. ———: ———. The doctrine of strict construction prevails concerning the liability of a surety on a bail bond and he cannot be subjected to liability beyond the strict scope of his engagement.

10. ———: ———. Once a surety is discharged, liability cannot be revived without his consent.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Reversed and remanded with directions.*

O'Sullivan & O'Sullivan, for appellants.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellee.

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

BOSLAUGH, J.

Dean Liakas, herein referred to as appellant, was convicted of the crime of burglary on two counts in the district court for Douglas County. He was adjudged November 9, 1954, to be confined in the Nebraska State Penitentiary. He prosecuted error proceedings to this court. The judgment was affirmed and the district court was commanded to enforce it. Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677. The mandate of this court was issued May 11, 1956, and filed in the district court the next day.

This court in error proceedings allowed a writ of error and allowed appellant, as the plaintiff in error, to be released from custody pending the error proceedings upon his entering into a bond to be fixed by the district court for Douglas County. That court required

a bond in the sum of $5,000. Appellant as principal and The Summit Fidelity and Surety Company as surety entered into, subscribed, and acknowledged a bond in that amount before that court November 12, 1954, in form as required by law. It was approved and made of record in the office of the clerk and appellant was released from custody pending the proceedings in error. The bond required appellant to prosecute the proceedings to effect, to appear personally in the district court for Douglas County from day to day and from term to term, not to depart from said county without leave, and to abide the final judgment enjoined upon him in said cause.

The surety filed an application in the district court for Douglas County June 5, 1956, for exoneration from and discharge of the bail evidenced by the bond, the substance of which is that: The Governor of Nebraska on March 11, 1955, issued a warrant for the arrest of appellant and granted extradition of him to the State of Iowa upon a requisition of the Governor of that state. Appellant was on or about April 9, 1955, removed from Nebraska and was taken to Iowa by the authorities of that state under and by virtue of the authority vested in them by the extradition warrant issued by the Governor of Nebraska. The removal of appellant from Nebraska to Iowa was without his approval or consent and without the approval or consent of the surety. The removal of appellant from Nebraska and its jurisdiction was against the protest of the surety made to the county attorney of Douglas County, the Attorney General, and the Governor of Nebraska before the removal of appellant to Iowa. The act of the Governor of Nebraska granting extradition of appellant to Iowa was such an interference with the custody of appellant by the surety as to discharge and exonerate the bond and the surety is entitled to discharge and exoneration of its bond and all liability thereon.

Appellee filed on June 6, 1956, a motion for an order

forfeiting the bond. A hearing was had on the application of the surety and the motion of the State. The bail bond was forfeited and the application of the surety for exoneration and discharge of the bond was denied. Judgment was rendered August 22, 1956, against the surety and in favor of the State on the bond for $5,000. A motion of the surety for new trial was denied. This appeal contests the correctness of the action of the district court rejecting the application of the surety, granting the motion of the State, and rendering judgment for the penalty of the bond against the surety and in favor of the State.

Evidence was presented on the hearing above mentioned, the relevant parts of which follow:

The Governor of Iowa on March 10, 1955, requested the Governor of Nebraska to have appellant apprehended and delivered to a named person who was authorized to receive appellant and to convey him to Iowa to be dealt with according to law in reference to a charge of burglary against him in that state. The surety made objections to the Governor of Nebraska in reference to the request that appellant be delivered to Iowa. The surety related the facts concerning the conviction of appellant for a felony in Nebraska and the pendency of the case in this court to review his conviction; the giving of a bond by the surety for his release from custody during the pendency of the appellate proceedings; and the legal right of the surety to the custody of appellant in Nebraska during the continuance in effect of the bail bond and until the final disposition of the case then pending in this court. The surety charged that the surrender of the jurisdiction of appellant by Nebraska and his removal to Iowa would prejudice the rights and increase the liabilities of the surety and that it would be violative of the position and responsibility of the surety as the custodian of appellant. The surety asked that the request of the Governor of Iowa be denied, that Nebraska continue its jurisdiction of appel-

lant until decision by this court of the case involving him, and that he be permitted to perform the obligation of his bond and abide the final decision in the pending case.

The Governor of Nebraska honored the requisition and issued a warrant on March 11, 1955, authorizing the arrest and extradition of appellant to Iowa. Appellant was by virtue thereof taken from Nebraska to Iowa.

A bail bond is a contract between the surety therein and the State to the effect that the accused, the principal in the bond, will appear in court when required and that he will comply with all the conditions of the bond. The surety may relieve himself of liability at any time by surrendering the principal in a legal manner. The giving and acceptance of a bail bond and the discharge of the accused are effective to transfer his custody from the officer who has him in charge to the surety on the bond who becomes the keeper or jailer of the accused by his selection. The dominance of the surety over the accused is a continuance of the original imprisonment. It is a principle of general acceptance and application that the surety in a bail bond has control and custody of the principal until the surety is discharged or excused for good cause recognized by law. If the surety elects, he may at any time selected by him seize and forcibly arrest the principal and deliver him up in discharge of the obligations of the surety. State ex rel. Smith v. Western Surety Co., 154 Neb. 895, 50 N. W. 2d 100; Reese v. United States, 9 Wall. 13, 19 L. Ed. 541; Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Cooper v. State, 5 Tex. App. 215, 32 Am. R. 571; United States v. Vendetti, 33 F. Supp. 34; Miller v. Commonwealth, 192 Ky. 709, 234 S. W. 307; 6 Am. Jur., Bail and Recognizance, § 100, p. 100.

There is an implied covenant in the contract between the surety and State that it will not interfere with the right of the surety to retain the principal in his custody

or with the right of the surety to discharge himself as bail by taking the principal into actual custody and surrendering him in satisfaction of the bond. Miller v. Commonwealth, *supra;* 8 C. J. S., Bail, § 79, p. 152.

It is generally said that a surety on a bail bond is excused and a forfeiture of the bond will be vacated if the performance of the obligations of the bond is made impossible by an act of God, of the public enemy, of the law, or of the obligee. State v. Wynne, 356 Mo. 1095, 204 S. W. 2d 927; State v. Pelley, 222 N. C. 684, 24 S. E. 2d 635; Taylor v. Taintor, *supra;* 6 Am. Jur., Bail and Recognizance, § 172, p. 132; 8 C. J. S., Bail, § 76, p. 147.

It is the duty of the Governor of a state to have arrested and delivered to the executive authority of any other state of the United States any person charged in the latter state with treason, felony, or other crime, who has fled from justice and is found in the former state. Art. IV, § 2, Constitution of the United States; § 29-702, R. R. S. 1943. However, under the circumstances of this case, when requisition for appellant was made on the executive of Nebraska, this State had exclusive jurisdiction of appellant until the demands of its laws were satisfied. There was no authority that could compel the State to waive or surrender its jurisdiction of him but the Governor of Nebraska could voluntarily elect to waive such jurisdiction by the State and surrender appellant to Iowa. This the Governor did. His act was that of Nebraska and it was bound thereby. The effect was that Nebraska then lost jurisdiction of appellant.

In State ex rel. Falconer v. Eberstein, 105 Neb. 833, 182 N. W. 500, this court said: "Where a person is charged in two states with the commission of a separate offense in each, and has been arrested in one of them, such state has exclusive jurisdiction of the alleged offender until the demands of its laws are satisfied. Nevertheless the governor of such state may honor the

requisition of the governor of a demanding state and such surrender of the prisoner will operate as a waiver of the jurisdiction of the asylum state."

People ex rel. Barrett v. Bartley, 383 Ill. 437, 50 N. E. 2d 517, 147 A. L. R. 935, concluded: "Where a prisoner serving a sentence is extradited as a fugitive from justice and delivered to another State * * *, jurisdiction over his person is waived by the asylum State, the waiver of jurisdiction being a prerogative of the Governor, and his extradition warrant takes priority over all State process by which the fugitive is held."

In Ex Parte Guy, 41 Okl. Cr. 1, 269 P. 782, it is related that: "The prisoner was convicted of a felony in the district court of this state and sentenced to imprisonment in the penitentiary; he was committed under such judgment and was undergoing sentence; the Governor of this state * * * ordered the delivery of such convict to the federal authorities, with the only condition that he be returned to the state authorities after conviction and satisfaction of the judgment in the federal court. Under such executive order, the convict was delivered to the federal authorities, was convicted, and discharged the judgment imposed in the federal court. Held, that * * *, notwithstanding the condition contained in such instrument, it became absolute upon the surrender of the convict to the federal authorities."

In Taylor v. Taintor, *supra,* the language used in referring to this subject is: "It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law. * * * If the principal is arrested in the State where the obligation is given and sent out of the State by the governor, upon the requisition of the governor of another State, it is within the third. In such cases the governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Con-

gress. If he refuse, there is no means of compulsion."

The doctrine has frequently been recognized and applied that a surety on a bail bond is discharged from liability thereon by the action of the obligee in the bond waiving jurisdiction of the prisoner and surrendering him to another sovereignty because of an offense committed by him there. In such a situation it is considered that the inability of the surety to produce the principal is caused by an act of the law or by an act of the obligee and that the action of the State is such an interference with the custody of the principal by the surety as to exonerate him on the obligation of the bond.

In Beavers v. Haubert, 198 U. S. 77, 25 S. Ct. 573, 49 L. Ed. 950, the court referred to Taylor v. Taintor, *supra,* in this manner: "The question in the case was the effect on the bail of a defendant given to a State by the action of its Governor, sending him out of the State under extradition proceedings. It was held that his bail was exonerated. The court said: 'It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law.' And the act of the Governor of a State yielding to the requisition of the Governor of another State was decided to be the act of the law. It was further said: 'In such cases the Governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse there is no means of compulsion * * *'. This case establishes that the sovereignty where jurisdiction first attaches may yield it, and that the implied custody of a defendant by his sureties cannot prevent. They may, however, claim exemption from further liability to produce him."

Reese v. United States, *supra,* considered a stipulation made by the government and the accused that he need only appear at such term of the court as might be held after the happening of an uncertain event. The

recognizance required him to appear at any subsequent term following the then next term in regular succession. It was concluded by the court that the effect of the stipulation was to supersede the condition of the recognizance. The opinion continues: "If, now, we apply the ordinary and settled doctrine, which controls the liabilities of sureties, it must follow that the sureties on the recognizance in suit are discharged. * * * It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. * * * But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

In United States v. Vendetti, *supra*, it is said: "It is possible to deduce from the early cases of Reese v. United States, 9 Wall. 13, 19 L. Ed. 541, and Taylor v. Taintor, 16 Wall. 366, 369, 21 L. Ed. 287, the rule that if the sovereignty to which the recognizance bond is given renders impossible the performance of the obligation, the surety will be absolved from all liability on the bond. Both cases proceed on the theory that when bail is given, the principal is regarded as delivered to the custody of the surety. If the obligee's acts deprive the surety of this custody, it cannot enforce a forfeiture if the principal fails to appear according to the conditions

of the recognizance. * * * In Taylor v. Taintor, supra, it is also said to be settled law that the bail will be exonerated if performance is rendered impossible by an 'act of the law.' Thus, the liability of the surety is terminated if a governor of the state in which the bond was given responds to a demand from another state for the surrender of the defendant * * *, or a court consents to the removal of the defendant to another jurisdiction * * *. From these decisions, it is clear that a surety may claim exemption from further liability if the sovereignty whose jurisdiction first attaches surrenders the principal to another sovereignty. The implied custody of the principal by his surety cannot prevent the surrender."

The court in People v. Moore, 4 N. Y. Cr. 205, referred to Reese v. United States, *supra,* and Taylor v. Taintor, *supra,* and concluded: "A defendant held under bail was without the knowledge or consent of his bail arrested under a warrant of the governor of this State on a requisition issued by the governor of New Jersey, and was extradited thereunder and delivered to the authorities of the State of New Jersey: Held, that the bail was exonerated and discharged."

Ex Parte Hansen v. Edwards, 210 Mo. App. 35, 240 S. W. 489, states: "The fact that petitioner was under bond to appear for trial upon a criminal charge in asylum State would not invalidate the action of the governor thereof in honoring the requisition, the fugitives bail being exonerated by the action of the governor in sending the accused out of the state on requisition."

In State v. Pelley, *supra,* the court said: "The appellant herein, Carrie Thrash Dorsett (the surety), is not entitled to the relief she seeks unless she can show that the performance of her undertaking has been rendered impossible or excusable (a) by an act of God; (b) by an act of the obligee; or (c) by an act of law. * * * if the party has been arrested in the State where the obligation is given and sent out of the State by the Gov-

ernor upon requisition from another State or other foreign jurisdiction, the case falls within the third category."

In In re James, 18 F. 853, it is said: "The removal of a prisoner by a court of competent jurisdiction beyond the control of his bondsmen, thus rendering them unable to produce the prisoner at the time and place set for trial, as undertaken by the conditions of the bond, is, in the language of the authorities, 'an act of the law,' and can be set up in defense to a suit on the bond."

State v. Adams, 40 Tenn. 259, was to enforce the penalty of a bail bond against the surety. The surety as a second defense said that the principal in the bond had been demanded by the Governor of South Carolina and delivered over by the Governor of Tennessee before the term at which the defendant was bound to appear. A demurrer to this plea was sustained. The court in deciding the ruling was wrong used this language: "But the second plea, if true, was a good defence, according to the case of The State v. Allen, 2 Humph. 258. This position, though much controverted, and elaborately and learnedly examined at the time by the court and counsel, is no longer an open question."

Adler v. State, 35 Ark. 517, 37 Am. R. 48, states: "This (a recognizance) is like any other contract * * *, performance of which is excused by the act of the law * * *. Imprisonment of the principal for crime, therefore, will generally release the bail, the state having taken him out of their possession; and so will the surrendering of him to the authorities of another state as a fugitive from justice."

The court said in United States v. Marrin, 170 F. 476: "Marrin and his surety would have been wholly protected had he remained in the Eastern district of Pennsylvania until the time for his appearance in this court. If he had remained within this jurisdiction, he could not have been removed on a warrant of arrest from any other jurisdiction without an order of court.

If the court had concluded, as it did in the Beavers Case (C. C.) 131 Fed. 366, that justice demanded his removal, such an order would at the same time relieve his sureties from liability for his appearance. It would be an act of the law, putting it beyond his power to appear in accordance with the condition of his recognizance; * * *." See, also, Ex Parte Youstler, 40 Okl. Cr. 273, 268 P. 323; Annotation, 4 A. L. R. 2d 454; 6 Am. Jur., Bail and Recognizance, § 187, p. 140.

The obligee in the bond voluntarily surrendered its jurisdiction of the principal, terminated the custody by the surety of the principal contrary to its obligation in reference thereof, required the principal to violate his duty not to depart from Douglas County, and sent him by force of law and its processes from this state to Iowa. The surety was thereby exonerated of and relieved from any obligation or liability on account of the bail bond involved in this litigation.

The doctrine of strict construction prevails concerning the liability of a surety on a bail bond and he cannot be subjected to liability beyond the strict scope of his engagement. Once a surety is discharged, liability cannot be revived without his consent. Nichols v. United States, 22 F. 2d 8; Reese v. United States, *supra;* People v. Meyers, 215 Cal. 115, 8 P. 2d 837; State ex rel. Vigg v. Romaine, 47 Okl. 138, 148 P. 79; 8 C. J. S., Bail, § 76, p. 147.

The judgment should be and it is reversed and the cause remanded with directions to the district court for Douglas County to render and enter a judgment in favor of the surety and against the State.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD K. CONNORS, APPELLANT, V. ANTHONY R. PANTANO, APPELLEE.

86 N. W. 2d 367

Filed November 29, 1957. No. 34252.

1. **Statutes.** The basic rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute.
2. ———. It is a fundamental rule of statutory construction that the usual and ordinary meaning of words will be used in construing a statute.
3. ———. Where a statute is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed or proper.
4. **Infants: Torts.** A child of the tender age of 4 years and approximately 7 months is legally incapable of committing a willful and intentional act of destroying property within the purview of section 43-801, R. R. S. 1943, because he has not, at that age, sufficiently attained the use of those qualities of attention, intelligence, judgment, and reason that would be necessary for him to be capable of doing such act willfully and intentionally.

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

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

Crawford, Garvey, Comstock & Nye, for appellee.

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. It involves an action wherein Edward K. Connors seeks to recover from Anthony R. Pantano all the damage that was caused to his garage and its contents, located at 3555 Woolworth Street, in Omaha, Nebraska, by a fire. This fire, which occurred on October 13, 1955, plaintiff alleged was intentionally set by defendant's son, Ross Pantano, who was born on March 19, 1951,

and therefore at the time of the fire approximately 4 years and 7 months of age. The plaintiff's right to recovery is based on section 43-801, R. R. S. 1943.

This statute was enacted by the 1951 Legislature and provides as follows: "The parents shall be jointly and severally liable for the willful and intentional destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons."

The trial court dismissed the action, finding: "* * * that a child so young as the one involved herein and of whom the defendant is the parent cannot be guilty of a 'willful and intentional destruction' of property * * *." His motion for new trial having been overruled, plaintiff appealed therefrom.

The question thus presented is, can a child of approximately 4 years and 7 months of age be capable of "the willful and intentional destruction" of property within the meaning of the foregoing statute? It should be understood this action does not involve the question of a child's liability, as such, but only the question of the father's liability under the statute.

Officer Downey of the Omaha fire department arson bureau investigated the fire. It was stipulated by the parties that if he and appellee were called as witnesses they would testify to the following: "An investigation was made and three boys admitted they were in the garage playing with matches, * * *. The three boys told the following story: They were playing and decided to get some matches and go in the Connors' garage, so they went in the kitchen of the Connors' home and James Connors climbed up on the kitchen counter top, got some matches out of the cabinet and then the three boys went out in the garage and each one of them ____ said they took a piece of cardboard and lit it with a match. James Connors and Ricki Fangman said they stepped on their cardboard and put the fire out, but they said Ross Pantano stuck his cardboard which was on fire, in a

hole in the garage wall and Ross readily admitted that is what he did but said he did not mean to make such a big fire. Ross, James and Ricki said right after Ross put the cardboard that was on fire in the hole in the garage wall, Mrs. Pantano called Ross and he went home, but Mrs. Pantano saw smoke coming out of the garage so she went over to investigate and saw that the inside of the garage was on fire * * *." We have set out only that portion of what was stipulated these persons would testify to which we consider material to the question here presented.

In construing this statute we apply thereto the following principles:

"The basic rule of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute." Howell v. Fletcher, 157 Neb. 196, 59 N. W. 2d 359.

"It is a fundamental rule of statutory construction that the usual and ordinary meaning of words will be used in construing a statute." Omaha Nat. Bank v. West Lawn Mausoleum Assn., 158 Neb. 412, 63 N. W. 2d 504.

"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., 161 Neb. 588, 74 N. W. 2d 474.

It should be noted that the Legislature, when it placed this responsibility on parents which they did not have at common law, limited their liability for the destruction of real and personal property by their minor or unemancipated children to when it was willfully and intentionally done.

The word willful may have varied meanings depending upon how it is used and the subject to which it is related. See, Hiatt v. Tomlinson, 100 Neb. 51, 158 N. W. 383; Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363. As stated in Hiatt v. Tomlinson, *supra*: "'* * * The word "wilful," like most other words in our language, is of somewhat varied sig-

nification according to its context and the nature of the subject under discussion or treatment. * * *.' State v. Meek, 148 Ia. 671."

As here used we find it means there was an intent entering into and characterizing the act of destruction but that it would not necessarily require that it be done with an evil intent. See, Hiatt v. Tomlinson, *supra;* Bundy v. State, 114 Neb. 121, 206 N. W. 21; Union Transfer Co. v. Bee Line Motor Freight, *supra;* Sall v. State, 157 Neb. 688, 61 N. W. 2d 256; Webster's New Twentieth Century Dictionary (2d Ed.), p. 2093; Black's Law Dictionary (4th Ed.), p. 1773.

Intentional means that an act is done with design or purpose, that is, deliberately. See, Webster's New Twentieth Century Dictionary (2d Ed.), p. 955; Churchill v. White, 58 Neb. 22, 78 N. W. 369, 76 Am. S. R. 64. As stated in 46 C. J. S. under Intentional at page 1106: "Intentional act. An act directed by a person who is conscious of what he is doing, who has intelligence enough to understand the physical nature and the consequences of the act, and who does it without the compulsion of an irresistible physical force or of an irresistible insane impulse. It is necessarily a willful act, * * *."

In view of the foregoing we have come to the conclusion that a child of the tender age of 4 years and approximately 7 months is legally incapable of committing a willful and intentional act of destroying property within the purview of this statute because he has not, at that age, sufficiently attained the use of those qualities of attention, intelligence, judgment, and reason that would be necessary for him to be capable of doing such act willfully and intentionally.

A comparable line of cases of this and other courts are those dealing with contributory negligence. Although an infant is liable for his torts (Churchill v. White, *supra*), we have often held a child of tender years cannot be charged with contributory negligence

even though the latter does not require intent. See, Siedlik v. Schneider, 122 Neb. 763, 241 N. W. 535; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499. And this same holding has been applied to primary negligence. See Shaske v. Hron, 266 Wis. 384, 63 N. W. 2d 706. As stated in Shaske v. Hron, *supra*: "There is an age of a child at which general experience declares him to be non sui juris, and it has been generally considered that a child under five and one-half years of age is incapable of either contributory or primary negligence." In the same opinion the court quotes from Restatement, Torts, § 283(e), p. 743, as follows: "If he is 'so young as to be manifestly incapable of exercising any of those qualities of attention, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character,' he is generally held incapable of negligence."

Finding the trial court was correct in dismissing appellant's action, we affirm its judgment doing so.

AFFIRMED.

WILLIAM W. KEEDY ET AL., APPELLANTS, V. LESTER H. REID, COUNTY SUPERINTENDENT OF SCHOOLS, GAGE COUNTY, NEBRASKA, ET AL., APPELLEES.
86 N. W. 2d 370

Filed November 29, 1957. No. 34273.

1. **Appeal and Error: Parties.** The real parties in interest in a proceeding in error to reverse the action of a county superintendent in creating a new district or changing the boundaries of districts, other than in city, village, or Class III districts, are the petitioners who signed the petitions for change of boundaries or the creation of the new district.
2. ———: ———. In a proceeding in error all real parties in interest must be made parties to the proceeding, either as plaintiffs in error or defendants in error.
3. **Schools and School Districts: Parties.** When the signers of petitions required by section 79-402, R. S. Supp., 1955, have a

common or general interest, the signers are numerous, and it would be impracticable to bring all before the court, one or more may sue or defend for the benefit of all, as provided by section 25-319, R. R. S. 1943.

4. **Appeal and Error: Parties.** In order to sue or defend for the benefit of a class, appropriate allegations, supported by the record, must be set forth in the petition in error sufficient to bring the representatives within the purview of section 25-319, R. R. S. 1943.

5. ———: ———. In an error proceeding where all the real parties in interest are not made parties to the proceeding before the time for filing a petition in error expires, and objection is timely made, the right to a review is lost and the petition in error should be dismissed.

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

Ernest A. Hubka, for appellants.

Philip M. Everson, Jr., and *William B. Rist,* for appellees.

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

CARTER, J.

This is an appeal from an order of the district court for Gage County dismissing a petition in error, the object and purpose of which was to reverse and set aside an order entered by the county superintendent of schools of Gage County, merging school district No. 161 with school district No. 114 under the provisions of section 79-402, R. S. Supp., 1955.

On January 16, 1957, the county superintendent of Gage County entered an order, after hearing, merging school district No. 161 with school district No. 114, both in Gage County, and fixing the new boundaries of school district No. 114 effective July 1, 1957. On February 14, 1957, appellants filed their petition in error in the district court in which Lester H. Reid, county superintendent of schools of Gage County, Nebraska, School District No. 161 of Gage County, Nebraska,

School District No. 114 of Gage County, Nebraska, Ralph Larsen, Eva Craig, and Mildred Anderson, were made parties as defendants in error. The last three defendants in error are alleged to have been the circulators of original petitions numbered 2, 3, and 4 as representatives of school district No. 161. Motions to dismiss were filed on the ground that there was a defect of parties defendant by failing to include necessary parties and by including parties neither proper nor necessary and having no legal interest in the issues raised. The trial court sustained the motions and dismissed the petition in error.

The determination of this case is generally controlled by this court's decision in Clausen v. School Dist. No. 33, 164 Neb. 78, 81 N. W. 2d 822, wherein it is said: "It becomes clear therefore that the petitioners in school districts Nos. 11 and 33 were the real parties in interest and necessary parties to a proceeding to review the action of the county superintendent in ordering the change of boundaries and consolidating the two districts with school district No. 37, and since it appears that they were not made parties and that service of summons was not had upon them, the motion to dismiss the petition in error was properly sustained." Since it affirmatively appears that the petitioners in school district No. 161 were the real parties in interest and not made parties defendant in the error proceeding, the order of the district court sustaining the motions to dismiss was correct.

It is urged by the appellants, however, that this is a class action within the purview of section 25-319, R. R. S. 1943, which provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." The amended petition asserts that the signers of the petitions in school district No. 161 have a common interest,

that they are very numerous, and that it would be impracticable to bring them all before the court. The record shows that there were 45 signers in school district No. 161 involved. We think this is a sufficient pleading of the facts to make section 25-319, R. R. S. 1943, applicable. The purpose of this section of the statute is to facilitate litigation, not to impede or prevent it. If one could not sue or defend in a representative capacity in a case such as we have before us, the service of process and the cost thereof could for all practicable purposes defeat an error proceeding. It is argued that in the Clausen case there were numerous signers involved and that this court required that each be made a party and served with summons in the error proceeding. Such was not the holding of this court. In that case no question of representative parties in a class action was involved. The holding of the court was, on this point, that the signers of the petitions were the real parties in interest and necessary parties to the error proceeding. The record in that case shows that the signers of the petitions were not made parties to the error proceeding by representation or otherwise and, consequently, a dismissal was in order. The Clausen case is not authority for the proposition with which we are now dealing in the present case. We hold that the signers of the petitions residing in school district No. 161 could have been made parties to the error proceeding in either of two ways,—by naming each as a party defendant in error and serving a summons upon each of them, or by serving summons upon one or more of the petitioners who are shown by proper allegations in the petition in error to be members of a class within the purview of section 25-319, R. R. S. 1943.

But even so, we think the trial court properly sustained the motions to dismiss. The proceeding to merge school district No. 161 with school district No. 114 was initiated under the provisions of section 79-402, R. S. Supp., 1955. Petitions were filed with the county

superintendent and notice of hearing on the petitions was given as required. The hearing was held pursuant to the notice, after which the county superintendent made the necessary findings and order merging school district No. 161 with school district No. 114, effective July 1, 1957.

We find no provision in Chapter 79, R. R. S. 1943, as amended, nor has one been cited to us, providing for the taking of an appeal or error proceeding from the order of the county superintendent made pursuant to section 79-402, R. S. Supp., 1955. Error proceedings from such order are therefore governed by section 25-1931, R. R. S. 1943, and must be commenced within 1 calendar month after the rendition of the order. The original petition in error was filed within the 1-month period of time fixed by the statute.

The petition in error alleged that defendant in error Ralph Larsen circulated the original petition, exhibit No. 2, and acquired the 16 signatures attached thereto. The petition in error then alleges that Larsen is a representative of school district No. 161 and representative for himself and all the 16 petitioners whose names appear on exhibit No. 2. It is not alleged that Larsen was a signer on exhibit No. 2, in fact he was not. Similar allegations are made concerning defendants in error Mildred Anderson and Eva Craig with respect to exhibits Nos. 3 and 4 containing 19 and 10 signatures respectively. Nowhere was it alleged that the signers of all the petitions in school district No. 161 were a class and that defendants in error Larsen, Anderson, and Craig, or any of them, were representatives of that class defending for and in behalf of all of them. The petition contained no allegation that the signers of petitions in school district No. 161 had a common or general interest in the action, that the parties were numerous, or that it was impracticable to bring them all before the court. The allegations of the petition in error did not, therefore, plead that Larsen, Anderson, and Craig were

representatives of all the 45 signers of petitions from school district No. 161. This is a fatal defect in a class suit. It evidences the fact that Larsen, Anderson, and Craig were made defendants in error in their capacity as circulators of the petitions and as agents or representatives of the persons signing the petitions which each circulated. This leads us to the conclusion that the real parties in interest, the same being all the signers of petitions in school district No. 161, were not made parties to or properly served with summons in the error proceeding.

The record shows that plaintiffs in error were granted leave to amend their petition in error on April 26, 1957. The amendment was made on the same date. It contained the necessary allegations that the signers of petitions for school district No. 161 were a class, that they had a common or general interest, that the parties were numerous, that it would be impracticable to bring all parties into court, and that the defendants in error Larsen, Anderson, and Craig represented all the signers of petitions in school district No. 161. No additional service of summons was had.

It will be noted that the amendment of the petition in error was made long after the 1-month period provided for the filing of a petition in error. The real parties in interest, all the signers of petitions in school district No. 161, did not purport to be made parties until long after the time for filing a petition in error had elapsed. There was no petition in error filed within 1 month against the real parties in interest. The failure to comply with the provisions of the statute requires a dismissal of the petition in error in accordance with the action taken by the trial court.

In a proceeding in error all necessary parties must be made parties to the proceeding. The failure to make all parties who may be affected by the modification or reversal of a judgment in a proceeding to review the cause by petition in error is ground for dismissal of the

petition. Clausen v. School Dist. No. 33, *supra*. In an error proceeding where the real parties in interest are not made parties to the proceeding before the time for filing a petition in error expires, and objection is timely made, the right to a review is lost, and the petition in error should be dismissed. Wolf v. Murphy, 21 Neb. 472, 32 N. W. 303; Curten v. Atkinson, 29 Neb. 612, 46 N. W. 91. It would appear by an opinion on rehearing in the last-cited case reported at 36 Neb. 110, 54 N. W. 131, that the court overruled its previous holding. A reading of the opinion will show that the court merely stated that the rule was inapplicable because of a waiver of the error by submitting the controversy on its merits without objection. There was no claim of waiver in the present case. See In re Estate of Fines, 139 Neb. 247, 297 N. W. 86, and the cases therein cited.

The order of the trial court dismissing the petition in error is affirmed.

AFFIRMED.

JAMES H. LYNCH ET AL., APPELLANTS, V. SAM J. HOWELL, COUNTY TREASURER OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.
86 N. W. 2d 364

Filed November 29, 1957. No. 34277.

1. **Taxation.** The assessment of property for tax purposes is a matter for the Legislature, whose power with respect thereto is plenary, except as limited by the Constitution.
2. ———. The assessment of property for tax purposes, as it generally relates to an ad valorem tax, includes the determination of the ownership, quantity, and value on the assessment date fixed by the Legislature. The assessment of property does not involve the power to tax.
3. ———. The power to tax is determinable as of the date the tax is levied.
4. ———. Where a valid assessment of property has been made and the property is within the limits of the municipal corporation imposing the tax on the date the tax is levied, the power to tax is generally held to exist.

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

Fitzgerald, Ross & O'Connor, for appellants.

Eugene F. Fitzgerald, Edward F. Fogarty, Herbert M. Fitle, Bernard E. Vinardi, Neal H. Hilmes, Irving B. Epstein, Frederick A. Brown, William Ross King, Harry H. Foulks, Jr., George C. Pardee, and *G. H. Seig,* for appellees.

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

CARTER, J.

This is a class action commenced in the district court for Douglas County to have declared null and void certain taxes levied on August 9, 1956, by the City of Omaha, the Metropolitan Utilities District of Omaha, and the University of Omaha on property known as Parcel 3, located within an area annexed by the city on July 19, 1956. The trial court found the taxes so levied to be valid and dismissed plaintiffs' petition. Plaintiffs appeal.

There is but one question to be determined on this appeal: Whether or not the real and personal property of the plaintiffs below, which is located within the area annexed on July 19, 1956, is subject to the tax levied by the defendants on August 9, 1956, when the property was not within the territorial limits of the city on March 1, 1956, the assessment date, nor within the city limits prior to the third Monday in May 1956, the date the county assessor was required to complete the assessment and make his return to the county clerk. The parties are in agreement that the taxation of motor vehicles within the newly annexed area is not involved in the litigation because of a constitutional provision and implementing statutes dealing specially with that class of personal property. On the issue before us the rules of law apply equally to real and personal property.

It will be noted that all ad valorem taxes levied upon

property in this state by municipal corporations must be uniform in respect to persons and property within the jurisdiction of the body imposing the same. Art. VIII, § 6, Constitution. It is fundamental, also, that an assessment of property is a prerequisite to the levy of a valid tax based upon valuation. Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co., 9 Neb. 339, 2 N. W. 870. In the case before us no irregularity in the assessment is asserted. The property here involved was properly assessed in McArdle district within the time prescribed by statute for assessing real and personal property. After the property had been listed and valued by the county assessor, it was annexed to the city of Omaha, the effective date of the annexation ordinance being July 19, 1956. The property, prior to the levy of the tax, was shown on the assessment rolls as being within the city of Omaha. The levy of the taxes here in question was made on August 9, 1956.

Many cases are cited from other jurisdictions on the question before us. We think that former decisions of this court provide the answer to the question posed. The question, simply stated, is: Did the defendants below have the power on August 9, 1956, to tax the property annexed to the city on July 19, 1956?

The purpose of an assessment is to determine the ownership, quantity, and value of property for tax purposes as of the date fixed by statute, the date being March 1st under our present law. It involves no question of the power to tax. This was made clear in State ex rel. Hinson v. Nickerson, 99 Neb. 517, 156 N. W. 1039, wherein we said: "There was no difference in that respect, and it was held that transferring the property to the city itself, which could not be taxed, did not relieve the company from payment of the tax for that year. It was held to be a question of ownership, and not a question of power to tax. Where it is a question of ownership, it is the ownership on April 1 that controls. When it is a question of power to tax, that power must exist

when it is assumed to exert the power; that is, when the property is taxed. The property is taxed by the city when the city levies the tax." See, also, Wood v. McCook Water-Works Co., 97 Neb. 215, 149 N. W. 417, L. R. A. 1915C 125; Hardin v. Pavlat, 130 Neb. 829, 266 N. W. 637; Seward County v. Jones, 105 Neb. 705, 181 N. W. 652; Adair v. Miller, 109 Neb. 295, 190 N. W. 865; Dunnegan v. Jensen, 112 Neb. 266, 199 N. W. 722; Chapin-Colglazier Constr. Co. v. Hamilton County, 112 Neb. 269, 199 N. W. 724; 3 Cooley on Taxation (4th Ed.), § 1062, p. 2238.

In the Nickerson case we held that the power to tax was determinable as of the date the tax was levied, and lands which had become lawfully detached from the city prior to the date the tax was levied were not subject to the power of the city to tax.

The foregoing cases cite the inverse rule to that which we have here. They involve cases where the property was detached from the territorial limits of the city or were transferred or conveyed to one claiming to hold them as exempt property. When the property was lawfully detached from the city, the power to tax was gone. When the property was transferred to one entitled to hold it as exempt property, the question became one of ownership on the assessing date and not a question of the power to tax.

The Constitution requires all municipal corporations authorized to assess and collect taxes to do so in such manner that they will be uniform as to persons and property within the jurisdiction of the body imposing the same. Art. VIII, § 6, Constitution. They must be levied uniformly as to persons and property within the city on the date the levy is made, subject of course to a previous valid assessment of the property as of March 1st.

No contention is here made that the plaintiffs did not own the property assessed on March 1, 1956. The valuation placed upon it is not attacked. No claim is made

that the assessment was not in all respects regular. The claim is that although it was properly assessed in McArdle district, it could not be taxed when it was annexed to the city of Omaha thereafter and before the levy of the tax was made. Our cases, hereinbefore cited, uniformly hold that the power to tax is determinable as of the date the levy was made. The property was admittedly within the city of Omaha on that date.

The assessment and valuation of property, as well as the subject of taxation generally, is a matter for the Legislature, whose power with respect thereto is plenary, except as limited by the Constitution. An assessment is an official listing of owners and quantities of property with an estimate of the value of the property of each for the purpose of taxation on a day fixed by the Legislature. Hacker v. Howe, 72 Neb. 385, 101 N. W. 255; American Prov. of the Servants of Mary v. County of Douglas, 147 Neb. 485, 23 N. W. 2d 714. The assessment of property does not involve the power to tax. The question of the power to tax arises at the time the levy of the tax is made. Consequently, if a valid assessment of property has been made and the property assessed is within the territorial limits of the municipal corporation levying the tax on the day the levy is made, the tax is in conformity with Article VIII, section 6, Constitution, and the power to tax exists. Such is the situation in the case before us and the tax levied on August 9, 1956, is in all respects valid as to the property annexed to the city on July 19, 1956.

The trial court having concluded by its decree that the taxes levied on real and personal property within the area annexed on July 19, 1956, known as Parcel 3, were in all respects valid, we affirm that part of the decree so holding. Since this is a complete disposition of the case we shall not consider other questions raised by the appeal.

AFFIRMED.

RAY H. LARSEN, APPELLANT, V. OMAHA TRANSIT COMPANY, A CORPORATION, FORMERLY KNOWN AS OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, ET AL., APPELLEES.
86 N. W. 2d 564

Filed December 6, 1957. No. 34204.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. 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.
3. **Negligence: Trial.** Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury.
4. **Automobiles: Negligence.** When a motor vehicle operated on a public highway collides with a person causing injury, liability arises when the peril of the injured person is discovered by the operator of the vehicle or by the exercise of ordinary care and caution could have been discovered in time to have avoided the injury, if at the time of the collision no negligence of the injured person was active or a contributing factor to the accident.
5. **Negligence.** The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence.

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

Eisenstatt, Seminara & Lay, Donald P. Lay, and *Frank Heinisch,* for appellant.

Kennedy, Holland, DeLacy & Svoboda, George L. DeLacy, and *William P. Mueller,* for appellees.

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

YEAGER, J.

This is an action by Ray H. Larsen, plaintiff and appellant, against Omaha Transit Company, a corporation, and Edwin L. May, defendants and appellees, wherein the plaintiff seeks to recover damages on account of injuries sustained which he claims were the result of negligence on the part of the defendants. A trial was had and at the close of the evidence of plaintiff the defendants moved for a directed verdict or in the alternative that the action be dismissed on the ground that the evidence of plaintiff was insufficient to sustain a verdict and judgment in favor of plaintiff. This motion was sustained and the action dismissed. A motion for new trial was duly filed which was overruled. From the order overruling the motion for new trial and the judgment dismissing the action the plaintiff has appealed.

The assignments of error present two questions. The first question is that of whether or not the evidence of plaintiff was sufficient to sustain a verdict and judgment in favor of the plaintiff. The second is that of whether or not certain evidence offered by the plaintiff was improperly rejected by the trial court.

The first question must be considered in the light of and agreeable to the following rules: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. See, also, Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551.

"In an action where there is any evidence which will support a finding for a party having the burden of proof the trial court cannot disregard it and direct a verdict against him." Haight v. Nelson, 157 Neb. 341,

59 N. W. 2d 576, 42 A. L. R. 2d 1. See, also, Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496; Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

In this case the evidence, which under these rules must be accepted as true together with the reasonable inferences favorable to the plaintiff, discloses that Douglas Street in Omaha, Nebraska, at the west side of the intersection with Sixteenth Street is 60 feet in width; that Sixteenth Street at the south side of Douglas Street is 60 feet in width; that the grade of Sixteenth Street through the intersection and on to the south is slightly upward; that on December 20, 1954, traffic at the intersection was controlled by traffic lights, red lights indicated that traffic was required to stop and green lights indicated it might proceed; that Sixteenth Street had six lanes each of the width of 10 feet; that only southbound vehicular traffic moved on Sixteenth Street; that these lanes were used by the defendant Omaha Transit Company, which will be referred to herein as the company, for the transportation of passengers; that the easternmost and the westernmost lanes were described as parking lanes; that there was a cross walk 15 feet in width extending eastward across Sixteenth Street on the south side of Douglas Street; and that on the west curb of Sixteenth Street immediately to the south of the west end of the cross walk and 19 feet south of the south line of Douglas Street was a traffic light pole.

On December 20, 1954, at about 3 p.m., the plaintiff came out onto the sidewalk and stood at the east edge thereof just to the south of the light pole which has been mentioned. At the time the traffic light was in favor of southbound traffic and against east and west traffic. While he was so standing and waiting for the light to change he was pushed or shoved eastward two steps with his feet about 5 feet into Sixteenth Street before he was able to halt his forward motion. At the time, he looked to the north and observed the approach of a bus of the company which was in the lane east of the west

parking lane. Plaintiff's view to the north from his position was open to a point in the next block where he could see a taxicab parked at a taxicab stand. The plaintiff stopped his forward motion and attempted by stepping backward to return to the sidewalk but before he was able to do so the bus moved forward and its right front corner struck him and he was knocked down and injured. The plaintiff's head was struck by the bus. His head was approximately 4 feet from the curb line when he was struck. There was no bus stop where the accident occurred but there was a bus stop farther south in the block.

It is pointed out here that the defendant Edwin L. May was the operator of the bus and no contention is made that his negligence, if any, would not be attributable to the company.

As a basis for his claimed right of recovery the plaintiff alleged that the defendants were negligent (1) in that there was a failure to keep a proper lookout for pedestrians ahead of the bus; (2) in that the bus was operated in too close proximity to a curb and sidewalk; (3) in that the bus was operated at an unreasonable rate of speed near a large crowd at a crossing and sidewalk; (4) in that there was a failure to keep the bus under proper control; (5) in that there was a failure to alter or divert the bus when in the exercise of care and caution the collision could have been avoided; (6) in failure to warn the plaintiff of the approach of the bus in the lane adjacent to the curb; and (7) in failing to keep passengers behind the white line in the bus in order to have full vision to the right of the driver of the bus.

It becomes necessary to ascertain whether or not the evidence which has been summarized amounts to proof, within the meaning of the rules cited, of one or more of these specifications of negligence.

At this point it is pointed out that the third and sixth specifications do not, on the record made, present a basis for recovery. The third charges that the bus was

operated at an unreasonable rate of speed but there is no evidence of speed and none from which a reasonable inference of speed could be drawn. As to the sixth there was nothing which could have required the giving of a warning prior to the time the plaintiff emerged into the street, and thereafter he knew of the position of the bus, in consequence of which he made every effort to remove himself from its path, therefore the warning could have availed plaintiff nothing.

As to the first, fourth, and fifth specifications, while there is no direct evidence that the operator of the bus did not keep a proper lookout, or that he did not keep the bus under proper control, or that he had the opportunity to alter or divert the direction of the bus and thus avoid the collision, there is evidence from which a reasonable inference could flow favorably to the plaintiff in all three of these connections. It could be reasonably inferred that if he had been keeping a proper lookout he would have seen plaintiff 60 feet away and would have had an opportunity to proceed farther out in the street or stop without striking him. As to the second specification, it is reasonably inferable that if the bus had continued the same distance from the curb as it was moving when first seen by the plaintiff it would have passed to the east of the point where the collision occurred. There was no reason why it should not have been caused to do so since, as pointed out, the bus stop was farther south.

A question of fact as to whether or not the defendants were negligent in any or all the respects was presented. The questions of fact were for determination by a jury. "Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury." Price v. King, 161 Neb. 123, 72 N. W. 2d 603.

The question of fact was that of whether or not the

bus of the company was at the time and under the circumstances disclosed operated in such manner that the operator thereof could in the exercise of ordinary care and caution have discovered the plaintiff in time to have avoided the collision with the plaintiff. In Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, it was said: "When a motor vehicle operated on a public highway collides with a person causing injury, liability arises when the peril of the injured person is discovered by the operator of the vehicle or by the exercise of ordinary care and caution could have been discovered in time to have avoided injury, if at the time of the collision no negligence of the injured person was active or a contributing factor to the accident." See, also, Most v. Cedar County, 126 Neb. 54, 252 N. W. 465; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499; Buresh v. George, 149 Neb. 340, 31 N. W. 2d 106. In the case at bar no question of contributory negligence is at this time before the court.

As pointed out, the plaintiff predicates error on the rejection of evidence. The evidence rejected was a part of a validly enacted ordinance of the city of Omaha relating to movement of buses while passengers are entering. The pertinent parts of the ordinance are the following:

"Section 1. All buses and streetcars * * * shall be marked * * * in the front vestibule or entryway by an easily discernible stripe, marker, or line dividing the front and the rear. The said stripe, marker, or line shall be located * * * on a line running from a point directly in the rear of the driver's seat to a point directly behind the front entryway or vestibule doors.

"Section 2. No person shall drive a bus on which the said marker, line, or stripe prescribed in Section 1 is required * * * without the prescribed stripe, marker, or line, nor shall he put the bus or street car in motion while any person other than himself is forward of the stripe, marker, or line."

The record discloses that at the bus stop about one-half block north of Douglas Street a passenger boarded the bus in the area in front of the line prescribed by section 1, and that he remained there continuously thereafter until the collision occurred. His exact location at any particular time during the interval is not made known, but during the interval he was engaged in an effort to put his fare into the fare box. His position was generally to the west of the operator of the bus. Obviously it could be inferred that thereby the view of the operator was obstructed. The view to the southwest could have been obstructed. In the light of common knowledge and experience the attention of the operator of the bus could have been attracted to this passenger in this forbidden position and distracted from the plaintiff in his position of peril. These were circumstances which, if supported by evidence or reasonable inference, the jury had a right to consider in determining whether or not the defendants were guilty of negligence. In this view the conclusion arrived at is that it was error to exclude the ordinance.

It is of course true that a violation of the ordinance could not be regarded as negligence as a matter of law, but it was a safety regulation. Its violation was a circumstance which a jury had a right to consider in determining whether or not the defendants were guilty of negligence. "The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence." Armer v. Omaha & C. B. St. Ry. Co., *supra*. See, also, Dickman v. Hackney, 149 Neb. 367, 31 N. W. 2d 232; Melcher v. Murphy, 149 Neb. 541, 31 N. W. 2d 411.

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

ALICE HUSAK, APPELLEE, V. THE OMAHA NATIONAL BANK, TRUSTEE, ET AL., APPELLEES, IMPLEADED WITH CLAY THOMAS, APPELLANT.

86 N. W. 2d 604

Filed December 6, 1957. No. 34208.

1. **Trial: Damages.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.
2. **Damages.** In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered.
3. ———. The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person.
4. **Torts: Damages.** In an action for personal injury plaintiff may recover all the damages proximately caused by the tort under a general allegation of the gross amount of the damages caused, including damages for future pain and suffering.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellant.

Young, Holm & Miller and *Edmund D. McEachen,* for appellee Husak.

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

MESSMORE, J.

This is an action at law brought by Alice Husak, plaintiff, in the district court for Douglas County, originally against The Omaha National Bank, trustee, Richard K. Wilcox, Franklin K. Wilcox, and Clay Thomas, defendants. All of the defendants except Clay Thomas were dismissed insofar as this action is concerned. The purpose of the action was to recover damages for personal

injuries, pain, suffering, and expenses sustained by the plaintiff as the result of being struck by a crowbar dropped from the Keeline Building in Omaha by an employee employed by the defendant Clay Thomas, the exclusive manager of the building. The case was tried to a jury resulting in a verdict in favor of the plaintiff and against the defendant Clay Thomas in the amount of $9,000. The defendant Clay Thomas filed a motion for a new trial which was overruled. From the order overruling the motion for new trial, said defendant appeals.

For convenience we will refer to the parties as originally designated in the district court, that is, Alice Husak as plaintiff, and Clay Thomas as defendant.

The record discloses that the defendant, Clay Thomas, had exclusive authority in the management of the Keeline Building and had managed the building for 40 years. He had the exclusive authority to hire and fire employees, and gave employees directions as to their duties. He had direct and exclusive responsibility for the upkeep of the building, its maintenance, the collection of rentals, and the payment of taxes and all other matters connected with the building. He employed Andrew John Koziol as a janitor, and paid him for his services.

The witness Koziol testified that he was originally employed by the defendant 35 years ago as a janitor in the Keeline Building and was acting in that capacity on August 17, 1953. On that date he was working on the third floor of the building, repairing windows by the use of a crowbar which weighed 11¾ ounces. The crowbar slipped out of his hand, dropped to the second floor where it hit a ledge approximately 2 feet wide and 18 feet from the sidewalk, and then fell, striking the plaintiff.

The plaintiff testified that at the time of the accident, August 17, 1953, she was 52 years of age. She was employed by the Fred and Clark Haas Store as a cashier

and wrapper, and had been so employed for a period of 24 years. She testified that on August 17, 1953, she was walking north on the east side of Seventeenth Street between Harney and Farnam Streets. As she was passing the Keeline Building, she suddenly felt a terrific blow on her right shoulder, had an excruciating pain, and started sinking to the sidewalk. At that time a man in close proximity to her took hold of her and helped her into the Suris Flower Shop where they seated her. Shortly thereafter a man entered the shop and said in an excited tone of voice that he had dropped the crowbar. He was the janitor of the Keeline Building. She remained in the flower shop for a short period of time. Mrs. Suris called the building manager, the defendant. He inquired as to who the plaintiff's doctor was, and apparently called the doctor for her. Mrs. Suris also called her employer who sent a woman to assist her in getting to her doctor's office in the Aquila Court. Her doctor, Dr. John McGee, examined her and sent her to the Doctors Hospital where she remained for a period of 10 days. She further testified that when she arrived at the hospital she had pain; that she was unable to move her arm which felt numb as did her hand and fingers; and that her right shoulder began to swell and turn black and blue on the top of the shoulder, and it spread into her arm and covered the entire shoulder and shoulder blade. When she left the hospital she was unable to use her right arm. She could use her right hand, although she was not able to raise her arm. She had the use of the arm from the elbow to the hand. She stayed at home about 20 days. Her salary was $32.50 a week, making her loss of earnings amount to $130. When she returned to work she was unable to use her arm, but could use her hand. She could not raise her arm, due to the pain in her shoulder. She used heat therapy during the time she was home and after she went to work. At the hospital, for the first 2 days they used cold packs, and then heat. It was stipu-

lated that she purchased a heat lamp for $10, and used it. When she returned home she had difficulty in sleeping. She would wake up with pain in her shoulder. The shoulder seemed to improve a little and then in about 4 months it became worse. At that time the doctor prescribed cortisone for her. As to her employment, she testified that she was a cashier and wrapper. She handled "will-call" merchandise which is kept on hangers on rods. She was required to use a pole to take the garments off the rod. She was unable to do this work when she first returned, and had to have help. She could use her left hand and arm to some extent. She was in this condition for about a year and a half after the accident. Her work was very tiring, because of the manner in which she had to perform it. She saw Dr. McGee in his office several times during the fall of 1953 and the winter and spring of 1954. She also contacted Dr. Richard Smith, an orthopedic specialist, in July 1954. From the date of the accident to the date of her consultation with Dr. Smith, she was unable to raise her arm high enough to reach her head. The only way she could comb her hair was to lean her elbow on the dresser and bring her head down so that she could reach it. She had difficulty in doing the housework in her apartment during this period of time. She was unable to dress herself properly. She did exercises prescribed by Dr. Smith for a period of 2 years, which added somewhat to her improvement. At the age of 19, she had an attack of polio which affected her lower limbs in such a manner that she had to use the strength in her arms to arise from a sitting position. Due to the accident, this was a painful ordeal, as was the effort of ascending stairs. The court properly instructed that her previous condition should not be taken into consideration except as stated in instruction No. 9. No error exists with respect to this instruction, and none is claimed.

By deposition Robert Earl Swann testified that he was in Omaha on August 17, 1953, in the vicinity of

the Keeline Building between 11 a.m. and 12 noon, when he saw a lady in distress. He had parked his car, and he got out and went to her assistance. He took her into a flower shop. This was the plaintiff. She seemed to be stunned, and apparently in a helpless condition.

Dr. J. W. McGee testified that he saw the plaintiff on August 17, 1953, and at that time the plaintiff had a severe right shoulder injury, and there was no question but that it was the result of a blow. There were bruises, swelling, and ecchymosis. The bruises and swelling covered the upper part of the plaintiff's right shoulder, that is, the top part and over the edge of the shoulder. She was X-rayed at Doctors Hospital and given sedatives and therapy of cold packs. There was no demonstrable fracture, dislocation, or bony change shown by the X-ray. She had sedatives while she was in the hospital. Her right arm was painful and she could not use it. She was in the hospital from August 17 to August 27, 1953, and saw the doctor in his office on October 21 and 26, 1953, and on February 8 and 19, and March 22, 1954, for treatment for her right arm and shoulder. He further testified that according to her history the pain was connected with the blow she had received when a crowbar was dropped in such a manner as to strike her right shoulder. Her last call at his office was May 24, 1954. He testified that in February 1954, she was put on cortone (cortisone) because he felt she might be developing peri-arthritis which is a condition of the soft parts about the joints and does not necessarily pertain to the bone. It is usually due to thickening and irritation of the muscles and ligaments in the area of the joint. He further testified that she always had pain in the movement of her arm.

Dr. Richard Smith, an orthopedic surgeon, was consulted by the plaintiff first on July 20, 1954. She gave him a history of being injured on August 17, 1953, when she was struck on the right shoulder by a crowbar. The

doctor testified that on July 20, 1954, the plaintiff had considerable tenderness about the right shoulder which was diffused, not well localized. There was crepitus or grating in the shoulder joint with motion. There was atrophy of a number of muscles about the shoulder, the supra and infra spinati, and the deltoid muscles. She had limitation of motion in the shoulder. Internal and external rotations were two-thirds normal. He testified that external rotation is putting the elbow at the side and then moving the hand from in front out to the side, and internal motion is the motion of putting the hand behind the back. She had internal rotation to the extent of reaching her lumbar spine area, compared to normal internal rotation which allows one to reach between the shoulder blades. She had flexion, the motion of lifting the arm straight in front, of approximately 90 degrees, compared to normal flexion of 180 degrees. She had abduction, the motion of lifting the arm upward from the side, of approximately 60 degrees, compared to normal abduction of 180 degrees. What shoulder action she had was primarily scapular, the arm and shoulder moving as if fused, rather than with normal glenohumeral rhythm in which the arm moves independently of the shoulder. The atrophy of muscles indicated she was using scapular muscles rather than the muscles normally used to raise the arm. He diagnosed the cause of limitation of motion in her shoulder as "adhesive capsulitis" which is adhesions of the soft tissue about the shoulder joint. These adhesions become quite solid and sometimes result in a completely "frozen shoulder." The condition was the result of trauma sustained in the accident of August 17, 1953. He prescribed a certain type of exercise, the length of time that the exercise should be done being 20 minutes two or three times a day, in order to endeavor to improve the plaintiff's condition. He explained the reasons therefor in his testimony. He last saw the plaintiff on December 31, 1956, shortly before trial and approxi-

mately 3 years and 4 months after the accident. He testified that at that time she still had limitation of internal rotation of approximately 10 degrees, and complained of the aching of the right shoulder, especially in cold weather. The court limited the questioning of the doctor to future pain and suffering only, excluding any evaluation of disability and permanent injury.

Dr. Werner P. Jensen testified in behalf of the defendant. He specializes in orthopedics. He examined the plaintiff on December 18, 1956, and found as a result of this examination that she had full range of motion of her shoulder. There was no atrophy in her shoulders or arm. She could abduct her arm out to the side, flex it, extend it, externally and internally rotate the right shoulder about the same as the left shoulder, and was able to put each of her hands up behind her back and between her shoulder blades. Upon testing the muscle strength of her upper extremities he found that she had good bicep and tricep strength and good strength on abducting her arm. In checking the sensation of her upper extremities, there was no alteration of the normal pattern of sensation, suggesting that the nerves were essentially normal. The reflexes of her upper extremities were normal. On examining her shoulder, she did not complain of any tenderness when he pressed on the joint between her shoulder blade and collar bone, around the upper end of the humerus, or around her shoulder blade.

The hospital and doctor bills were stipulated.

The defendant assigns as error the following: (1) The court erred in failing to find that the verdict of the jury was excessive and the result of passion and prejudice, and in overruling defendant's motion for new trial. (2) The court erred in its instruction No. 8 in allowing the jury to assess damages for future pain when the plaintiff's petition failed to allege future pain or permanent injuries and when the evidence on the subject was vague and uncertain. (3) The court erred

in allowing the plaintiff's physician to testify, over defendant's objection, as to future pain that plaintiff would suffer as the result of injuries received in this accident when plaintiff in her petition failed to allege, among other specified damages, future pain or permanent injuries resulting from said accident.

We discuss the assignments of error in continuity.

In Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186, we said: "A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." See, also, Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376.

"The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its functions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed." Dailey v. Sovereign Camp, W. O. W., 106 Neb. 767, 184 N. W. 920. See, also, Fridley v. Brush, *supra.*

In Sutton v. Inland Const. Co., 144 Neb. 721, 14 N. W. 2d 387, we said: "No method of exact computation can be devised in determining compensatory damages in cases of this kind. We think the evidence was such that the jury could properly arrive at the amount determined upon by them. We can find no yardstick whereby we can say as a matter of law that the verdict was excessive. Under such circumstances this court may not substitute its judgment for that of the jury, even if it be assumed that this court would determine that a lesser amount would constitute adequate compensation for the injuries sustained." See, also, Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643; Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701.

This assignment of error cannot be sustained.

With reference to the admission of evidence as to future pain and suffering and the giving of instruction

No. 8 allowing recovery thereon, the defendant contends that in the absence of an allegation of future pain and suffering the submission of this issue was prejudicially erroneous. This court is committed to the rule that damages for future pain and permanent effect of injuries proximately caused by a tort are recoverable under the general ad damnum clause and need not be specifically alleged.

In the case of City of Harvard v. Stiles, 54 Neb. 26, 74 N. W. 399, it was held: "A recovery may be had under a general allegation of damages for all injuries which necessarily follow as results of the act, the subject of complaint. They need not be specially pleaded, and this is applicable to necessarily resulting permanent effects of the injuries." As previously stated, permanent disability was not submitted to the jury in the instant case. The court went on to say: "Under the general allegation of damages in a petition, the plaintiff may recover for all the injuries which necessarily resulted from the act complained of, and it is needless to specify them. So damages for the future and permanent effect of injuries, necessarily resulting to the plaintiff, are recoverable under the general ad damnum clause and need not be specifically alleged. (5 Ency. Pl. & Pr. pp. 748, 749, and cases cited; Bank of Commerce v. Goos, 39 Neb. 437.)"

In Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, it was said: "In an action for personal injury plaintiff may recover all the damages proximately caused by the tort under a general allegation of the whole amount of the damages caused, including any damages for impairment of his capacity to earn money. Nye v. Adamson, 130 Neb. 887, 266 N. W. 767; Carlile v. Bentley, 81 Neb. 715, 116 N. W. 772." See, also, 15 Am. Jur., Damages, § 314, p. 756.

The petition in the instant case sufficiently alleged the subject matter instructed upon by the court as to future pain and suffering with reasonable certainty. It

is as follows: "As a proximate result of being struck by said crowbar, plaintiff suffered a severe bruise and contusion covering her entire right shoulder, causing her to suffer great pain and require hospitalization and medical treatment and submit to the necessity of medical attention for an unknown period of time in the future."

The defendant's second assignment of error is not sustained.

With reference to the third assignment of error concerning future pain and suffering, the defendant refers to a part of the testimony of Dr. Smith wherein he testified: "Yes, I think she will have pain in her shoulder; as I stated before with cold weather, especially, and damp weather she will have pain, intermittently, not constant." The doctor's answer related to pain the plaintiff might suffer in the future by virtue of her injury. The defendant objected only on the ground that the question was based on the fact that future pain and suffering had not been alleged, and that such pleading was necessary to such proof. The defendant also, in support of the claim that future pain was not proved with reasonable certainty, makes reference to the life expectancy tables which were not introduced in evidence.

"The law does not require the production of tables of expectancy in order to prove the probable duration of human life. Such evidence, if tendered, is not conclusive, but may be received and considered with other evidence in the case bearing upon the question of the probable continuance of life of the injured person." Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A 698. See, also, Litwiller v. Graff, 124 Neb. 460, 246 N. W. 922.

As stated in 20 Am. Jur., Evidence, § 1215, p. 1066: "In proving life expectancy, standard mortality tables are universally accepted as competent proof. The law does not, however, require the production of such tables

whenever there is an issue of expectancy of life, and does not regard them as essential to the establishment of that issue or to the recovery of damages on account thereof."

We find no prejudicial error as contended for by the defendant.

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

AFFIRMED.

IN RE ASSESSMENT OF K-K APPLIANCE COMPANY. K-K APPLIANCE COMPANY, A CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF PHELPS COUNTY, NEBRASKA, ET AL., APPELLEES.

86 N. W. 2d 381

Filed December 6, 1957. No. 34225.

1. **Taxation: Appeal and Error.** The review by the district court of assessments made by the county assessor is limited to questions presented to the county board of equalization.
2. **Taxation.** Where a taxpayer objects to the amount of the assessment of a stock inventory, the correctness of the inventory as well as the actual valuation placed upon it by the county assessor are issuable facts before the county board of equalization.
3. ———. All nonexempt property is subject to assessment for tax purposes in this state, including used and obsolete property having an actual value.
4. ———. Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct. The burden of proof rests upon the taxpayer to prove that an assessment is excessive.
5. ———. Where the evidence shows that an assessment by a county assessor was arbitrarily made, the assessment cannot be sustained. In such a situation the valuation becomes one of fact to be determined from the evidence, unaided by presumption.

APPEAL from the district court for Phelps County: EDMUND P. NUSS, JUDGE. *Reversed and remanded with directions.*

Anderson, Storms & Anderson, for appellant.

Clarence S. Beck, Attorney General, *Homer G. Hamilton,* and *Richard E. Person,* for appellees.

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

CARTER, J.

This is an appeal from a decree entered by the district court for Phelps County, affirming the action of the county board of equalization in fixing the valuation of plaintiff's property for taxation purposes.

Plaintiff is engaged in the retail sale of gas and electric appliances and liquid propane gas in the city of Holdrege. The fiscal year of the company is from October 1 to September 30. A complete inventory of its merchandise on hand was taken on September 30, 1955. On March 23, 1956, plaintiff filed its personal property tax schedule showing merchandise on hand as of March 1, 1956, in the amount of $11,435, based on the inventory and subsequent purchases and sales. The basic value of the stock of merchandise was fixed at $8,005, the same being computed at 70 percent of cost value under the instructions of the State Tax Commissioner. The county assessor increased the basic value to $13,065 and gave notice thereof to the plaintiff. A complaint objecting to the increase was filed with the county board of equalization. The county board of equalization sustained the increase in valuation and plaintiff appealed to the district court, contending that the increase in valuation was arbitrarily made, that it exceeded the actual value of plaintiff's stock of merchandise, and that it was greatly in excess of the basic value of the property. The trial court affirmed the increased basic value in the amount of $13,065, and plaintiff has appealed to this court.

Plaintiff's evidence shows that its personal property tax schedule covering its stock of merchandise was de-

termined in the following manner: It listed all items in its inventory of September 30, 1955, at its cost value. This produced a total cost value of $29,731. All purchases made subsequent to the closing inventory and prior to March 1, 1956, were calculated and shown on the schedule. Such purchases totaled $53,745. Total sales between the close of the inventory and March 1, 1956, were shown to be $96,054. From this a gross profit of 25 percent was deducted, thereby fixing the net cost of goods sold during the period at $72,041. The book value of the closing inventory and the cost of merchandise purchased thereafter prior to the assessing date amounted to $83,476. From this the net cost of goods sold was deducted, leaving a valuation of $11,435 on March 1, 1956. The county assessor admits that this is a proper method of calculation and the one used by her in valuing stocks of merchandise in Phelps County.

The county assessor raised the basic value of the inventory in the amount of $5,060, which is equivalent to an increase of $7,228 in its cost value. The plaintiff contends that this increase was arbitrarily made and consequently void.

The basis upon which the increase was made was explained by the county assessor as follows: She sent an assistant to plaintiff's place of business to count the appliances on hand. He made no attempt to determine the make, model, quality, size, age, or cost of the appliances. The county assessor determined the value of the appliances for assessment purposes in a manner that is unique in the annals of this court. She testified that she examined advertisements carried in two newspapers, the Omaha World Herald and the Holdrege Citizen. From these she averaged the prices for which such appliances were offered for sale. The average prices thus arrived at she applied to the number of appliances counted by her assistant in plaintiff's place of business. In this manner she determined that 15 ranges had an average valuation of $254, and assessed them at

$3,810. Values of washers, dryers, refrigerators, television sets, and air conditioners were valued in a like manner. By this method she determined that plaintiff's stock of appliances had a taxable value of $15,685. How she reduced the increase into basic value so as to produce an increase of $5,060 in the basic value of the stock of merchandise is not clearly demonstrated by the record. The method employed is not material in any event.

There is a presumption that a board of equalization, in making an assessment, acted upon sufficient competent evidence to justify its action. This presumption disappears when there is competent evidence on appeal to the contrary. Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307. It is fundamental that a county assessor may not act arbitrarily in raising an assessment. The yardstick employed in fixing the valuation of property for tax purposes must be one which reasonably tends to accomplish the purpose of the taxing statutes. If it be shown that the method employed was in fact arbitrary or speculative, having no real relation to the value of the property being assessed, it will not sustain the valuation thus fixed, and renders any raise in the assessment based exclusively thereon entirely void.

A casual examination of the method employed by the county assessor in fixing the actual value of plaintiff's stock of merchandise shows its want of reasonableness in the accomplishment of this result. The yardstick employed was purely an arbitrary one which lacked many vital elements for determining actual value. Any resemblance to actual value resulting from its use would be nothing more than sheer coincidence. Valuations of property for tax purposes cannot be supported by such evidence. We necessarily hold that the raising of the basic value of the property contained in plaintiff's inventory is arbitrary and void, and cannot be sustained.

It is contended that cost value is not the actual value of the stock of merchandise. The decisions of this court

sustain the correctness of this statement. The cost value of a stock of merchandise is, however, some evidence of its actual value and, in the absence of other competent evidence of actual value, is sufficient to sustain a finding that the cost value is the actual value. The county assessor testified that the method employed by the plaintiff was the method generally used in fixing the actual value of stocks of merchandise in Phelps County. The uniformity provision of the Constitution requires that taxes be levied by valuation uniformly and proportionately. Art. VIII, § 1, Constitution. The method employed by the plaintiff in fixing the actual value of its stock of merchandise was in conformity with that used generally by the county assessor of Phelps County. No violation of the constitutional provisions is therefore shown. We necessarily conclude that the only competent evidence of actual value in the record is the cost price established by the plaintiff. We are required to hold in this case that the cost price in the amount of $11,435 is the only evidence of actual value shown by the record. The trial court erred in not so holding.

The complaint filed by the taxpayer before the board of equalization raised the issue that "Item No. 58 business schedule inventory and place of business of corporation of Holdrege, Nebraska * * * is erroneously assessed for the year 1956 at $13,065.00 for the following reasons: This value is in excess of the basic value of said inventory on hand on the assessment date." It is contended that this presents the only issue that can be tried on appeal and that the question of property omitted from the inventory cannot properly be considered. It is the rule that an issue raised before the county board of equalization limits the scope of an appeal taken from the board's ruling thereon. Archer-Daniels-Midland Co. v. Board of Equalization, 154 Neb. 632, 48 N. W. 2d 756. The issue raised in the instant case is whether or not plaintiff's inventory as shown by item No. 58 of the assessment schedule was correctly valued. This raises

the question of the correctness of the inventory as well as whether or not it was given a proper valuation.

The evidence of the plaintiff affirmatively shows that it did not list for taxation certain property which was considered obsolete. The president of the corporation testified that it was the policy of the company not to list items of stock upon which taxes had been paid for a period of 3 years, and that this was the reason for it not being included in the inventory required by item No. 58 of the schedule. We point out, however, that the applicable statute requires that all property in this state, not expressly exempt therefrom, shall be subject to taxation. § 77-201, R. S. Supp., 1955. The obsolete property is therefore subject to taxation and should have been included in the schedule at its actual value. The president of the company testified that this obsolete property was actually worth about $3,000. It should be added to the inventory in that amount.

It is contended that the plaintiff failed to list certain propane gas tanks for taxation. The county assessor listed the tanks and gave them a valuation of $3,870. The inventory listed the tanks and gave them a valuation of $5,469.50. The evidence shows that they were included in the inventory shown as item No. 58 of the assessment schedule. The evidence will not sustain a finding that the tanks were either omitted or undervalued.

There is a further contention that a number of propane gas cylinders with a capacity of one hundred pounds were not listed for taxation. The plaintiff's president and general manager admitted that these cylinders were not included in the inventory nor otherwise listed for assessment. He stated that the company had about 500 of these cylinders which were purchased more than 5 years previous to the assessing date. The secretary of the company testified that the number of cylinders owned by the company could be established by the company's books. She was excused as a witness with

the understanding that she might be recalled to establish the number of cylinders owned by the plaintiff. She was not recalled nor was any other evidence produced as to the number of cylinders on hand on March 1, 1956. There is evidence that the cylinders cost $15.60 each when they were purchased.

The cylinders were not a part of the stock of merchandise. Some were sold, some lost, and some leased to customers who purchased propane gas from the plaintiff. The county assessor testified that she added 20 cylinders to the inventory and fixed their actual value at $5 each. The plaintiff has not shown that the quantity or valuation was incorrect. The plaintiff has therefore failed to sustain the burden of proof on this item. On the other hand, the county board of equalization has failed to show by competent evidence that the plaintiff owned in excess of 20 cylinders on March 1, 1956.

The value of the inventory for tax purposes is listed on the tax schedule as book value. We conclude therefore that the book value of the closing inventory should be increased in the amount of $3,000 for the merchandise described as used or obsolete, and in the further amount of $100 for the cylinders as assessed by the county assessor. The book value of the closing inventory should therefore be shown on the tax schedule as $32,831. This produces a book value as of March 1, 1956, in the amount of $14,535, and a basic value of $10,174.50.

The decree of the district court is reversed and the cause remanded with directions to enter a decree in accordance with the findings of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HAZEL EXSTRUM, APPELLEE, V. UNION CASUALTY AND LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT.
86 N. W. 2d 568

Filed December 6, 1957. No. 34243.

1. **Contracts.** A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done.
2. **Estoppel.** Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration.
3. **Insurance.** When the certificate delivered to an employee, to certify that he is insured under a group or master policy, is executed by the same insurance company which issued the group policy, then such policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each, together constitute the entire contract between the employee and the insurance carrier.
4. ———. When the certificate delivered to an employee to certify that he is insured under a group or master policy is not revoked, recalled, or canceled by the insurance carrier, and proof of death is made by the beneficiary and all conditions precedent under the terms of the insurance contract are complied with, the insurance carrier is estopped to deny liability under the group insurance policy.

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

Stiner & Boslaugh, for appellant.

Dryden & Jensen, for appellee.

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

MESSMORE, J.

This is an action at law brought by Hazel Exstrum as plaintiff against the Union Casualty and Life Insurance Company, a corporation, defendant, in the district court for Buffalo County, the purpose of the action being to recover on a group life insurance policy issued on the life of Clayton D. Exstrum, deceased, husband of

the plaintiff, wherein she was named as beneficiary. Proof of the death of her husband was made by the plaintiff, and the defendant company refused to allow her claim. By stipulation of the parties, a jury was waived and trial was had to the court. After trial to the court, judgment was rendered for the plaintiff. The defendant filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the defendant appeals.

We summarize the amended petition of the plaintiff. It alleged that prior to October 1, 1954, the defendant entered into a group policy of life insurance with contributing employers and trustees and successors of the Central States, Southeast and Southwest Areas Health and Welfare Fund; that the plaintiff's husband, Clayton D. Exstrum, was an employee of the Brown Transfer Company, a contributing employer to the welfare fund, from March 5, 1954; that Clayton D. Exstrum was employed by the Brown Transfer Company as a truck driver and dock worker, but not working regular hours; that he was a regular, active employee of the Brown Transfer Company and remained so up to and including the date of his death on January 19, 1955; that Clayton D. Exstrum became a member of the union, and by virtue of an agreement between the truck drivers' union and the Brown Transfer Company, the latter remitted payments directly to the Central States, Southeast and Southwest Areas Health and Welfare Fund of Chicago, Illinois, which were the premiums for the insurance in this matter; that the defendant issued and delivered to Clayton D. Exstrum a certificate of life insurance setting forth the effective date of such insurance as October 1, 1954; and that the Brown Transfer Company commenced remittance to the defendant in accordance with instructions. It was further alleged that such amounts were accepted and retained by the defendant. The plaintiff alleged the death of her husband, the proof thereof, and claim made to defendant; that

the policy of insurance was in full force and effect, all premiums paid thereon, and all conditions precedent to the establishment of liability complied with; and that on March 3, 1955, the defendant, by letter to the plaintiff, refused to pay under the policy of insurance. The plaintiff prayed for judgment in the amount of $2,500 and attorney's fees as provided under the statutes of Nebraska.

The defendant's answer, after making certain admissions, alleged that the policy of insurance did not become effective as to the decedent for the reason that he was not actively at work on and after January 1, 1955, the effective date of the policy; that the policy was an Illinois contract; and that under the law of Illinois the certificate of insurance was not considered a part of the insurance contract and there could be no right of action on the certificate issued to the insured as distinguished from the master policy. The answer prayed for dismissal of the plaintiff's action.

The plaintiff filed a motion for permission to file a reply which was allowed by the court to be filed at the time of the decision of the court finding for the plaintiff. The reply alleged that the defendant was estopped to claim any other defense to the policy than that evidenced by a letter denying liability which will be discussed later in the opinion.

While the defendant contends that the trial court abused its discretion in permitting the plaintiff to file a reply as heretofore indicated, we conclude that there was no prejudicial error on the part of the trial court in granting the plaintiff the right to file the reply, and the trial court did not abuse its discretion as contended for by the defendant.

The facts are not in dispute. The record discloses that the group insurance policy was issued as part of a plan to provide life insurance benefits for members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, which

will hereinafter be referred to as the union. The assured named in the policy was the trustees and successors of the Central States, Southeast and Southwest Areas Health and Welfare Fund, which will hereinafter be referred to as the fund. The fund is, by written agreement, a trust. The general plan was that the employers having union contracts, and who are referred to in the insurance policy as "contributing employers," would contribute on behalf of their union members to the fund, and the fund in turn would pay premiums for group life insurance on the employees who were union members.

The Brown Transfer Company of Kearney, Nebraska, had been a contributing employer with respect to union members then in its employ since the creation of the fund in 1950. The union had a contract with the Brown Transfer Company requiring it to make contributions to the fund for each union member employee, after 30 days had elapsed following such employee becoming a member of the union. Clayton D. Exstrum, hereinafter referred to as Exstrum or the decedent, was employed by the Brown Transfer Company on March 5, 1954, and became a union member on September 13, 1954. The Brown Transfer Company made contributions to the fund for and on behalf of Exstrum. These contributions to the fund were made in connection with report and remittance forms. Four copies of these forms were made. The Brown Transfer Company retained one copy, one was sent to the LaSalle National Bank of Chicago, Illinois, the receiving bank, one to the union, and one to the fund. The bookkeeper for the Brown Transfer Company identified certain exhibits which are the remittance sheets for the payment of premiums on Exstrum's insurance made by the Brown Transfer Company for the insurance on the life of Exstrum from and after November 1, 1954, to January 15, 1955. There is apparently no controversy with reference to the payment of the premiums by the

Brown Transfer Company. We need not discuss these separate payments or the exhibits exemplifying them.

We deem it advisable at this point to set out some of the provisions of the insurance policy here involved.

A "contributing employer" is defined in the insurance policy as follows: "* * * an Employer in good standing who is making payments into a Trust Fund, which is administered by the Assured for the purpose of providing insurance benefits for a class or classes of employees of such Employer pursuant to an agreement between the Assured and the Employer."

The original policy was amended, wherein an eligible employee is defined as follows: " 'Eligible Employee' as used in this policy means an employee actively at work with a Contributing Employer whose employment is covered under the collective bargaining agreement establishing the Central States, Southeast and Southwest Areas Health and Welfare Fund."

Paragraphs 1, 2, 3, and 4 of the policy amendment, relating to the effective date of insurance, provide as follows: "1. The effective date of this policy as to an employer becoming a Contributing Employer after April 1, 1952 shall be the first (1st) day of the calendar month following two (2) full calendar months from the date such employer becomes obligated to make his contributions to the Policyholder. The effective date as to such Contributing Employer may be a date earlier than that set forth by agreement between the Contributing Employer, the Policyholder, and the Company.

"2. Each employee employed on the effective date of his employer's insurance, for whom contributions have been made for two (2) full calendar months on his behalf prior thereto, is insured on such effective date.

"3. Each employee not insured on the effective date of his employer's insurance is insured on the first (1st) day of the calendar month following two (2) full cal-

endar months of contributions made by his employer on his behalf.

"4. Each employee not in active employment on the effective date of his insurance after the effective date of this policy shall be insured on the first (1st) day of his employment."

The policy also contains this provision with reference to issuance of certificates: "The Company will issue to the Assured, for delivery to each insured employee, a certificate setting forth a summary of the essential features of the insurance coverage to which the employee is entitled and to whom the benefits are payable."

A certificate was issued wherein the defendant insurance company stated that it "Certifies that it has insured certain employees of Contributing Employers to the TRUSTEES AND SUCCESSORS OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND (Herein called the Assured) for Group Life Insurance under Group Life Policy Number L. I. T. - 90, and that Clayton D. Exstrum an employee, is insured for the sum of $2,500.00 payable in event of death of such employee to Hazel Exstrum - Wife beneficiary designated by the employee to receive such benefits as are payable in the event of the death of the employee. Effective date Oct 1 1954 116826 Certificate Number (Provided Employee is then regularly performing the duties of his occupation)."

The defendant insurance company addressed a letter dated March 3, 1955, to Mrs. Hazel Exstrum, wife and beneficiary of Clayton D. Exstrum, deceased, which stated as follows: "The Central States Welfare Fund indicates that the Brown Transfer Company began remitting to the Fund, on your husband's behalf, on Oct. 21, 1954. Under the rules of eligibility, he would have become eligible for insurance coverage on the first day of the calendar month following two (2) full months of contributions, or January 1, 1955. However, the

policy provides that: 'If an eligible employee is not in active employment on the effective date of his insurance, such eligible employee becomes insured on the day he returns to active employment.' Since your husband was not in active employment on January 1, 1955, and did not return to active employment prior to his death, he was not eligible for insurance coverage. We will, therefore, be unable to honor this claim." This letter was signed by the claims supervisor of the defendant insurance company.

The evidence by Exstrum's employer and his wife shows that Exstrum was employed as an extra man, subject to call, to drive a truck or work on the dock as the case might be; that during November and December this work was seasonal; and that he was not called to work from and after November 20, 1954, when he returned from his last trip and was ill. The testimony discloses that while he was in the hospital for tests at Kearney, Nebraska, and subsequently at Mayos at Rochester, Minnesota, prior to his death on January 19, 1955, had he been called to work he would have been able to work, but that there was no occasion to call him, and that he was continuously kept on the books as an employee until after his death.

The bookkeeper for the Brown Transfer Company testified that Exstrum was classified as an extra driver, which meant that he worked when he was called. He was carried on the books of the company as an employee at the time of his death. He was not paid for any work after November 20, 1954. Being an extra employee, he was paid by the hour or by the trip, and not weekly wages.

The following assignments of error are interrelated and will be discussed together later in the opinion: (1) The court erred in admitting in evidence the certificate of insurance for the reason that it was not properly a part of any insurance contract. (2) The court erred in concluding that the plaintiff was entitled to recover

on the certificate of insurance as an independent contract separate and distinct from the master policy. (3) The court erred in concluding that the defendant was bound by the recitals of the effective date of the policy as contained in the certificate of insurance. (4) The court erred in failing to construe the policy under the laws of Illinois. (5) The court erred in finding that defendant was estopped to contend that the certificate was not a part of the insurance contract.

The defendant contends that the insurance contract here being considered was made in the State of Illinois and is governed by the law of that state.

The Illinois statute referring to group life insurance contains a provision that the policy, the application of the employer or trustee of any association of employees, and the individual applications, if any, of the employees insured shall constitute the entire contract between the parties. Ch. 73, § 843, Ill. R. S. 1955. Subsection (d) of the Illinois statute provides for the issuance of a certificate of insurance.

The contract here considered provides: "This policy, the application of the Assured attached hereto, and the individual applications, if any, of the employees, constitute the entire contract between the parties hereto. All statements made by the Assured, or by the individuals insured, shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid the insurance, or be used in defense of a claim under it, unless it is contained in a written application."

The policy here involved provides, under the heading "Certificates": "The Company will issue to the Assured, for delivery to each insured employee, a certificate setting forth a summary of the essential features of the insurance coverage to which the employee is entitled and to whom the benefits are payable."

It is the contention of the defendant that the Illinois law governs because the negotiations for the purchase of

the policy were carried on in Chicago, Illinois, the policy was delivered there, and all premiums were paid in Chicago, Illinois.

The law is that a contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done. See, Restatement, Contracts, § 74, p. 80; Avondale v. Sovereign Camp, W. O. W., 134 Neb. 717, 279 N. W. 355; Stephan v. Prairie Life Ins. Co., 113 Neb. 469, 203 N. W. 626; McElroy v. Metropolitan Life Ins. Co., 84 Neb. 866, 122 N. W. 27, 23 L. R. A. N. S. 968.

We conclude that the contract in question is an Illinois contract.

The defendant argues that although subdivision (d) of the Illinois statute required that the group policy contain a provision for the issuance of a certificate to each insured employee, even though the certificate was issued it recited an erroneous effective date, for the reason that under the master policy, as set out in the statement of facts, the effective date of the policy insofar as Exstrum was concerned would be January 1, 1955; and that the purpose of the certificate was not to advise Exstrum of the detailed provisions of the policy, but rather to give him some evidence of the existence of the insurance.

It will be observed from the facts heretofore stated that on March 3, 1955, by letter, the defendant insurance company rejected the claim of the plaintiff, setting forth as the reason therefor that the policy provided that if an eligible employee was not in active employment on the effective date of his insurance, such eligible employee became insured on the day he returned to active employment, and that since the plaintiff's husband was not in active employment on January 1, 1955, and did not return to active employment prior to his death, he was not eligible for insurance coverage.

The defendant, in its answer, set up the defense that the deceased was not eligible under certain provisions of

the policy, that is, that the policy became effective on January 1, 1955, and on that date he was not in active employment. It is obvious that the defendant attempts to claim that the question here involved is also one of eligibility, and that the deceased was not actively at work. The defendant, on no occasion, said that Exstrum never became eligible for insurance. We believe the defendant is estopped, both in the pleadings and in this case, from raising any defense other than that upon which it rejected the plaintiff's claim for insurance. There is nothing before this court involving the payment of premiums, or any defense other than that set forth in the letter of March 3, 1955. There can be no implication from the letter that the defendant was denying that it issued a certificate of insurance to the deceased. What the letter did was to set forth one defense, that Exstrum was not actively employed on January 1, 1955. We deem the following to be applicable.

In Yates v. New England Mutual Life Ins. Co., 117 Neb. 265, 220 N. W. 285, it is said: "Where an insurance company, before being sued, * * * bases its refusal to pay life insurance to the beneficiary solely upon the ground that the policy had lapsed before the death of the insured, it will not be permitted to assert other and different defenses after litigation is begun.

"In such case, where the answer of the insurance company sets up a different ground of defense than that given as a reason for nonpayment of the policy, and no reply is filed, but the action is tried as though there was a reply, if facts showing an estoppel are admissible and admitted for other purposes, it is not necessary that estoppel be specially pleaded." In the instant case estoppel was specially pleaded in the reply.

In O'Neil v. Union Nat. Life Ins. Co., 162 Neb. 284, 75 N. W. 2d 739, it was held: "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon

another and a different consideration." See, also, Hamblin v. Equitable Life Assurance Society, 124 Neb. 841, 248 N. W. 397; Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122; Brown v. Security Mutual Life Ins. Co., 150 Neb. 811, 36 N. W. 2d 251.

And as said in Serven v. Metropolitan Life Ins. Co., 132 Neb. 637, 272 N. W. 922: "A party who gives one reason for his conduct and decision as to a matter involved in controversy cannot after litigation has begun defend upon another and a different ground." See, also, Moore v. Washington Nat. Ins. Co., 135 Neb. 29, 280 N. W. 221.

We conclude that the only defense to this action is that raised in the letter heretofore referred to.

The master policy provided for the issuance of a certificate of insurance. It is true that we are here dealing with an Illinois contract and that an Illinois statute has been pleaded by the defendant.

As provided in section 25-12,101, R. R. S. 1943: "Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States."

It is conceded by the defendant that it has found no decisions of the courts of Illinois interpreting the statute which it pleads. Our research has developed none. We have practically interpreted the concept of such a statute.

In the case of Hemmer v. Metropolitan Life Ins. Co., 131 Neb. 14, 267 N. W. 153, it was said: "When the certificate delivered to an employee, to certify that he is insured under a group or master policy issued to his employer, is also executed by the same insurance company which issued the group policy, then such policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each, together constitute the entire contract between the employee and the insurance carrier." In Uptegrove v.

Metropolitan Life Ins. Co., 145 Neb. 51, 15 N. W. 2d 220, this court followed the case of Hemmer v. Metropolitan Life Ins. Co., *supra*, as set out above.

This action was brought in this state. We believe, under the Nebraska authorities heretofore cited, that the certificate of insurance issued to Exstrum became a part of the contract of insurance. The premiums on Exstrum's insurance were sent to the fund in payment of his insurance by the Brown Transfer Company, the contributing employer. The fund was the agent of the defendant insurance company authorized to receive and remit such premium payments to the receiving bank for the benefit of the insurance company. No premiums were ever returned to the Brown Transfer Company, the contributing employer. The fact that the fund might not have paid the amount of premiums to the receiving bank makes no difference. The fund, as agent of the defendant insurance company, was acting within the scope of its authority in accepting the premiums from the contributing employer for the benefit of the insurer, the defendant. In fact, the evidence that Exstrum was insured was manifested by the certificate. This was the only evidence he had of this fact. The master policy was in the possession of the fund. The defendant insurance company did not seek at any time to revoke or cancel the certificate but, to the contrary, gave Exstrum every right to rely upon the validity of the certificate of insurance and to believe he was insured. Had he been informed otherwise, he might have, in all probability, obtained insurance elsewhere or made other arrangements with reference to insurance. There is nothing in the record to show that he was not an insurable risk at the time the certificate of insurance was issued showing him to be insured as of October 1, 1954, when he was in the employ of the Brown Transfer Company.

We conclude that the defendant insurance company,

under the circumstances of this case, is estopped to deny liability.

Under the law of Nebraska, findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. See Scottsbluff Nat. Bank v. First State Bank, 162 Neb. 475, 76 N. W. 2d 445.

Under the provisions of section 44-359, R. R. S. 1943, the plaintiff is allowed attorney's fees in the amount of $300 as costs, the defendant to pay all costs of this action.

The judgment of the trial court in the instant case is not clearly wrong and should be, and is hereby, affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

MILDRED DWINNELL, APPELLANT AND CROSS-APPELLEE, V. ALBERT DWINNELL, APPELLEE AND CROSS-APPELLANT.
86 N. W. 2d 579

Filed December 13, 1957. No. 34222.

1. **Divorce.** Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband towards the wife, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by this court on appeal.
2. ———. In awarding the custody of minor children in a divorce suit the primary concern of the court is the best interest and welfare of the children, having due regard for the rights of fit, proper, and suitable parents.
3. ———. Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody.
4. ———. Where the evidence sustains a finding that a mother is not a suitable and fit person to have the care and custody of her minor children, a decree of the district court awarding the custody of such children to the father will not be disturbed on appeal where it is shown that the father is a suitable and fit person to have their custody.

5. ———. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.
6. **Attorney and Client.** The fee allowed for the service of an attorney for a wife in a divorce suit should be sufficient to adequately compensate for the service necessary to be performed.
7. **Divorce: Attorney and Client.** On appeal in a divorce suit from the amount of the fee allowed to the wife for services rendered by her attorney, this court will interfere only to correct a patent injustice resulting from an allowance which is clearly excessive or insufficient.

APPEAL from the district court for Wheeler County: ERNEST G. KROGER, JUDGE. *Modified and affirmed.*

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

Arthur O. Auserod and *Davis & Vogeltanz*, for appellee.

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

CARTER, J.

Plaintiff, Mildred Dwinnell, brought suit for divorce against the defendant, Albert Dwinnell. The trial court granted a divorce to the plaintiff and awarded alimony to the wife. The custody of the six minor children was given to the husband. The plaintiff appeals, asserting that the allowance of alimony was insufficient, that the custody of the minor children should have been given to the plaintiff, and that the allowance of attorney's fees to plaintiff's attorney was grossly inadequate. The defendant has cross-appealed, asserting that the divorce should have been granted to the defendant and that the trial court should have appointed a trustee to conserve the money paid to the plaintiff as alimony.

The record shows that the plaintiff and defendant were married on September 4, 1932. Nine children were

born to the marriage. Six of the children were minors living at home when the action for divorce was commenced. They are Shirley, Alice, Thelma, Roy, Betty, and Ronnie, ages 17, 16, 14, 12, 11, and 4 years, respectively. The plaintiff was 44 and the defendant 58 years of age. They lived on a ranch approximately 9 miles from Bartlett, Nebraska, for about 20 years prior to the commencement of this action.

We do not deem it necessary to relate all of the domestic troubles of the parties to this suit. An examination of the record reveals a series of arguments resulting in physical violence over many years. The arguments generally were commenced by the wife, whose complaints were directed at the refusal of the husband to permit the purchase of adequate food, clothing, and other things within the financial means of the parties. The evidence shows that the defendant was more than frugal, he was penurious to the extent of justifying complaint by the wife. The evidence shows further that the wife developed a bad temper and quite often resorted to physical violence. She repeatedly threw dishes and other objects at the husband, and struck and kicked him as well. In resisting the attacks of the wife the husband resorted on occasion to excessive force. The wife several times showed bruises and black marks on her person, and on two occasions sustained broken fingers while engaged in physical encounters with her husband. The evidence pertaining to the arguments and the physical injuries was adequately corroborated by the record. The evidence was sufficient to sustain the petition of the plaintiff for a divorce. In disposing of this phase of the case we follow the rule announced in Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361, wherein we said: "In an action for divorce if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully re-

garded by this court on review." Even though this court considers the case de novo on appeal, when questions of veracity and reliability must be determined from irreconcilable testimony, the fact that the trial court had the opportunity to hear the witnesses and to observe their conduct and demeanor while testifying, and came to one conclusion rather than another, in order to arrive at a conclusion based on the evidence, the findings of the trial court with reference thereto must be given consideration. Hodges v. Hodges, *supra.*

The plaintiff complains of the failure of the trial court to grant the custody of the minor children to her. The rules of law as to the awarding of the custody of minor children are definite and clear. Such rules are: In awarding the custody of a minor child in a divorce action, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody. Smallcomb v. Smallcomb, *ante* p. 191, 84 N. W. 2d 217.

With reference to the fitness and suitability of the mother to have the care and custody of the six minor children in the present case, the evidence discloses that she developed an uncontrollable temper, not only toward the father but the children as well. On occasion she threw objects at the children. There is evidence that the older children occasionally had to physically hold their mother to prevent her from doing physical harm to themselves and the other children. She developed a nervousness and emotionalism that required medical treatment. She was taken to Dr. Chester H. Farrell, a neuropsychiatrist, who testified that she was suffering from a form of mental disturbance that bordered on a scizophrenic illness of a paranoid type. It is apparent from the evidence that her home environment subjected her to periods when she was flighty, emotional,

irritable, and ill. The evidence shows that at times she became subject to such a condition in the presence of the children in the absence of the father. During such times she appeared to lose her self-control. At one time she stabbed the defendant in the face with a table fork with such force that it penetrated his nose. On another occasion she threw a fruit jar in defendant's face with such force that it required several stitches to close the wound. On another occasion she kicked the defendant in the back with such force that he was hospitalized for several days. There is evidence in the record that she said she did not care whether or not she gained the custody of the children, so long as they were not given to the defendant. The three oldest children, who have reached their majority, testified that the best interests of the children required that they remain in the custody of the father and that the mother was not qualified to have their custody. Two of the next three children testified that they desired to remain with the father, one of the three not being interrogated on that point. The trial court privately interviewed the next two children, Roy, age 12, and Betty, age 11, and each expressed a strong desire to remain with the father. There is evidence in the record that, during all of the domestic difficulties here related, the father showed affection for the children and protected their best interests. The trial court found that the mother was not a fit and suitable person to have the care and custody of the children for the reasons herein stated and awarded their custody to the father. The evidence sustains the action of the trial court. The order placing the minor children in the care and custody of their father is affirmed.

Plaintiff contends on this appeal that the real estate owned by the defendant was undervalued and that the award of alimony in the amount of $30,000 was inadequate. The value of certain property is not in dispute. The following items are in this category: Government bonds $33,379, cattle $16,367, machinery $850, and other

equipment $650. The total value of the foregoing is $51,246.

The value of the land is in dispute. The evidence shows that defendant owned 2,960 acres of ranch land. It was in five separate tracts of 640, 160, 80, 160, and 1,920 acres. The evidence of value varies from $30 per acre to $12 per acre. The trial court found the value of the real estate and the value of the undisputed items to be $100,000. The latter valuation takes into consideration the debts of the defendant in the amount of $3,885.08, unpaid taxes in the amount of $689.24, and the fact that the defendant owned at the time of his marriage 80 acres of land, a number of tax deeds, and certain stock, farm machinery, and equipment. We think a net valuation of defendant's property for the purposes of this suit is $100,000, as the trial court found. The plaintiff worked hard in assisting in the accumulation of this property, as the evidence amply shows.

The trial court awarded plaintiff alimony in the gross amount of $30,000. The rule for fixing the amount of alimony is set forth in Malone v. Malone, 163 Neb. 517, 80 N. W. 2d 294. Applying the rule therein announced, we do not think the award of alimony, under the circumstances of the present case, should be less than one third of the value of the property accumulated during the period of the marriage relation. We therefore modfy the award of alimony by increasing it to $33,350 payable as follows: $10,000 within 30 days after the mandate of this court is issued, and the balance to be paid $2,500 on January 1, 1958, and $2,500 on January 1 of each succeeding year until the full amount is paid. No interest is to be paid except on payments which become delinquent under the terms of the decree so entered.

Plaintiff complains of the inadequacy of the allowance for her attorney as fixed by the district court. The attorney's fee was fixed at $1,500 in addition to a $300 allowance for expenses. There is no evidence in the record as to the value of the services rendered by plain-

tiff's attorney. We necessarily apply the rule announced in Specht v. Specht, 148 Neb. 325, 27 N. W. 2d 390. In that case we in effect said that where there is no direct evidence of the value of the services of the attorney in this type of case, other than the record of the proceedings, the trial court ordinarily has a better opportunity of appraising the value of the attorney's services, and this court will interfere only to correct a patent injustice resulting from an allowance which is clearly excessive or insufficient. We think the allowance for attorney's fees is in line substantially with the previous holdings of this court. Yost v. Yost, 143 Neb. 80, 8 N. W. 2d 686; Malone v. Malone, *supra*. We find no reason to interfere with the trial court's allowance for the services of plaintiff's attorney.

By cross-appeal the defendant complains of the granting of the divorce to the plaintiff instead of to him. What we have already said in this opinion on that subject disposes of this point contrary to defendant's contention.

Defendant also complains by cross-appeal of the failure of the trial court to appoint a trustee to handle the money to be paid to the plaintiff. The trial court evidently did not deem such action necessary under the record, as no disposition of the issue was made. We find no error in its failure to appoint a trustee, particularly in view of the fact that legal avenues are open for the appointment of a guardian or conservator in the proper forum if such action is warranted.

The costs of the appeal are taxed to the defendant, including an attorney's fee of $750 for services rendered the plaintiff in this court. As modified, the decree of the district court is affirmed.

MODIFIED AND AFFIRMED.

WILBUR GETTEL, APPELLANT, V. BURDETTE HESTER, WHO IS ONE AND THE SAME PERSON AS BURDETTE L. HESTER, ET AL., APPELLEES.

86 N. W. 2d 613

Filed December 13, 1957. No. 34230.

1. **Deeds.** In the transfer of property by deed, the general rule is that the intention of the parties as determined from the whole instrument shall govern. However, when the intention is obscure, uncertain, or ambiguous, resort may be had to subordinate rules of construction and permissible surrounding circumstances.
2. ———. In construing a reservation which is obscure, uncertain, or ambiguous, the intention of the parties is to be pursued, if possible, and emphasis is given to a determination of what the grantor meant by the language of the reservation. A reasonable construction should be given, and the entire instrument and the surrounding circumstances, including the purpose for which the property or right reserved is intended to be used, should be considered.
3. **Equity.** It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties.

APPEAL from the district court for Kimball County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Torgeson, Halcomb & O'Brien and *John D. Knapp*, for appellant.

Van Steenberg & Myers and *George P. Burke*, for appellees.

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

CHAPPELL, J.

Plaintiff, Wilbur Gettel, brought this action in equity, seeking to quiet fee simple title in him as against defendants, Burdette Hester and Alma R. Hester, his wife, to the north half and the southwest quarter of Section 4, Township 13 North, Range 56 West of the 6th P. M.,

in Kimball County, Nebraska. Plaintiff's amended petition, filed August 18, 1956, alleged in substance that he was the owner in fee simple of all the land, but Burdette Hester, hereinafter called defendant or designated by name, claimed to have some right, title, or interest therein. It alleged that plaintiff and defendant acquired the fee title to the land, save and except an undivided one-half of the mineral rights retained by the Federal Farm Mortgage Corporation, by warranty deed dated October 26, 1940, which was filed in the deed records of Kimball County on September 2, 1941; that by warranty deed dated March 29, 1947, and filed of record May 26, 1947, defendants conveyed to plaintiff all of their rights, title, and interest therein in fee simple; and that defendants and each of them are without any rights whatsoever and have no estate, right, title, or interest whatever in or to the land and should be forever barred from asserting same.

In amended answer thereto defendants denied generally, but admitted that Burdette Hester claimed to own some title or interest in the land. For their amended cross-petition, defendants alleged that Burdette Hester was the owner of an undivided one-third interest in the surface acres of the land and an undivided one-sixth interest in the mineral acres of the land, but, notwithstanding that fact, plaintiff claimed to have some right, title, or interest to said land or a part thereof. Defendants then offered to do what was just and equitable, sought to have plaintiff forever barred from asserting any right, title, or interest in or to defendant's undivided interest aforesaid, and to have the title thereto quieted in defendant.

Plaintiff, for reply to defendants' amended answer, denied that defendant owned any title or interest in the land, and renewed the prayer of his petition. For answer to defendants' amended cross-petition, plaintiff denied that defendant was the owner in fee simple of an undivided one-third interest in the surface of the land and

an undivided one-sixth interest in the minerals of the land. It then alleged in substance that defendants were estopped from claiming any right, title, or interest in the land because on March 29, 1947, they executed, acknowledged, and delivered a warranty deed purporting to convey to plaintiff an undivided one-third interest in the land, at which time they owned some right, title, or interest therein, not to exceed an undivided one-third thereof; that at that time plaintiff paid defendants a good and valuable consideration in full for said conveyance, which consideration defendants retained; and that defendants have not subsequently acquired any right, title, or interest in the land and are prevented by delay, neglect, and laches from enforcing any claim which they might have or purport to have therein. Defendants' reply thereto was a general denial.

After trial upon the merits, a judgment was rendered finding that the language of the deed from defendants to plaintiff on March 29, 1947, was uncertain in meaning and there was a mutual mistake by plaintiff and defendants with regard to the extent of the ownership of the minerals in the land at the time of their negotiations and the sale to plaintiff by defendants, both of whom believed they jointly owned all of the mineral rights instead of an undivided one-half thereof; that plaintiff, who lived in Kimball County and was in a position to investigate the records and discover their true interest while defendants were living in Germany, had the deed prepared which reserved one-third of the mineral rights in defendant, when in fact he owned only a one-sixth interest therein. Therefore, the deed should be reformed to reserve such interest in defendant, and quiet title thereto in him. Judgment was rendered accordingly in favor of defendants, with costs taxed to plaintiff.

Thereafter, plaintiff's motion for new trial was overruled, and he appealed, assigning in substance that the trial court erred in so finding and adjudging the

issues, and that the judgment was not supported by the evidence, but was contrary thereto and contrary to law. We do not sustain the assignments.

At the outset we are confronted with a motion filed by plaintiff to strike a supplemental transcript filed by defendants in this court, which included plaintiff's original petition, affidavit, and application for service by publication; order for service; voluntary appearance by defendants; and their original answer and cross-petition. The ground for plaintiff's motion to strike was that the original transcript filed by plaintiff was full and complete as required by the Revised Rules of the Supreme Court, Rule 4a, and contained the amended pleadings upon which the case was tried which had superseded the original petition, and answer and cross-petition, neither of which had ever been offered in evidence during the trial, and could not be considered by this court.

In that connection, rule 4a does as a minimum require, among other things unimportant here, that: "The transcript shall contain: (1) The pleadings upon which the case was tried; * * * and (5) such other parts of the record as the party appealing may desire to include therein." However, section 25-1912, R. R. S. 1943, provides in part: "The transcript shall contain the judgment, decree or final order sought to be reversed, vacated or modified, and all other filings made with such clerk, unless otherwise ordered by the appellant or appellants by the filing of a praecipe at the time of filing of notice of appeal, designating what portions of the record should be included in the transcript." In that respect, plaintiff, as appellant, did not file any "praecipe" as required by such section. Thus, defendants had a right to have "all other filings made with such clerk" made a part of the transcript, because rule 4c provides in part: "After the original transcript is filed in the clerk's office, any party may without leave of court file a supplemental transcript containing any matters omitted from the original transcript." Therefore, plain-

tiff's motion to strike should be and hereby is overruled.

In that situation, we conclude that whether or not plaintiff's original petition which alleged that the terms of the deed dated March 29, 1947, were ambiguous, and defendants' original answer and cross-petition, which alleged mutual mistake, should be considered by this court, requires no discussion except to say that the cause was actually tried by the parties without appropriate objections upon those theories, and the evidence supports the findings and judgment with regard thereto.

Being an equity suit, it is the duty of this court to try the issues de novo, in conformity with rules reaffirmed in Uptegrove v. Elsasser, 161 Neb. 527, 74 N. W. 2d 61.

An examination of the record discloses the following pertinent and controlling facts. By warranty deed, dated October 15, 1940, but not recorded until December 28, 1940, the Federal Farm Mortgage Corporation conveyed the land, "excepting and reserving one-half of all oil, gas and mineral rights therein, which are expressly reserved and retained by the grantor," to one John O. Rich for a consideration of $1,000.

Theretofore, by a written agreement executed on August 31, 1940, and recorded on that date, John O. Rich agreed to convey fee simple title to the land to plaintiff and defendant, free and clear of all encumbrances whatsoever, for a consideration of $1,400, same to be paid $400 cash in hand duly paid and received, and $1,000 on or before 5 years from September 1, 1940. After signing the contract, possession of the premises was to be given to plaintiff and defendant with right of re-entry and possession by John O. Rich upon default. John O. Rich agreed to furnish a good and sufficient abstract showing fee simple title, clear of all encumbrances whatsoever, to plaintiff and defendant upon demand within 60 days from date of demand, which could only be made by them if and when they were able to pay the balance and discharge the contract. It was mutually agreed by and

between the parties that then Rich would make and deliver a warranty deed conveying the premises, "an undivided one-third (1/3) interest to" defendant, and "an undivided two-thirds (2/3) interest to" plaintiff. It will be noted that no reservation of mineral rights was ever mentioned or made in the contract, as was done in the deed from the Federal Farm Mortgage Corporation to Rich, executed thereafter on October 15, 1940. In that connection, defendant saw and signed the contract aforesaid, but for reasons hereinafter noted, never saw the subsequently executed Federal Farm Mortgage Corporation's deed to Rich until this trial.

Be that as it may, by warranty deed dated October 26, 1940, and not recorded until September 2, 1941, after the consideration named in the foregoing contract had been handled and paid in full by plaintiff out of the first crop taken from the land, John O. Rich and wife conveyed the land to plaintiff and defendant, as follows: "An undivided one-third (1/3) interest to" defendant, and "an undivided two-thirds (2/3) interest to" plaintiff, "subject to the reservation of one-half of all oil, gas and mineral rights retained by the Federal Farm Mortgage Corporation." Also, defendant never saw that deed until the trial herein, and it will be remembered that the deed from the Federal Farm Mortgage Corporation to Rich making such a reservation was not recorded until December 28, 1940, some 4 months after the aforesaid contract was executed and recorded.

At time of trial defendant was a major in the United States Army, having served for some 15 years in this country, England, Germany, and Okinawa. Plaintiff and defendant were cotenants of the land and personal friends. During the first part of 1947, while defendant was in Germany, plaintiff wrote defendant a letter asking him if he would sell his share of the land to plaintiff. Knowing nothing about the land, and never having received any rentals therefrom after 1941, defendant decided to sell, and wrote a letter to plaintiff stat-

ing that he would sell his one-third undivided interest in the land for $600, but would retain his undivided one-third of all the mineral rights, not then knowing that he and plaintiff owned only one-half of the mineral rights and the Federal Farm Mortgage Corporation owned the other one-half. Plaintiff thereafter answered defendant's letter, saying that he would accept defendant's offer to sell his undivided one-third interest in the land for $600 and agreeing that defendant could retain his undivided one-third of the mineral rights. On March 4, 1947, defendant answered plaintiff's last letter, saying: "Got your letter couple days ago. Sure glad to hear from you. Sure would like to see you but it is going to be couple years before I get back to the States. Am not sure what I am going to do then. Say Willie I will take up that offer of yours. You can send me the money and the papers and I will get them signed here and sent back to you. Don't send a check or cash but put it in Postal Money Orders. * * * Well will close now Willie and look forward to answer one of these days. Best of luck to you & your wife. As ever your pal Hester."

In other words, defendant living in Germany did not then know that he only owned one-third of one-half, or one-sixth, of the mineral rights. He did not learn that fact until he returned to Kimball in 1952 while on his way back from England to Camp Roberts, California. He had previously heard that plaintiff had leased their mineral rights in the land, so defendant consulted his attorney at Kimball about his mineral rights and learned for the first time that he and plaintiff had not received all of the mineral rights in the deed from Rich but that the Federal Farm Mortgage Corporation owned one-half thereof.

Plaintiff was in the United States Navy from January 1942 until December 1946, but thereafter lived in Kimball County where the land and records were located. However, he evidently did not know that he and defendant owned only one-half of the mineral rights. Thus, in

response to the letters aforesaid, plaintiff employed and paid his own attorney in Kimball to prepare the deed here involved from defendants to plaintiff, and to record same after its execution. Plaintiff gave his attorney all the information necessary for drafting the deed and having it executed. In conformity therewith, it was drafted by plaintiff's attorney and forwarded by his letter to defendant in Nurnberg, Germany, through military channels. That letter said in part: "At the request of Wilbur Gettel, Kimball, Nebraska, I have prepared the warranty deed which conveys to him, your 1/3 interest in and to the North Half and the Southwest Quarter of Section 4, Township 15 (13) North, Range 56, West of the 6th P. M., Kimball County, Nebraska, with a reservation of 1/3 of the mineral rights." The letter then gave specified instructions with regard to execution and acknowledgment of the deed, and said: "As soon as this deed has been signed and acknowledged, both by you and your wife, mail the same to the American National Bank of Kimball, Nebraska, with instructions to deliver the deed to the undersigned upon payment of the sum of $600.00. The bank then will remit to you as soon as I have given the bank the money in exchange for this deed. Mr. Gettel is anxious to close this matter and asks that you execute, acknowledge and return the deed just as soon as possible."

That was subsequently accomplished, and defendant received all of the $600 consideration for the deed except $14 or $15, the deduction of which was not explained, but defendant made no complaint about it. The warranty deed directly involved herein was duly signed, witnessed, and acknowledged in Germany by defendants as grantors, with plaintiff as grantee, on March 29, 1947, and then returned to the bank as instructed. The deed was duly recorded by plaintiff's attorney on May 26, 1947. In the meantime, on May 12, 1947, defendant wrote plaintiff from Nurnberg, Germany, saying: "Say Willie I sent that deed back about five weeks ago all

signed and every thing. Have not heard anything from it so far. Wonder if you could see what is holding everything up. Sure would appreciate it if you would * * * Write when you find time. As Ever Your pal Bert." However, the transaction was subsequently completed. By that deed, defendants conveyed to plaintiff: "All of an undivided one-third interest in and to the North Half and the Southwest Quarter of Section 4, Township 13 North, Range 56 West of the 6th P. M., reserving however, one-third of the mineral rights," followed by a general warranty clause.

Thereafter, on October 5, 1953, defendant was again in Kimball where he consulted with his attorney and had a conversation with plaintiff concerning their mineral rights. Plaintiff, his wife, defendant, and defendant's father were all present. That conversation was corroborated by defendant's father and other evidence, part of which was given by plaintiff himself. Thereat it was agreed by the parties that defendant did and should have one-sixth of the minerals because he had reserved one-third as directed by plaintiff, mistakenly believing, as both of the parties concurrently did, that together they owned all the minerals, when in fact they only owned one-half. At that time and place plaintiff called his attorney, who appears herein, and instructed him by phone to prepare a document for plaintiff to sign the next day, which document was to recite their agreement and settle their respective mineral rights. On the next morning, defendant met plaintiff on the street in Kimball. Plaintiff told defendant that he had to go to Sidney on business but would come back later that day, then sign the document, and turn it over to defendant's attorney. However, plaintiff then drove away and was never seen by defendant again until this trial. Thereafter, the first time that defendant learned that there was any further dispute about their mineral rights was in June or July, 1954, when plaintiff filed this action and his attorney notified defendant thereof while he was

on Okinawa. In that connection, plaintiff admitted that he and defendant had a conversation on or about October 5, 1953, concerning their mineral rights, and that he never again tried to contact defendant. Plaintiff denied any agreement was then reached, but when asked whether he denied subsequently making the statement "'I have changed my mind,'" he answered, "I don't exactly; no."

At conclusion of the evidence, defendants offered to do what was just and equitable, even to the extent of returning the consideration for the deed and paying one-third of $1,500, admittedly the amount of improvements placed upon the land after plaintiff took title from defendant, but that offer was not accepted.

In construing and applying section 76-205, R. R. S. 1943, this court said: "The primary rule is that the intention of the parties as determined from the whole instrument shall govern. It is only when the intention is obscure or uncertain that resort may be had to subordinate rules of construction and permissible surrounding circumstances." Elrod v. Heirs, Devisees, etc., 156 Neb. 269, 55 N. W. 2d 673. Therein we also held that: "In ascertaining the intention expressed in such an instrument the court is not confined to a strict or literal interpretation of the language used if to do so would frustrate the intention of the parties thereto as gathered from the whole instrument."

That opinion concluded that our Legislature enacted the Uniform Property Act to modify and eliminate some common law technicalities and exactions. For example, section 76-104, R. R. S. 1943, provides in part: "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."

Also, section 76-106, R. R. S. 1943, provides: "An otherwise effective reservation of property by the conveyor reserves the interest the conveyor had prior to

the conveyance unless an intent to reserve a different interest is effectively manifested."

Further, section 76-206, R. R. S. 1943, provides: "Unless such intention is expressly negatived by the language in the instrument, a covenant in conveyance of real property that the grantor is seized, or lawfully seized, or words to like effect, shall be interpreted as a covenant that the grantor has good title to the very estate in quantity and quality which he purports to convey." In that connection, the record demonstrates that defendant had good title to the very estate in quantity and quality which he purported to convey to plaintiff. We are dealing here with a reservation of property which defendant attempted to retain by the very terms of the deed involved.

In that connection, section 76-209, R. R. S. 1943, has no application herein because the deed involved did not purport to convey a greater interest than the grantor at the time possessed. As a matter of fact, it effectually manifested an intent to transfer a less interest, and defendant had the very interest which he purported to convey. The question here is whether or not the language "reserving however, one-third of the mineral rights" reserved the interest grantor had in all the minerals prior to the conveyance, or effectively manifested an intent to reserve a different interest.

Contrary to plaintiff's contention, we conclude that the reservation in the deed was obscure, uncertain, incomplete, and ambiguous for want of an object from which one-third of the mineral rights was reserved. We are confronted with the question, did defendant intend thereby to reserve only an undivided one-third of the mineral rights in his undivided one-third of the surface, or to reserve his undivided one-third interest thereof in all the land, which in fact was only one-sixth? Plaintiff and defendant were cotenants, and it is generally true that in the absence of ambiguity or mutual mistake: "An exception by a cotenant refers only to his interest, not the entire property." 26 C. J.

S., Deeds, § 140 (4), p. 1014. However, herein the terms of the deed and reservation were not only ambiguous, but also were prepared by plaintiff as the result of a concurrent mutual mistake. Any ambiguity therein should be resolved in favor of defendant who did not prepare it and had no choice in the selection of the words used or the arrangement of the sentences. People's State Bank v. Smith, 120 Neb. 29, 231 N. W. 141. We have also concluded that: "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." Bradway v. Higgins, 152 Neb. 724, 42 N. W. 2d 627.

Also, it is generally the rule in cases comparable with that at bar that: "In construing a reservation or exception, the intention of the parties is to be pursued, if possible, and emphasis is given to the determination of what the grantor meant by the language of the reservation or exception. A reasonable construction should be given, and the entire instrument and the surrounding circumstances, including the purpose for which the property or right excepted or reserved is intended to be used, should be considered." 26 C. J. S., Deeds, § 140(5), p. 1014. See, also, § 83, p. 820.

Under all the circumstances in this case heretofore recited, we conclude that the true intent of the parties herein was that defendant reserved his undivided one-third interest of the mineral rights in all the land, which would be one-third of one-half, or one-sixth, undivided mineral interest in all the land, as concluded by the trial court. Cases relied upon by plaintiff from other jurisdictions are either distinguishable in fact or law, or we do not desire to follow them. Any other construction would not only be contrary to the intent of the parties but would also be unjust and perpetrate a fraud

upon defendants. Contrary to plaintiff's contention, we find no theory of estoppel, neglect, or laches which under the circumstances appearing herein could possibly justify any other conclusion. See, James v. McNair, 164 Neb. 1, 81 N. W. 2d 813; State v. Platte Valley Public Power & Irr. Dist., 143 Neb. 661, 10 N. W. 2d 631; Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291.

Plaintiff also argued that the theory of mutual mistake could not be considered because not pleaded, and that the pleadings would not permit reformation of the deed to conform with the intent of the parties. The contention has no merit. Plaintiff has evidently overlooked the provisions of sections 25-21,112 and 25-21,115, R. R. S. 1943; the holding in Wells v. Tietge, 143 Neb. 230, 9 N. W. 2d 180, with regard to the sufficiency of the allegations of a petition or cross-petition in a suit to quiet title; and the reaffirmation in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131, of the rule that: "'It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties.'"

Also, in Restatement, Restitution, § 51, comment a, p. 203, it is said: "The mistake may have resulted in the transfer of a larger area of land * * * or in the transfer of a more extensive interest in the subject matter, or of a different subject matter from that agreed to by the parties. In the case of grants of land the usual remedy is by a decree reforming the grant to conform to the agreement of the parties, the decree directing or having the effect of a reconveyance of what is in excess of or different from that agreed to."

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

AFFIRMED.

YEAGER, J., participating on briefs.

STANLEY G. ZYCH, APPELLEE AND CROSS-APPELLANT, V. BETTY JUNE ZYCH, APPELLANT AND CROSS-APPELLEE.
86 N. W. 2d 611

Filed December 13, 1957. No. 34232.

Appeal and Error. Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned.

APPEAL from the district court for Douglas County: JAMES T. ENGLISH, JUDGE. *Reversed and remanded with directions.*

Leslie D. Carter, for appellant.

Robert E. O'Connor and *Edward T. Rosse,* for appellee.

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

SIMMONS, C. J.

In this action plaintiff sought a divorce from the defendant on the grounds of extreme cruelty. Defendant cross-petitioned for a divorce on the grounds of extreme cruelty, and sought alimony, child support, and attorney's fees.

Trial was had. The court granted the defendant a divorce from the plaintiff; awarded her the custody of the three children; awarded $15 per week per child for child support; ordered the family home sold and the proceeds divided equally between the parties; and ordered the payment of a fee of $250 to a firm of accountants. In a preliminary order defendant's attorney had been awarded a fee of $200. The court granted an additional fee of $1,000 to defendant's attorney.

A motion for new trial was filed and overruled.

Defendant appeals assigning that the trial court erred in not granting a new trial, and that the judgment was not sustained by the evidence and was contrary to law.

Specifically defendant argues that the division of the property and child support award were not fair and reasonable.

Plaintiff cross-appeals contending that the child support award and the attorney's fee allowed were excessive.

We reverse the judgment of the trial court and remand the cause with directions to dismiss the petition and cross-petition.

Plaintiff does not assign as error the refusal of the court to grant a divorce on his petition. Neither does he assign as error the granting of the divorce to the defendant on her cross-petition. The assignment of error of the defendant is broad enough to cover the sufficiency of the evidence to sustain a decree, but defendant was successful and does not by argument raise that question.

The rule is: Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. See, also, Smallcomb v. Smallcomb, *ante* p. 191, 84 N. W. 2d 217.

Apparently plaintiff wants a divorce and defendant is willing that he should have it. She so testifies. However, the desire of the parties is not enough to sustain a decree.

There are three children of tender age involved in this controversy. The stability of the marriage relationship is involved. The integrity of the administration of justice under the law of this state as to the granting of divorces is involved.

Accordingly we have examined this record to determine whether or not there was plain error in the trial court's decree denying the plaintiff a divorce and granting a divorce to the defendant.

The corroborated evidence of the plaintiff is that the

defendant nagged him, and was quarrelsome and critical of him. This happened while they were living in the homes of his relatives. It does not appear to have happened after they moved into a home of their own. The evidence falls far short of the test of extreme cruelty set out in DeWaal v. DeWaal, 148 Neb. 756, 29 N. W. 2d 371, and Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877.

Plain error does not appear in the denial of a divorce to the plaintiff.

Plaintiff left the family home on April 12, 1955. He returned once for a visit. The immediate cause of his leaving does not appear. The uncorroborated evidence, offered by the defendant, is that sometime thereafter plaintiff was seen to enter a theatre in company with an identified woman and two other persons. That evidence, together with the suggestion of a suspicion that there was another woman involved, is the sole evidence upon which the decree in defendant's favor can rest. It is manifest that it does not establish extreme cruelty under the statute. It is likewise manifest that the granting of a divorce to the defendant on that evidence is a plain error. It cannot be disregarded.

During the progress of the trial a firm of accountants was employed to attempt to determine the financial worth of the plaintiff. The court allowed a fee of $250 for that service. It is not questioned. It is directed that that fee be taxed as costs in this action.

The finding of the trial court and the decree, including the ordering of payment of $1,000 attorney's fee to the defendant's attorney, is reversed.

The cause is remanded with directions to dismiss the petition and cross-petition. All costs are taxed to the plaintiff. The defendant is allowed an attorney's fee of $250 for the services of her attorney in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

HERMAN C. FREDERICK, APPELLANT AND CROSS-APPELLEE, V. CARGILL, INC., APPELLEE AND CROSS-APPELLANT.

86 N. W. 2d 575

Filed December 13, 1957. No. 34236.

1. **Workmen's Compensation.** 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 him in an accident arising out of and in the course of his employment.
2. ———. "Earning power," as used in subdivision (2), section 48-121, R. S. Supp., 1955, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.
3. ———. If, after injury, an employee receives the same or higher wage than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired.

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

Thomas A. Walsh and *A. Lee Bloomingdale,* for appellant.

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellee.

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

SIMMONS, C. J.

This is a workmen's compensation case. Plaintiff's petition was heard before one judge of the compensation court and resulted in a dismissal. Plaintiff appealed to the district court where trial de novo was had. Compensation was granted from July 9, 1954, to November 15, 1954, "for temporary and permanent disability." Compensation for permanent partial disability of the body as a whole was denied. Hospital and medical expenses were granted.

Plaintiff appeals here assigning error in the denial of compensation for permanent partial disability following the period of temporary total disability.

Defendant cross-appeals and in doing so fails almost entirely to comply with Rule 8 b4 as required by Rule 1 d of the rules of this court. However, plaintiff has not challenged the sufficiency of defendant's brief in that regard. We do not approve the procedure here followed; nevertheless, it not being questioned, we consider the ground of the cross-appeal which is that the trial court erred in allowing any compensation because plaintiff's "illness was not due to injury."

We affirm the judgment of the trial court.

The cause is here for trial de novo on the record as to those issues of fact involved in the findings of fact about which complaint is made.

We take up first the question presented by the cross-appeal, for, if correct, it is determinative of this litigation. We state the evidence as we conclude the facts to be, pointing out such contradictions as we deem require mention.

Plaintiff was an employee of defendant as a janitor and had been so employed for 8 years. On July 2, 1954, he was sweeping in a room where a metal duct came down on an angle toward the floor. This duct had a protruding edge or flange. Plaintiff struck the left side of his back over the chest cavity against this flange. He suffered pain and shortness of breath. He fell to the floor. The accident occurred near quitting time. Plaintiff went home shortly thereafter.

There is evidence that plaintiff early related the point of impact to the front of his chest rather than the back. However, that discrepancy was explained largely by the difference in meaning of the word chest. In any event in trial de novo we find according to plaintiff's testimony, as did the trial court.

July 3 and 4, 1954, were Saturday and Sunday. July 5 was a holiday. During these days plaintiff remained

at home. He testified as to the pain in the chest. He returned to his work on July 6 and 7, although having increasing pain. On July 8 he was unable to work because of the pain. He reported to his foreman both about the accident and his condition. Plaintiff testified that he also reported the accident to his foreman on July 2. His petition before the compensation court alleged that the defendant had notice on July 8. No statutory limitations are involved. The defendant clearly had notice on July 8. Defendant on that day took plaintiff to a medical clinic. Two doctors examined the plaintiff and concluded that he was critically ill. He had a temperature of 102 degrees and was obviously sick. The first doctor found no external evidence of an injury and concluded that trauma was not involved. Both doctors concluded that the plaintiff was either in an advanced stage of tuberculosis or lung cancer, and that he required hospitalization.

On July 9, 1954, he was hospitalized in Council Bluffs, Iowa, under the care of a different doctor. The examining physician that day reported "Clinical findings compatible with lobar pneumonia." On July 10 a thoracentesis was made, and 50 cc. of frank (red) blood were removed. This congealed in the syringe. The doctor performing this tap was careful to make certain that he was not drawing blood from a vein.

Plaintiff in September 1954 came under the care of a lung surgeon. On September 10 he performed a lung tap and removed a total of 350 cc. of pus from two cavities in plaintiff's chest. On September 16, an operation on plaintiff was performed. A portion of the sixth rib was removed, the thorax opened, two accumulations of pus removed, and the two empyema cavities were drained. Plaintiff returned to work on November 15.

During the period of hospitalization clinical tests negatived the diagnosis of tuberculosis. The operation finding negatived the diagnosis of lung cancer. At one time defendant took the position that the plaintiff's condition

was due to a hydrothorax and not to a hemothorax. Defendant undertook to discredit the affirmative evidence of blood found on July 10, 1954, in the thoracentesis operation by the testimony of an expert that blood originating from a trauma several days earlier would be dark and congealed blood. Plaintiff's evidence is that a trauma producing a minor rupture would be continuously leaking fresh blood into the cavity where the pus formed. This is sustained by the testimony of increasing pain following the injury and by X-ray pictures showing an enlargement of the empyema cavity.

Defendant here abandons the acute tuberculosis and lung cancer theory, and discusses the hemothorax-hydrothorax contention, but rests its position on the contention that the empyema was caused by pneumonia. That in turn rests on the preliminary finding of the doctor made July 9, 1954. We find no serious attention given to that theory by anyone thereafter. However, plaintiff's physicians explored it and negatived it by use of the X-ray pictures and other findings. There is much discussion in the record of blood counts and other matters which does not affect the decision here.

The long-established rule is: 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 him in an accident arising out of and in the course of his employment. Sears v. City of Omaha, 164 Neb. 869, 83 N. W. 2d 857.

Plaintiff's evidence meets the above test. In regular sequence there is shown the accident, increasing pain, blood in the lung cavity, empyema, and the resulting surgery.

Defendant's cross-appeal is not sustained.

The medical and hospital bills were stipulated as reasonable. No contention is advanced as to them here.

We think it obvious that the trial court intended its decree as granting compensation for temporary total disability from July 9, 1954, to November 15, 1954.

The amount of the award, as such, is not challenged here.

We accordingly affirm the award as to medical and hospital expenses and as to the compensation for temporary total disability.

This brings us to plaintiff's appeal. Plaintiff's doctors testified that as a result of the operation he had an adhesion in the lower left lung which would restrict his air intake and affect his vital capacity. He has had a part of one rib removed with the resulting scar. Both doctors say he has a 10% permanent disability of the "body as a whole." The surgeon testified further: "But for all intents and purposes he has normal function, respiration, he is able to carry on as good as the other lung might be, after all they are pairs."

Plaintiff returned to work for the defendant on November 15, 1954. Apparently this was at the same kind of work. There is no indication in the record that he is not able to perform the work although he testified that: "* * * I am weaker and sometimes I am short in breath." At the time of the trial he was receiving higher wages than at the time of the accident.

The above medical evidence is undisputed. Plaintiff argues that since it is in a specialized branch of medical science and is not intrinsically unreasonable, it must be accepted as true.

Assuming the fact of disability testified to by the plaintiff's witnesses, it does not follow necessarily that plaintiff is entitled to receive compensation. Section 48-121, R. S. Supp., 1953, was in force when this accident occurred. As amended in other items, it is now section 48-121, R. S. Supp., 1955. Except as to the scheduled disabilities set out in subdivision (3) the act provides that: "For disability partial in character, * * * the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, * * *" with a maximum limit.

In Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d

51, we defined earning power as follows: "Earning power," as used in subdivision (2), section 48-121, R. R. S. 1943, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.

In the course of the opinion we repeated our holding that if, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired.

We find nothing in this record upon which to base any reasonable calculation of an impaired earning power. Plaintiff has not shown an industrial disability.

The assignment of error of the plaintiff's appeal is accordingly denied.

As construed here the judgment of the trial court is affirmed.

AFFIRMED.

MARGARET COYLE, APPELLANT, V. JOHN STOPAK, APPELLEE.
86 N. W. 2d 758

Filed December 13, 1957. No. 34254.

1. **Trial.** It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial.
2. **Automobiles.** The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.
3. **Negligence.** 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.

4. **Automobiles: Negligence.** Although the evidence may be entirely circumstantial as to the rate of speed at which a motor vehicle was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence. Circumstances connected with an accident may be sufficient to overcome direct evidence as to the speed of a motor vehicle.

5. **Automobiles: Highways.** A motor vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a motor vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way.

6. ———: ———. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption.

7. **Automobiles.** An "emergency" is a sudden or unexpected happening or occasion calling for immediate action.

8. ———. In order to justify a resort to the defense of sudden emergency there must be an absence of opportunity for mature deliberation.

9. ———. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.

10. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.

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

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

13. ———. 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 disaster.

14. ———. An act done by another in normal response to fear or emotional disturbance to which the actor's negligent conduct is a substantial factor in subjecting the other is not a superseding cause of harm done by the other's act to himself or a third person.

15. **Trial.** The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired.

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

17. ———. 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.

18. ———. There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the questions of facts in issue.

19. ———. However, this right should be very sparingly exercised and generally counsel for the parties should be relied on and allowed to manage and bring out their own case.

20. ———. The judge presiding at a trial must conduct it in a fair and impartial manner. He should refrain from making any unnecessary comments or remarks during the course of a trial which are calculated to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Reversed and remanded with directions.*

Wear, Boland & Mullin, McCormack & McCormack, and *A. Lee Bloomingdale,* for appellant.

Crawford, Garvey, Comstock & Nye and *Gerald M. Vasak,* for appellee.

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. It involves a tort action wherein Margaret Coyle seeks to recover from John Stopak damages resulting from personal injuries she suffered in a truck-car accident which she claims was caused by the negligent conduct of Stopak in driving his truck. A jury returned a verdict for defendant and judgment was entered thereon. Her motion for new trial having been overruled, plaintiff perfected this appeal.

The accident, in which appellant was injured, happened about 6 p.m. on Tuesday, September 27, 1955, on a U. S. Highway bearing numbers 6, 30A, and 275, which we will herein refer to as the Dodge Road or highway, at a point about 4 miles west of Boys Town, Nebraska. It had its inception when appellee's truck, a 1951 GMC straight truck with stock rack, bumped into the rear of a 5-passenger Mercury coupé owned by Charles E. Coyle. At the time of the accident appellant was riding in the car as a guest of her husband.

The Coyles, Charles E. and appellant, are husband and wife. They are elderly people and were, at the time of the accident, respectively 77 and 78 years of age. They lived in a house which was one of the buildings on an 80-acre farm located north of Dodge Road, and adjacent thereto, at a point about 4 miles west of Boys Town. The buildings on this farm are located about 200 feet north of Dodge Road and a graveled lane leads from the house to the highway. As this lane leaves the gate, which is about 20 feet north

of the surfaced portion of the highway, it fans out in both directions. The Coyles, Mr. Coyle driving, were leaving their home to go to dinner at the Ten Mile Inn, which is to the east on Dodge Road.

Dodge Road is a four-lane surfaced highway 44 feet wide with two lanes for travel in each direction, each of which is 11 feet wide. On the south side of this paved surface, in the area immediately across from the Coyle driveway, the shoulder is amply wide for vehicles to enter upon if it becomes necessary for them to do so. At the time of the accident the weather was bright and clear, visibility good, and the surface of the highway clean and dry.

As Mr. Coyle drove down the lane and reached the north edge of the pavement of Dodge Road he stopped his car, which was then facing in a southeasterly direction, and looked both east and west along the highway. At the point where the Coyle lane or driveway enters onto the highway, which runs east and west, the highway is level. However, it rises both to the east and west thereof, reaching a crest to the east at a point somewhere between ¼ and ½ mile therefrom and to the west somewhere between ½ and ¾ mile therefrom. When Mr. Coyle looked to the east he saw a vehicle approaching from that direction but at a distance which he considered sufficient to permit him to cross the highway ahead of it in order to drive towards the east. Mr. Coyle then looked to the west. He admitted he could see to where the highway crested. He testified he saw no vehicles coming from that direction, so started to drive his car onto the paving, proceeding in a southeasterly direction at from 10 to 15 miles an hour as he did so.

Appellee, who was 58 years of age at the time of trial, is a farmer, feeder, and commercial trucker. He lives about 5 miles southeast of Fullerton, Nebraska. On the day of the accident he was hauling a load of cattle to

the South Omaha market for Mike Uzendoski, a feeder living near Fullerton.

Appellee was driving his truck east on Dodge Road in the south lane for eastbound traffic. He testified he saw the Coyle car entering onto the surfaced portion of the highway when his truck was some 50 to 60 feet west of the center of the Coyle lane, if extended across the highway; that the car proceeded onto the surfaced portion of the highway and traveled in a southeasterly direction at from 15 to 20 miles per hour; that as it continued to travel in a southeasterly direction the car entered the south lane for eastbound traffic; and that as it did so the left front of his truck came in contact with and bumped the right rear of the car, causing some damage to both vehicles. What happened after this occurred, a more detailed discussion of the facts relating to this incident, and what happened thereafter will be more fully set out in connection with our discussion of the various assignments of error.

Appellant alleged in her petition that appellee operated his truck at a greater rate of speed than was reasonable and proper, having regard for the condition of the highway, and the traffic thereon. She now contends the trial court prejudicially erred in failing to submit this issue to the jury in view of the evidence adduced.

In this regard, "It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleadings and evidence, and a failure to do so is prejudicial." Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571.

"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." Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899.

"A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence, whether requested to do so or not." Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877. See, also, Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

"In order to require that an instruction be given, the theory must be supported by competent evidence. In the absence of competent evidence instruction upon it is not required nor proper." Southwell v. DeBoer, *supra.*

"The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured." Bowers v. Kugler, 140 Neb. 684, 1 N. W. 2d 299. See, also, Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711; Shields v. County of Buffalo, *supra.*

The only direct evidence as to the speed at which appellee was driving his truck is that of appellee himself for Mr. Coyle testified he never saw appellee's truck. Appellee testified that when he first saw the Coyle car as it was entering onto the surfaced portion of the highway he was about 50 to 60 feet west of the center of the Coyle lane and going between 35 and 40 miles an hour. This was fully within the maximum then provided by law. See § 39-7,108, R. R. S. 1943.

However, section 39-723, R. R. S. 1943, provides, insofar as here material, that: "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, * * *." See, also, subsections (1), (3), and (4) of § 39-7,108, R. R. S. 1943. And as stated in subsection (4): "* * * speed shall be de-

creased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care; * * *."

We said in Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing."

"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, *supra.*

The foregoing would be true as to the specification of speed as well as to any other specification of negligence claimed. See, Andersen v. Omaha & C. B. St. Ry. Co., 116 Neb. 487, 218 N. W. 135; Shields v. County of Buffalo, *supra;* Davidson v. Vast, 233 Iowa 534, 10 N. W. 2d 12; Haase v. Employers Mut. Liability Ins. Co., 250 Wis. 422, 27 N. W. 2d 468; Shockey v. Baker, 212 Ga. 106, 90 S. E. 2d 654. We think the rule stated in 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), § 6560, p. 596, is applicable here. It is as follows: "Although the evidence may be entirely circumstantial as to the rate of speed at which an automobile was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence. Circumstances connected with an accident may be sufficient to overcome direct evidence as to the speed of a motor vehicle."

Section 39-752, R. R. S. 1943, provides in part as follows: "The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public high-

way." However, we are not, in discussing this question, concerned with the negligence, if any, of Mr. Coyle for even if it existed it would not be imputable to appellant, a guest passenger in his car. See Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 N. W. 2d 466. As therein held: "The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her * * *."

As stated in Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102: "A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way."

And in Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701, we held: "A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption."

Bearing in mind these principles we turn to the evidence in the record relating thereto.

Appellee's truck was 28 feet in length with an axle load capacity of 18,000 pounds. Empty it weighed about 8,500 pounds. On the day involved it was carrying a load of about 11,000 pounds consisting of 11 head of cattle weighing about 1,000 pounds each. It had brakes on all four wheels, the back wheels carrying dual tires. These brakes were all in good condition and consisted of regular, emergency, and vacuum. If fully applied these vacuum brakes would cause all four wheels to slide and the tires thereon to skid.

Appellee testified that he first observed the Coyle car as it was leaving the lane and entering upon the surfaced part of the highway; that his truck was then some 50 to 60 feet west of the center of the lane if extended

across the highway; that he immediately applied his regular and vacuum brakes, causing the cattle in his truck to pile forward in the rack and push it forward against the cab, mashing it, and breaking the window therein; that he continued to observe the car as it traveled southeasterly across the paved surface at from 15 to 20 miles an hour; that when the car entered the south lane for eastbound traffic, in which he was driving, the left front of his truck came in contact with the right rear of the car; that his truck was then traveling at from 28 to 30 miles per hour; and that he stopped his truck in the south lane for eastbound traffic in a distance of about 28 to 30 feet from the point of impact, although there is evidence from which it could be found it traveled 78 feet before being stopped.

There are other important facts to be considered in connection with the foregoing. The point of impact was 90 feet east of the center of the Coyle lane, if extended across the highway, thus making the distance between where appellee first saw the Coyle car, and applied his brakes, and the point of impact between 140 and 150 feet. In this area there were no skid marks, thus indicating appellee did not apply his vacuum brakes at full strength at any time as he watched the Coyle car come across the highway up to the time his truck bumped into it. Appellee's testimony is to the effect that in this distance of 140 to 150 feet the speed of his truck was only reduced about 7 to 10 miles an hour, although he admits that traveling at from 35 to 40 miles an hour he could have stopped it within 50 to 60 feet if he had applied his brakes full strength. We think, from this evidence, the jury could properly have found that appellee was driving and continued to drive his truck much faster than 35 to 40 miles an hour, as he testified he was doing when he first observed the Coyle car, and faster than was reasonable and proper under the circumstances considering the traffic he observed.

This is further evidenced by the fact that the cattle

piled forward in the rack and caused it to move forward against the cab when appellee applied the brakes. Appellee testified that would be likely to happen only in case of an application of the brakes for a quick or an emergency stop. Certainly a jury could find that if he was only driving from 35 to 40 miles an hour when he first saw the Coyle car coming onto the highway that no quick or emergency stop was necessary.

We could discuss this matter further but that would serve no purpose. We think the evidence adduced was clearly sufficient to require this issue to be submitted and the trial court's failure to do so resulted in prejudicial error. It was not necessary for the jury to accept appellee's testimony as to his speed in view of all the circumstances disclosed by the evidence.

Appellant also contends the trial court prejudicially erred by submitting to the jury the question of whether or not appellee was confronted by a sudden emergency. By its instruction No. 13 the trial court advised the jury as follows: "You are instructed that in the event you find that defendant was confronted by a sudden emergency, not caused by him, which placed himself or the plaintiff in a position of peril, without sufficient time in which to determine with certainty the best course to pursue, defendant would not be held to the same coolness, accuracy of judgment or degree of care as is required of him under ordinary circumstances, or of one having ample opportunity for the full exercise of judgment, and would not be liable for injuries caused by his vehicle, provided he exercised ordinary or reasonable care or prudence, considering the stress of the circumstances, to avoid an accident."

"An 'emergency' is a sudden or unexpected happening or occasion calling for immediate action." Horton Motor Lines v. Currie, 92 F. 2d 164. See, also, Hilzer v. Farmers Irr. Dist., 156 Neb. 398, 56 N. W. 2d 457.

"In order to justify a resort to the defense of sudden emergency * * * there must be an absence of opportunity

for mature deliberation." Horton Motor Lines v. Currie, *supra*. See, also, Hilzer v. Farmers Irr. Dist., *supra*.

"The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it." Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491. See, also, Davis v. Dennert, *supra*.

Appellee observed the Coyle car entering upon the surfaced part of the highway and proceeding in a southeasterly direction at from 15 to 20 miles an hour. He had the opportunity to and did observe it at all times after he first saw it coming onto the highway. But appellee says he could not be sure that the Coyle car was going to enter the outer or driving lane in which he was traveling until the very last moment. Appellee had a right to assume, until he actually observed otherwise, that Coyle would first take the inner or passing lane for eastbound traffic and then look to see if any traffic from the west prevented his entering onto the driving lane before doing so. Consequently a jury could properly find that when Coyle failed to do so and proceeded directly onto the outer or driving lane in which appellee was driving that appellee was confronted with a sudden emergency. This would be a situation comparable to where a driver of a car suddenly enters onto a public highway from a private road or lane in front of a vehicle traveling thereon and fails to yield to it the right-of-way which the driver of the vehicle traveling on the public highway has the right to assume he would. We think the evidence adduced justified the submission of this issue.

Appellant contends the trial court also prejudicially erred by giving instruction No. 8 submitting the question of intervening cause because, as she claims, the evidence adduced did not justify the submission thereof.

But even assuming that the question should have been submitted, it is appellant's contention that the trial court, as a whole, failed to correctly or adequately inform the jury as to the law concerning intervening cause as it applies to the facts of this cause.

We said in Welstead v. Ryan Construction Co., 160 Neb. 87, 69 N. W. 2d 308, that: "It is error to submit issues upon which there is no evidence to sustain an affirmative finding." See, also, Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643.

"Actionable negligence exists when the injury or the loss is the proximate result thereof. The proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. An injury is not actionable if it would not have resulted from the alleged negligence but for the interposition of a new and independent cause. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. An efficient, intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it while the occasion is that which provides an opportunity for the causal agency to act." Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683. See, also, Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831.

"The causal connection is broken if between the defendant's negligent act and the plaintiff's injury 'there

has intervened the negligence of a third person who had full control of the situation and whose negilgence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.' Ladd v. New York, New Haven & Hartford Railroad, 193 Mass. 359, 363." Gordon v. Bedard, 265 Mass. 408, 164 N. E. 374. See, also, Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

"A tortfeasor is answerable for all the consequences that in the natural course of events flow from his unlawful acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer, or were the natural consequences of his original act." Hilligas v. Kuns, 86 Neb. 68, 124 N. W. 925, 26 L. R. A. N. S. 284. See, also, Paup v. American Telephone & Telegraph Co., 124 Neb. 550, 247 N. W. 411; 1 Cooley, Torts (4th ed.), § 50, p. 114.

In Kroeger v. Safranek, *supra,* we said: "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 disaster."

"An act done by another in normal response to fear or emotional disturbance to which the actor's negligent conduct is a substantial factor in subjecting the other is not a superseding cause of harm done by the other's act to himself or a third person." Restatement, Torts, § 444, p. 1191.

The evidence shows that after the Coyle car was hit it remained upright and continued east in the south lane for eastbound travel for a distance of some 100 to 150 feet when it left the highway by going over the shoulder to the south thereof; that about 275 feet further to the east it again came onto the highway and proceeded to cross it toward the north; and that as it did so it ran

head-on into the left side of a truck traveling thereon from the east to west. As a result of the second impact the truck that was hit ended up on its top some 400 to 500 feet east of the Coyle lane while the Coyle car remained upright. The car stopped on the north half of the surfaced part of the highway, facing mostly west but some north. It was between 30 and 45 feet east of the truck which was also on the surfaced portion of the highway facing south. Both Mr. Coyle and appellant were in the front seat of the car, appellant having been seriously injured.

From the evidence adduced we think a jury could find that the shock of the first impact caused Mr. Coyle to become semi-conscious and resulted in his losing control of himself; that because thereof he was neither able to shut off the motor nor touch the steering wheel to control the car but, if he did the latter, he was not able to exercise any judgment while doing so; and that the impact, which had sent the Coyle car out of control, was the proximate cause of its running into the side of the westbound truck. If the jury found such to be the facts then, of course, appellee would be liable for any injuries resulting to appellant therefrom if, in the first instance, the impact or accident was caused by any negligence on his part. There is, however, evidence from which a jury could find that Mr. Coyle remained conscious at all times, even up to and after the second impact; that he was able to get hold of the steering wheel of his car after it went out of control as a result of the first impact and control it; and that after he did so he drove it onto the highway. If the latter is found to be the situation and Mr. Coyle regained control of his car and drove it back onto the highway, then we think what happened after that was not a proximate result or consequence of the first impact but due entirely to Mr. Coyle's subsequent conduct. In view thereof we think the facts present a jury question on this issue.

As to the second part of this contention it is, of course,

true that: "The purpose of an instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired." Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. However, as stated in Buhrman v. Smollen, 164 Neb. 655, 83 N. W. 2d 386: "Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof."

"Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects." Johnson v. Nathan, 161 Neb. 399, 73 N. W. 2d 398.

We think these principles have application here. If appellant desired more detailed and specific instructions as to when an intervening cause is sufficient to breach the causal connection between the original negligence, if any, and the injury or when an intervening cause becomes a new and independent cause within the meaning of the instructions given, she should have requested same to be given. In the absence of such request we think the instructions given adequately and sufficiently state the principles here applicable on this issue.

Appellant also contends the trial judge prejudicially erred by interrogating appellee and by making comments relating thereto which had the effect of implying that the answers elicited by his questions were the truth. In view of our holding that a new trial is necessary we make no comment on what the trial court did since it will probably not happen on a retrial. However,

we think it would be well to state the principles applicable:

"We see no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist them to arrive at a correct conclusion on the questions of facts in issue." Leo v. State, 63 Neb. 723, 89 N. W. 303. See, also, Buhrman v. Smollen, *supra*.

However this right "* * * should be very sparingly exercised, and generally counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause." Bartley v. State, 55 Neb. 294, 75 N. W. 832. See, also, Omaha Brewing Assn. v. Bullnheimer, 58 Neb. 387, 78 N. W. 728.

However, "* * * the judge presiding at a trial must conduct it in a fair and impartial manner, he should refrain from making any unnecessary comments or remarks during the course of a trial which may tend to a result prejudicial to a litigant or are calculated to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial; * * *." 64 C. J., Trial, § 91, p. 90, and cited with approval in Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, and Styskal v. Brickey, *supra*. See, also, 88 C J. S., § 49, p. 124.

Appellant's further contention that the verdict is clearly wrong because it is not supported by sufficient evidence is without merit for certainly the record does not disclose a factual situation which entitles appellant to a judgment against appellee as a matter of law. There

is ample evidence, if the cause had been properly submitted, to sustain a finding by a jury that appellee was not negligent in the first instance and, if he was, that he had been relieved thereof by an intervening cause superseding such negligence. In either case a verdict for appellee would be proper and sustainable.

We have come to the conclusion that appellant is entitled to a new trial and that the judgment of the trial court overruling her motion therefor was in error. We therefore reverse the judgment of the trial court denying appellant a new trial and remand the cause to it with directions that appellant's motion for a new trial be sustained and that she be granted a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

UNIVERSAL C. I. T. CREDIT CORPORATION, A CORPORATION, APPELLEE, V. HANS VOGT, APPELLANT.
86 N. W. 2d 771

Filed December 13, 1957. No. 34266.

1. **Trial: Appeal and Error.** Findings of a court in a law action in which the jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong.
2. **Courts.** Comity is neither a matter of absolute obligation, nor mere courtesy or good will, but is the doctrine under which contracts made, rights acquired, and obligations incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition of such right or title.
3. **Sales.** Apart from failure to comply with local statutes in regard to filing or recording conditional sales contracts, it is not generally regarded as contrary to public policy to enforce the title reserved by the vendor in a conditional sales contract, valid by the law of another state in which the contract was made and the property was then located, as against purchasers in good faith from, or creditors of, the vendee, whose rights attached after the property had been removed to the state of the forum.
4. ———. Whether a sale of a chattel conditioned upon the re-

tention of title by the vendor pending payment of the purchase price is legally effective to keep title in the vendor depends upon the law of the place where the chattel was at the time of the sale. So the requirements of acknowledgment and registration applicable are those of the state of situs of the chattel.

5. **Automobiles: Sales.** Compliance with the certificate of title and registration laws of the state where the contract was made and the motor vehicle was then located, by notation of the lien of a conditional sales contract on the certificate of title, generally gives such lien priority over the rights of third persons acquired in another state after removal of the property thereto.
6. **Executions.** A creditor, by the levy of an execution, acquires no greater rights in the property levied upon than the judgment debtor had at the time of the seizure.
7. **Judicial Sales.** The doctrine of caveat emptor applies to all judicial sales in this state, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. He is bound to examine the title and not rely upon statements made by the officer conducting the sale as to its condition.

APPEAL from the district court for Washington County: JAMES T. ENGLISH, JUDGE. *Affirmed.*

O'Hanlon & O'Hanlon, for appellant.

Mecham, Stoehr, Rickerson & Sodoro, for appellee.

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

CHAPPELL, J.

Plaintiff, Universal C. I. T. Credit Corporation, brought this action on October 1, 1956, in the district court for Washington County to replevin a 1956 Mercury Tudor Hardtop Monterey automobile from defendant, Hans Vogt. Plaintiff claimed the right of property in and possession of the car as a vendor by assignment for value of a conditional sales contract duly executed, filed, and recorded in Oklahoma where the transaction was consummated, with the lien thereof noted on the certificate of title issued in Oklahoma to the vendee, Johann Leuritsen, who there obtained a registration certificate with the

title number and numbered license plates designated thereon, and defendant had constructive and actual notice of plaintiff's rights. Defendant, a judgment creditor of Johann Leuritsen, claimed the right of property in and possession of the car as a bona fide purchaser thereof at an execution sale by the sheriff of Washington County, Nebraska, on October 1, 1956, and the issuance of a Nebraska certificate of title to defendant on that date, free of all liens.

A jury was waived, and upon trial to the court it rendered judgment, finding and adjudging that plaintiff had the right of property in and possession of the car which had in appropriate proceedings been duly returned to plaintiff. It also awarded plaintiff one cent damages, and costs. Defendant's motion for new trial was overruled and he appealed, assigning that the judgment was contrary to the evidence and the law. We do not sustain the assignment. In that connection, it is elementary that such findings have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. Scottsbluff Nat. Bank v. First State Bank, 162 Neb. 475, 76 N. W. 2d 445.

The evidence was either stipulated or without dispute. On May 7, 1956, Leuritsen purchased the car as new from a dealer, Roy Jackson Motor Co. of Antlers, Oklahoma, on a duly executed, valid conditional sales contract, which was thereupon assigned to plaintiff for a valuable consideration by the dealer. A duly certified copy of the original conditional sales contract, which had been filed and recorded on May 10, 1956, in the office of the county clerk of Choctaw County, Oklahoma, where Leuritsen then allegedly resided and the transaction was consummated, was received in evidence. It described the car by make, year, model, and motor number. It designated the vendee or purchaser as "Johann Leuritsen Gen. Del. Hugo, Okla.," and the seller as "Roy Jackson Motor Co. Antlers, Okla." It recited that there had been a "Cash Down Payment" of "$750.00 * * *

leaving a time balance of $2709.60," which Leuritsen "promises to pay at the office of" plaintiff's Shawnee, Oklahoma, branch "in 30 successive monthly instalments, each in the amount of $90.32 * * * All payable the same date of each month * * * The first instalment becomes due * * * June 15, 1956 * * * Title to the car is retained by" plaintiff "until such balance is fully paid * * *." Leuritsen agreed "to keep the car free from liens" and that upon default of payments aforesaid or other conditions unimportant here, plaintiff could repossess the car as owner and retain all payments as compensation for use of the car while in Leuritsen's possession. The installments for June, July, and August, totalling $270.96, were paid by Leuritsen to plaintiff's Shawnee, Oklahoma, branch office, but he failed to pay the installment due September 15, 1956.

On May 7, 1956, when Leuritsen purchased the car, he "made an application in writing showing that he was a resident of Hugo, Oklahoma and had lived there for six months; * * *." His "Application for Oklahoma Certificate of Title" to the car, duly signed, acknowledged, and filed by him on May 7, 1956, again correctly described the car and recited that his address was "City Hugo, Okla. County Choctaw" and that "This motor vehicle is subject to a lien: Amount $2709.60 in favor of Roy Jackson Motor Co. Address Antlers, Okla.," the seller, who was a dealer. It also recited "Title No. E868448 Motor No. 56SL 93517M."

Leuritsen's "State of Oklahoma Certificate of Title of Vehicle," duly issued and filed on May 7, 1956, as "Original Title No. E868448," again correctly described the car, with "Tag Number * * * 1956 58 1597." It recited that the certificate of title was "Issued to Johann Leuritsen * * * Hugo * * * Oklahoma" and certified "that according to the Records of the Oklahoma Tax Commission," he was "the owner of the vehicle described in the margin hereof and that the said vehicle is subject to a Lien lien in favor of Roy Jackson Motor Co. Address

Antlers, Okla in the amount of $2709.60 Dated 5-7-56."

Leuritsen's "Application for Automobile Registration State of Oklahoma Official Registration Certificate" duly subscribed, sworn to, and filed May 7, 1956, recited "Name of Present Owner Johann Leuritsen * * * P/O. (Home Address) Hugo * * * State Okla * * * If new, date purchased 5-7-56." It again correctly described the car and noted thereon "Original Title No. E868448" with "1956 License No. 58-1597."

Thereupon and thereafter, Oklahoma license plates bearing that license number and the registration certificate aforesaid were conspicuously placed upon and in the car. However, some time subsequently, Leuritsen came to Nebraska with the car, and during the period from July 15, 1956, to and beyond October 1, 1956, he lived and worked part-time in Omaha but visited his wife and children who lived in Kennard, Washington County, Nebraska, where some of his children attended school during 1956. While in Omaha, Leuritsen applied for and obtained a wheel tax tag which was fastened to his Oklahoma license plates. Some time after his return to Nebraska, plaintiff's Oklahoma branch office, upon learning that Leuritsen was somewhere in the Omaha area, sent its Omaha office an action request for collection of installments on the car. However, plaintiff looked for Leuritsen there without success, and he actually remitted his July and August installments directly to plaintiff's Shawnee, Oklahoma, branch office. The installment due September 15, 1956, was in default on that date and was never paid.

On April 12, 1955, defendant purportedly obtained a default judgment in the district court for Washington County against Leuritsen and Gladys, his wife, respectively named therein as Johann L. Lauritsen and Gladys V. Lauritsen, for $3,210. In doing so, defendant obtained personal service upon Gladys Lauritsen, and upon Johann Lauritsen by leaving a copy of the summons at his usual place of residence in Kennard, Washington

County. A writ of execution thereon issued September 5, 1956, and on September 13, 1956, the sheriff of Washington County, Nebraska, levied same upon the car involved at Kennard in Washington County. The car was thereafter purchased by defendant at the sheriff's sale on October 1, 1956. On that date defendant also obtained a Nebraska certificate of title without noting any liens thereon, and obtained a Nebraska registration certificate. At the time of levy and sale upon execution, the car had upon it the 1956 Oklahoma license plates, No. 58-1597, and had in it the Oklahoma registration certificate referring to the Oklahoma "Original Title No. E868448" which, as heretofore observed, recited that the car was subject to a lien for $2,709.60. Further, it was stipulated that after the levy and prior to the sheriff's sale, defendant and his attorney both "had actual notice of a claim by the plaintiff by reason of a conditional sales contract" which was in default on September 15, 1956, and that immediately after the sale October 1, 1956, "the plaintiff, through its attorney, made a demand upon the defendant, through his attorney, for recognition of the plaintiff's rights under its conditional sales contract but the defendant then and there took the position that the plaintiff had no right, title or interest in" the automobile, and thereupon this action was filed.

The Washington County personal property tax records for the village of Kennard show that from 1950 to 1954, inclusive, joint returns were made and signed by Johann Leuritsen for himself and wife. Therein he claimed resident exemption from payment of poll tax as a volunteer fireman. However, the 1955 tax return was made and signed by Gladys Leuritsen without mentioning her husband. Also, the 1956 return was made and signed by her, but therein she claimed resident exemption from payment of poll tax by her husband as a volunteer fireman. In that connection, defendant adduced evidence that Johann Leuritsen "has done trucking and been

in other business. He has had places scattered all over the country."

In the light of the evidence heretofore recited, we are confronted with the question of whether or not the doctrine of comity is applicable and controlling. We conclude that it is. In Green Finance Co. v. Becker, 151 Neb. 479, 37 N. W. 2d 794, this court held: "Comity is neither a matter of absolute obligation or mere courtesy or good will, but is the doctrine under which contracts made, rights acquired, and obligations incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition of such right or title."

As stated in 11 Am. Jur., Conflict of Laws, § 77, p. 362, citing authorities: "Ordinarily, the validity and effect of a conditional sale, as regards both the parties and third persons, are governed by the law of the state in which the contract was made and the property was then situated." Also, as stated in § 78, p. 363, citing authorities: "Apart from failure to comply with the local statutes in regard to filing or recording conditional sales contracts, it is not generally regarded as contrary to public policy to enforce the title reserved by the vendor in a conditional sales contract, valid by the law of another state in which the contract was made and the property was then located, as against purchasers in good faith from, or creditors of, the vendee, whose rights attached after the property had been removed to the state of the forum." Further, as stated in the 1957 Cumulative Supplement thereto, at page 55, citing Annotation, 13 A. L. R. 2d 1326, and other authorities: "A number of recent cases have considered whether or not the issuance of a statutory certificate of title to a motor vehicle has any effect upon the general rule that a conditional sale contract properly executed and recorded under the laws of the state where the contract was made and the property was then located has priority over the rights of third persons acquired in another state

after removal of the property thereto. No clear-cut rules with respect to this question can be said to have crystallized, but in a majority of the decisions the rights of the original lienholder have been protected."

Turning to Annotation, 13 A. L. R. 2d 1326, we find the same statement supported by authorities, some of which conclude that compliance with the certificate of title and registration act under the laws of the state where the contract was made and the motor vehicle was then located, by notation of the lien of a chattel mortgage or conditional sales contract on the certificate of title, generally gives such lien priority over the rights of third persons acquired in another state after removal of the property thereto. See, also, Annotation, 13 A. L. R. 2d 1353.

In Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240, this court held: "Ordinarily, foreign law or valid rights based thereon will be given effect or enforced under the doctrine of comity unless opposed to the settled public policy of the forum." Therein, we also concluded that bona fide contracts such as that at bar, which are valid and enforceable in the state where made and to be performed, do not offend the public policy of this forum. The conclusion is applicable here in the absence of any statute or holding requiring the application of a contrary rule.

As said in Restatement, Conflict of Laws, § 272, p. 359: "Whether a conditional sale is effective to enable the vendor to retain title is determined by the law of the state where the chattel is at the time of the sale." Also, as stated in § 273, p. 360: "If, after a valid conditional sale, the chattel is taken into another state, the vendor's title to the chattel will be recognized in the second state."

In Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501, 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 Certificate of Title Act eliminates the practice of filing and recording chattel mortgages on motor vehicles in the chattel mortgage records, and substitutes the recording of such upon the certificate of title itself.

"One holding a lien upon a motor vehicle must, insofar as he can reasonably do so, protect himself and others thereafter dealing in good faith, by complying and requiring compliance with applicable laws concerning certificates of title to motor vehicles."

In connection with the last rule aforesaid, defendant argued that when plaintiff consented to removal of the car to Nebraska, or knew that Leuritsen was in the Omaha area and did look for him there, it had the duty to protect its priority by filing its conditional sales contract in Nebraska or by obtaining a certificate of title to the car for Leuritsen in Nebraska with its lien noted thereon. Defendant's contention has no merit. In that regard, there is no evidence which would sustain a conclusion that plaintiff consented to removal of the car to Nebraska, but whether or not it did is of little importance under the circumstances presented here, because plaintiff and its assignor performed their duty by recording their contract and noting the lien thereof on the certificate of title with the title issued and filed in conformity with the laws of Oklahoma.

As concluded in Securities Credit Corp. v. Pindell, *supra*, section 60-110, R. R. S. 1943, of the certificate of title act, has eliminated the practice of filing and recording chattel mortgages and conditional sales contracts on motor vehicles, under sections 36-207, 36-208, 36-301, 36-302, and 36-303, R. R. S. 1943, but instead requires notation of the lien thereof upon the certificate of title. Therefore, plaintiff's contract could not have been filed and recorded as such anywhere in Nebraska in order to give it priority. However, it was lawfully filed and recorded in Oklahoma, and plaintiff's lien was also so noted

on Leuritsen's certificate of title obtained by him through the dealer, plaintiff's assignor, which was the key to the whole situation.

In that connection, section 60-106, R. S. Supp., 1955, provides in part: "(1) Application for a certificate of title shall be made upon a form prescribed by section 60-114, and shall be sworn to before a notary public or other officer empowered to administer oaths. (2) Such application shall be filed with the county clerk of the county in which the applicant resides, if the applicant is a resident of this state or, if a nonresident, in the county in which the transaction is consummated, * * *. (3) * * * If a certificate of title has not previously been issued for such motor vehicle in this state, such application, unless otherwise provided for in this act, shall be accompanied by * * * a certificate of title * * *. * * * (5) In the case of the sale of a motor vehicle by a dealer to a general purchaser or user, the certificate of title shall be obtained in the name of the purchaser by the dealer upon application signed by the purchaser, and in all other cases such certificates shall be obtained by the purchasers."

Since the car involved was titled in Oklahoma with plaintiff's lien noted thereon, its conditional sales contract could not have been filed and recorded in Nebraska until and unless a Nebraska certificate of title thereto had been obtained by Leuritsen, the purchaser, upon which plaintiff's lien could be noted. It appears then that plaintiff had no right or duty to obtain a Nebraska certificate of title for Leuritsen after learning that he was somewhere in the Omaha area and plaintiff looked for him without success. Of course, if plaintiff could have obtained a certificate of title for Leuritsen in Nebraska, or if Leuritsen himself had done so, the lien of plaintiff would of necessity have been noted thereon and defendant, as a judgment creditor, would have neither gained nor lost anything thereby.

Defendant also argued that Leuritsen never was a

resident of Oklahoma but always was a resident of Nebraska, and that plaintiff and its assignor were negligent in failing to discover that fact and lost priority of its lien when Leuritsen did not obtain a Nebraska certificate of title noting its lien thereon. The contention has no merit. In that connection, the record discloses that four times in writing, two of them under oath, Leuritsen represented to the dealer, to plaintiff, and to Oklahoma officials that he was a resident of Hugo, Oklahoma, when and where the transaction was consummated. As against plaintiff, Leuritsen would be estopped to claim otherwise, and defendant, as a judgment creditor at judicial sale, could acquire no greater right or interest than Leuritsen had, which was the certificate of title with plaintiff's lien noted thereon.

Concededly, Leuritsen had done trucking and had been in other business in places scattered all over the country. The mere fact that his wife and children then lived in Kennard and he visited them there at times did not make him a resident thereof when the transaction was consummated. Residence of a party in a community is determined by the intention of such party, and Leuritsen was not prevented from having a residence separate and apart from his family. Wray v. Wray, 149 Neb. 376, 31 N. W. 2d 228. Under the circumstances presented here, plaintiff had a right to assume that Leuritsen had a personal residence in Hugo, Oklahoma, at the time the transaction was consummated, and there is evidence to support the conclusion that he was such a resident. Sheffield v. Walker, 231 N. C. 556, 58 S. E. 2d 356.

In that connection, section 60-305, R. R. S. 1943, provides in part: "The provisions of law relative to registration and the display of registration numbers shall not to be construed to apply to any motor vehicle owned by a nonresident of this state * * * if the owner thereof shall have complied with the provisions of the law of the state of which he is a resident, relative to the

registration thereof and the display of registration number plates thereon, and shall conspicuously display his registration number plates as required by the law of this state."

In that regard also, section 60-305.01, R. R. S. 1943, provides: "A nonresident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered *for the current calendar year* in the state, country, or other place of which the owner is a resident, and which at all times, when operated in this state, has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner, may operate or permit the operation of such vehicle within the state without registering such vehicle or paying any fees to this state." (Italics supplied.) Such section was amended by Laws 1957, c. 264, § 1, p. 978, effective September 20, 1957, to include an exception, but it has no application here. It thus appears that Leuritsen was not required to obtain a Nebraska title and get a registration certificate and license plates in Nebraska during 1956.

In North American Acceptance Corp. v. Meeks, 146 Neb. 546, 20 N. W. 2d 504, this court held, citing 2 Beale, The Conflict of Laws, § 272.2, p. 1001, § 273.1, p. 1003, and Restatement, Conflict of Laws, § 272, p. 359, and § 273, p. 360: "Whether a sale of a chattel conditioned on the retention of title by the vendor is legally effective to keep title in the vendor depends upon the law of the place where the chattel was at the time of the sale. So the requirements of acknowledgment and registration applicable are those of the state of situs of the chattel.

"If, after a valid conditional sale in another state, the chattel is taken into this state, the vendor's title to the chattel will be recognized in this state."

At the beginning of travel by automobile, the system of filing and recording chattel mortgages and conditional sales contracts was simple and generally effective.

However, as time progressed and the automobile became a giant commercial enterprise with transportation of automobiles by millions of purchasers and users for pleasure and business from county to county and from state to state, the certificate of title system with notation of liens thereon and registration upon presentation of such certificate has generally been adopted by most of the states in order more effectively to protect owners of motor vehicles, lienholders, and the public. That has been done so that in cases such as that at bar, wherein the certificate of title, registration, and license plate laws of another state have been complied with, the vendor of a conditional sales contract which retains title pending payment in full for the motor vehicle with the lien thereof noted on the certificate of title, will not have the burden and expense of keeping his eyes upon or following the movements of the vehicle in order to ascertain into what state or into what county in any such state or states the vehicle has been taken.

In that connection, also, this court has held that: "A creditor, by the levy of an execution, acquires no greater rights in the property levied upon, than the judgment debtor had at the time of the seizure." Thies v. Weible, 126 Neb. 720, 254 N. W. 420.

Herein Leuritsen had a certificate of title subject to the lien of plaintiff's conditional sales contract duly noted thereon, which retained title in the vendor pending payment in full for the car. That was the only lawful method by which plaintiff could have preserved priority of its lien under the circumstances presented in this case, and it must be assumed that defendant knew the provisions of our certificate of title and registration laws. Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913.

In that connection, we have also held that: "The doctrine of caveat emptor applies to all judicial sales in this state, subject to the qualification that the purchaser

is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where he is free from negligence. He is bound to examine the title and not rely upon statements made by the officer conducting the sale as to its condition." Fisher v. Minor, 159 Neb. 247, 66 N. W. 2d 557.

As recently as Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361, we held that: "A certificate of title of a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle.

"An innocent purchaser is one who buys property for a present valuable consideration without knowledge sufficient to charge him in law with notice of any infirmity in the title of the seller.

"The general rule is that where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment."

In that connection, defendant claimed the benefit of the last rule aforesaid, but he is not entitled thereto since it could not be said that he acted in good faith without knowledge of the facts, and thereby altered his position to his detriment.

Under the circumstances heretofore recited in this case, we conclude that defendant had timely constructive notice of plaintiff's prior rights under its conditional sales contract, and should not prevail.

There is also another very good reason why defendant should not recover in this case. Concededly, defendant and his attorney had timely actual notice of plaintiff's rights under its conditional sales contract. In 7 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 4591, p. 483, citing authorities, it is said: "It has also been pointed out that the purpose of recording a conditional sales contract is to give constructive notice,

and therefore the purpose of the recording statutes is fulfilled if a person has actual notice or knowledge of the existence of the contract of sale." See, also, 47 Am. Jur., Sales, § 919, p. 127.

As early as McCormick v. Stevenson, 13 Neb. 70, 12 N. W. 828, this court concluded that a contract, providing that the title to personal property shall not pass to the vendee until the purchase money is paid, is valid between the parties, and that a party purchasing with actual notice that the debtor is not the owner of the property is not protected. See, also, Peterson v. Tufts, 34 Neb. 8, 51 N. W. 297, wherein it was concluded that if attaching creditors or their attorneys had timely actual notice of the vendor's prior rights under a conditional sales contract which retained title pending payment of the balance due, such notice would be effectual to protect such vendor's valid rights.

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.

LOWELL RAHE, BY EMMA RAHE, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. ROGER LEWIEN, APPELLEE.

86 N. W. 2d 610

Filed December 13, 1957. No. 34282.

Automobiles: Negligence. The record in this case is examined and the rules stated in Werner v. Grabenstein, *ante* p. 231, 85 N. W. 2d 297, are followed.

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

Ernest A. Hubka, for appellant.

John E. Dougherty, for appellee.

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

SIMMONS, C. J.

This is an action for damages resulting from an automobile accident. Plaintiff was a guest in a car driven by the defendant. At the close of plaintiff's case-in-chief the trial court, on motion of the defendant, dismissed plaintiff's action.

Plaintiff appeals.

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

The sole question here is whether or not there was evidence of gross negligence so as to take the case to the jury.

There is evidence from which a jury could have found the following facts to be true:

The accident happened on a north and south county road south of DeWitt, Nebraska. The road was improved with crushed rock on the traveled portion. It was "a little rough." Coming from the south and going north, as did the parties, there were no traffic warning signs save a conventional railroad crossing sign. The road was in a depression or valley and then came to a rise in the road toward a hill on which a railroad right-of-way existed. A double track, consisting of a main track and sidetrack, crossed the road in a southwest-to-northeast direction. The roadbed rose abruptly in elevation some 4 or 5 feet as it approached the railroad track. At this point the road made a turn to the west of 6 or 8 feet in crossing the tracks, then turned back to the east, and then went north again. Planks were placed between the rails on the traveled portion of the crossing. They did not extend to the east so as to cover the full area of the roadbed had it continued in a straight line. Beyond the tracks the road dropped again and proceeded north about 100 feet to a bridge across a stream. On approaching the railroad crossing from the

south the road surface of the crossing where the rails are cannot be seen, nor can what is immediately beyond to the north be seen.

The accident happened on a midafternoon. The sky was clear and the road was dry. Plaintiff and defendant drove south from DeWitt 2 miles, then turned west a mile, then started back north on the 2-mile return trip to DeWitt. On this south-to-north trip defendant accelerated the speed of his car to 65 to 70 miles per hour. About half a mile from the railroad crossing defendant's car swerved in the rocks and plaintiff urged the defendant to slow down, "* * * you might upset." Defendant proceeded and when less than a quarter of a mile from the railroad crossing he was again warned to slow down, "* * * you're going to miss the jog on the track." He was then going 65 to 70 miles per hour. He slowed down little, if any.

Traveling at a speed of 65 miles per hour, defendant drove his car upon, what was to him, the blind crossing. The right wheels of his car missed the planks and hit the rails, causing a blowout of the tires. The car then went across the rails, down the road in an irregular course, hit the right bannister of the bridge, went over the side of the bridge, and fell into the stream bed. Plaintiff was seriously injured.

The recent case of Werner v. Grabenstein, *ante* p. 231, 85 N. W. 2d 297, was factually quite similar to the instant case. We there reviewed our decisions and restated the rules applicable to guest passenger cases. We see no reason to repeat what was held there.

Applying the rules there stated, we conclude that plaintiff's evidence presented a factual situation which, if believed by the jury, would sustain a finding of gross negligence of the defendant.

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

REVERSED AND REMANDED.

FRANK J. STRNAD, APPELLANT, V. HERMAN P. MAHR, APPELLEE.
86 N. W. 2d 784

Filed December 20, 1957. No. 34190.

1. **Negligence.** Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.
2. **Negligence: Trial.** The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.
3. ———: ———. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence.
4. **Trial: Appeal and Error.** The court should submit to the jury only such issues as find some support in the evidence, and where an issue is submitted without support in the evidence which is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded.*

John J. Lawler, for appellant.

Fraser, Crofoot, Wenstrand, Stryker & Marshall, for appellee.

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

CHAPPELL, J.

Plaintiff, Frank J. Strnad, brought this action against defendant, Herman P. Mahr, seeking to recover damages to plaintiff's car and to recover for loss of the services of his wife together with damages resulting from her personal injuries, all of which were alleged to have been proximately caused by negligence of defendant in backing his car out from the curb into plaintiff's car

while same was being operated by his wife, Helen J. Strnad.

Defendant, for answer, admitted that his car, driven by him, and plaintiff's car, driven by plaintiff's wife, collided at the time and place alleged by plaintiff, but denied that defendant was guilty of any negligence, and alleged that the collision was unavoidable by him and that the sole proximate cause thereof was the contributory negligence of plaintiff's wife which was more than slight.

Upon trial of the issues to a jury, verdict was rendered finding for defendant, and judgment was rendered thereon, with costs taxed to plaintiff. Thereafter, plaintiff's motion for new trial was overruled and he appealed, assigning, insofar as important here, that the trial court erred prejudicially in submitting the issue of alleged contributory negligence and the theory of comparative negligence to the jury. We sustain the assignment.

In that connection, this court has held: "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.

"The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.

"Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence." Bay v. Robertson, 156 Neb. 498, 56 N. W. 2d 731.

Also, in Fries v. Goldsby, 163 Neb. 424, 80 N. W. 2d 171, we reaffirmed the last rule above stated and held: "The court should submit to the jury only such issues

as find some support in the evidence, and where an issue is submitted without support in the evidence which is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed."

Further, in the last-cited opinion, we said: "Also, as held in Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A. L. R. 642: 'The operator of a motor vehicle in backing the same onto a street or highway must look backward, not only before he begins his operation, but also while he is in the act of backing, and must give a signal of his intention to back when a reasonable necessity for it exists, in order that he may not collide with or injure those lawfully using such street or highway.' See, also, Annotation, 67 A. L. R. 655; Chew v. Coffin, 144 Neb. 170, 12 N. W. 2d 839.

"In Annotation, 29 A. L. R. 2d 112, it is said, citing many authorities from this and other jurisdictions: 'In cases dealing with injury or damage resulting from the movement of a motor vehicle which had been parked at the curb of a street * * * the courts have concurred in recognizing that the operator of such a parked car is under a duty of yielding the right of way in the travelled portion of the street * * * to * * * other motor vehicles which are moving thereon at the time, and that before moving into traffic the operator of the parked car must exercise reasonable care to look for other users of the street, and must refrain from moving his own vehicle until he ascertains that such a movement is consonant with the safety of others.'

"Also, as held in Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507: 'A user of the highway may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption.' "

In Annotation, 29 A. L. R. 2d, p. 145, it is said: "It

is implicit in the cases involving collisions between passing automobiles and motor vehicles moving into the line of traffic from parking spaces at the side of the road that the passing motorist is under a general duty of keeping a reasonable lookout ahead for other vehicles and to keep his car under reasonable control so as to be able to avoid collision with other vehicles which may move into the highway in the exercise of reasonable care." See, also, page 151 of the same annotation.

As held in Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701: "A driver of a motor vehicle should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care.

" 'Reasonable control' by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due care; but 'complete control' such as will only prevent a collision by anticipation of negligence or illegal disregard of traffic regulations, in absence of notice, warning, or knowledge, is not required by the laws of Nebraska."

As held in Andelt v. County of Seward, 157 Neb. 527, 60 N. W. 2d 604: " 'Where a driver of an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.' Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. We there applied the rule in a case where a plaintiff speeded up her car in an attempt to avoid a collision. It was contended that her act in that regard was negligent. We stated the above rule and further held: 'All the law requires is that one conduct himself as an ordinary, careful and prudent person would have done under similar circumstances, and if he does that he is not held to

be negligent, even though he committed an error of judgment. Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689.'"

Also, in Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689, this court said: "The law is quite well settled that, where one is confronted suddenly with an emergency and is required to act quickly, he is not necessarily negligent if he pursues a course which mature reflection or deliberate judgment might prove to be wrong. The law does not require under such circumstances that no mistakes should be made. All it requires is that one demean himself as an ordinary, careful and prudent person would have done, under like circumstances, and if he does that, he is not held to be negligent, even though he committed an error in judgment. Wilson v. Roach, 101 Okla. 30. Neither is a person, under such circumstances, required to exercise the same degree of care and circumspection a prudent person would have exercised where no danger is present. Frish v. Swift & Co., 97 Neb. 707. It has also been held that where two alternatives are presented to a traveler on a highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence for taking either. Skene v. Graham, 114 Me. 229."

In the light of such rules, we have examined the record to determine whether or not there was any competent evidence from which it could have been reasonably concluded that plaintiff's driver was guilty of any contributory negligence which proximately contributed to or caused the accident and alleged damages complained of by plaintiff. We conclude that there was not.

In that connection, the trial court substantially submitted to the jury defendant's allegations that plaintiff's wife was guilty of contributory negligence as follows: (1) In failing to honk her horn or warn defendant of

the presence of plaintiff's car; (2) in failing to stop in order to avoid colliding with defendant's car when she knew the presence and location thereof at the time and place; (3) in failing to swerve or make use of the instrumentalities within her control; and (4) in failing to turn out around defendant's car to avoid collision therewith. There was no allegation that plaintiff's wife failed to keep a proper lookout or was driving at an unlawful or excessive speed.

Insofar as important here, the record discloses the following: The accident occurred on July 11, 1955, at about 2:30 p. m. It was a hot, sunny afternoon. Plaintiff's wife was driving plaintiff's 1946 maroon Mercury coach. Prior to the accident she had driven north on Seventeenth Street to the Medical Arts Building in Omaha where she stopped in the east lane at a bus and cab station and let her oldest son out. Seventeenth Street was a traffic-light-controlled, four-lane, one-way street for north-bound traffic. She then drove on north and crossed the intersection at Seventeenth and Dodge Streets with the green light. Shortly thereafter, she was able to cross over and drive north at 10 or 15 miles an hour in the second lane from the west on Seventeenth Street. She intended to turn left at the intersection of Seventeenth Street and Capitol Avenue and drive west up the very steep grade on Capitol Avenue. As she reached the intersection, she held out her arm to indicate that she was about to turn to the left. Thus, having the green light for northbound traffic, she entered that intersection and stopped near the center thereof to let a car pass on her left and proceed on toward the north. After that car had passed her, plaintiff's wife shifted into low gear and turned left across the west lane of Seventeenth Street to the west pedestrian's crosswalk running north and south. A lady and little boy were crossing that walk toward the north, so plaintiff's wife hesitated momentarily to permit them to cross. She then noticed defendant's car, which was admittedly

a 1951 brown two-door Ford, 16.4 feet long, parked diagonally, headed in a northwest direction in the first parking space on the north side of Capitol Avenue about 25 feet west of the west curb line of Seventeenth Street.

Capitol Avenue, running east and west, was a two-way street, wide enough for cars to park diagonally on both the north and south sides thereof, as they were parked at that time, yet there was enough room for a least three cars to proceed thereon between the parked cars. When plaintiff's wife first saw defendant's car, it was standing parked at the curb, so she proceeded west, still in low gear, at about 5 miles an hour, up the steep grade of Capitol Avenue in the north lane for westbound traffic, with the right side of plaintiff's car about 18 or 20 feet south of the north curb. No other cars were travelling east or west on Capitol Avenue at that time, although there was a car double-parked on the south side of the street, near the crest of the hill, in about the middle of the block. The driver of that car was sitting and waiting for a space to park his car if any should be vacated. He testified that he saw the accident and said he thought plaintiff's wife was driving about 10 or 12 miles an hour as she proceeded west from Seventeenth Street at a slight angle toward the northwest.

Be that as it may, when plaintiff's wife got within about 12 feet from defendant's car, she saw defendant start to back his car out fast down the incline, without giving any signal or warning or braking his car, so she stepped down hard on her brakes and swerved left with no time to honk her horn, whereupon about the center of the back end of defendant's car collided with the right front light, fender, and wheel of plaintiff's car, allegedly damaging same and injuring the head and neck of plaintiff's wife. Thereafter, both cars stopped near each other, and defendant got out, saying to plaintiff's wife: " 'Where in the hell did you come from? I just looked across the street and the light

was red' " meaning that it was red against traffic going west across and from Seventeenth Street. Defendant testified that he had no recollection of making such statement and didn't believe that he did, although he might have done so.

Defendant admittedly did not honk his horn or give any signal that he was going to back out. Also, he admitted that he never braked his car and never even saw plaintiff's car until after the impact. In that connection, he testified that he looked over his right shoulder and saw that the traffic light on Capitol Avenue was red against east and west traffic, then he backed out a foot or foot and one-half, and hesitated, then looked over his left shoulder, and seeing no car, he backed slowly out, 3 or 4 feet more at 2 or 3 miles an hour, whereupon the collision occurred. Defendant's manner of backing out and the distance he did so were corroborated in some respects by the eyewitness heretofore mentioned. However, in a deposition previously taken, defendant admitted that the front of his car was out 6 or 8 feet from the curb at the time of the impact; which corresponded with the version of that fact by plaintiff's wife.

In the light of the foregoing evidence, we cannot discover that plaintiff's wife was guilty of any contributory negligence proximately contributing to or causing the accident. She was in a proper, lawful lane of traffic where she had the right-of-way. She was not driving at an unreasonable or excessive rate of speed, and no contention was made otherwise. She was keeping a proper lookout, and no contention was made otherwise. When defendant backed out just 12 feet from plaintiff's car, plaintiff's wife was confronted with an emergency of which she alone was entitled to the benefit. In that situation, she had a right to assume, unless and until she had warning, notice, or knowledge to the contrary, that defendant would use the ordinary care required in backing out from the curb into her path, and until she

had such warning, notice, or knowledge, she was entitled to govern her actions in accordance with such assumption. At the speed the cars were approaching each other, it could not be reasonably concluded that she had any time or opportunity to do more than she did to avoid the collision.

For reasons heretofore stated, we conclude that the trial court erred prejudicially in submitting the issue of alleged contributory negligence of plaintiff's wife and the theory of comparative negligence to the jury. Therefore, the judgment should be and hereby is reversed and the cause is remanded for new trial. All costs are taxed to defendant.

REVERSED AND REMANDED.

MILDRED B. KROEGER, ADMINISTRATRIX OF THE ESTATE OF RUSSELL K. KROEGER, DECEASED, APPELLEE, V. KARL SAFRANEK, APPELLANT, IMPLEADED WITH PRUCKA TRANSPORTATION COMPANY, INC., APPELLEE.
87 N. W. 2d 221.

Filed December 20, 1957. No. 34235.

1. **Trial: Evidence.** To justify the overturning of a verdict supported by direct testimony on the ground that it is in conflict with natural laws or some established principle of mathematics, mechanics, physics, or the like, the indisputable physical facts must demonstrate beyond question that the supporting evidence is false and that the verdict is in fact without evidentiary support.
2. ———: ———. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury.
3. **Trial.** A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence. A litigant, however, is not entitled to have repetitious allegations of the same act of negligence submitted to the jury.
4. **Trial: Appeal and Error.** When an instruction correctly states the law and a litigant does not consider it sufficiently specific as it relates to the evidence adduced, it is the duty of counsel

to request an instruction that will supply the omission, and if he fails to do so the judgment will not ordinarily be reversed for such claimed defects.

5. **Husband and Wife: Damages.** The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the pecuniary loss suffered in the death of the head of a family. Ordinarily the value of ordinary services to the wife is left to the good judgment and common sense of the jury under the circumstances of each case.
6. **New Trial.** To justify the granting of a new trial on the ground that the verdict is excessive, that fact must be plain and evident.
7. **Trial: Appeal and Error.** This court can properly set aside a verdict for excessiveness where there is no evidence to sustain it, or where reasonable minds can come to no conclusion other than that the verdict is the result of passion and prejudice. To do otherwise would constitute an invasion of the province of the jury.

APPEAL from the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. *Affirmed.*

Kanouff & Brown and *Schaper & Schaper,* for appellant.

Robert W. Haney, Thomas J. Walsh, Benjamin M. Wall, and *McCormack & McCormack,* for appellees.

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

CARTER, J.

This is an action for wrongful death. It was commenced by Mildred B. Kroeger, administratrix of decedent's estate, for the benefit of his widow and 5-year-old daughter as next of kin. Plaintiff recovered a verdict of $46,165 and judgment was entered thereon. The defendant Safranek, hereinafter called defendant, appealed.

The case was previously before this court. Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831. The facts in the former case are correctly stated. We adopt such statement and we shall refer to the evidence in this case

only as it bears upon the issues tried and the errors assigned. The assignments of error are that the verdict is not sustained by the evidence, that the verdict is excessive, and that the trial court erred in giving instructions numbered 2, 5, 6, 14, and 17.

The evidence shows that the action is the result of a collision between two large trucks. Plaintiff's decedent was operating a truck belonging to the Prucka Transportation Company in a westerly direction on U. S. Highway No. 30-A at a point about 7½ miles west of Wahoo, Nebraska. The defendant was operating his own truck in an easterly direction immediately prior to the collision. Plaintiff produced evidence that defendant's truck came over the center line and caused the collision. Defendant produced evidence that decedent's truck crossed the center line onto his side of the highway and caused the accident. We determined on the former appeal that the evidence on these claims of negligence was sufficient to be submitted to the jury. The defendant contends on this appeal, however, that physical facts have been established which preclude a recovery by the plaintiff. We shall discuss the facts giving rise to this contention.

The evidence shows that Mr. and Mrs. Elmer Gulick were following defendant's truck for a distance of 10 to 12 miles immediately prior to the accident. They testified that defendant's truck was weaving back and forth across its side of the highway and that on several occasions it passed across the center line. They testified further that the movements of defendant's truck were such that they did not deem it safe to attempt to pass it. They followed about 300 feet to the rear of the truck. They testified that they saw the accident and each described it is follows: The Prucka truck driven by plaintiff's decedent was traveling west and was at all times on its right-hand side of the highway. They each testified that immediately prior to meeting the Prucka truck, defendant drove his truck to the right and onto the 12-

inch curb on his right-hand side of the highway. They said that as he turned his truck back toward the center of the road, the front end of the trailer crossed over the center line and was hit on the left front corner by the Prucka truck. They said, also, that the rear of the trailer whipped around and that it also was hit by the Prucka truck. These two witnesses were strangers to all the parties to the action prior to the accident; they were in a position to see, and their evidence is unequivocal.

The defendant testified that he was driving a 2-ton tractor with a 32-foot, factory-made, flatbed trailer. The trailer was hitched to the tractor by means of a fifth wheel and a kingpin. When so connected the front of the trailer has no side movement. Mr. W. F. Weiland, a professor of mechanical engineering at the University of Nebraska, testified that the blow to the left front end of defendant's trailer, as hereinbefore described, could not cause the rear end of the trailer to swing to its left, but would, on the other hand, cause it to swing to its right.

It is upon this state of the record defendant contends that plaintiff is barred from recovery because of undisputed physical facts. It is a general rule that nature's unchanging laws and the unvarying principles of mechanics cannot be turned aside by a verdict of a jury. But to justify the overturning of a verdict supported by direct testimony on the ground that it is in conflict with natural laws or some established principles of mathematics, mechanics, physics, or the like, the indisputable physical facts must demonstrate beyond question that the supporting evidence is false and that the verdict is in fact without evidentiary support. See, Hessler v. Bellamy, 128 Neb. 571, 259 N. W. 514; Dederman v. Summers, 135 Neb. 453, 282 N. W. 261; Young v. Stoetzel, 159 Neb. 624, 68 N. W. 2d 186.

Decedent's truck was traveling west on the north half of the highway. The tire marks of the Prucka truck

on the pavement at the point of the accident were on the north side of the center line. The defendant said that he did not drive his tractor over the center line at the scene of the accident. The witnesses Gulick stated that they could not see the defendant's tractor and the course it took. The evidence is that defendant's flatbed trailer was 24 inches wider than his tractor. This means, of course, that the trailer extended 12 inches beyond the tractor in a normal operation of the outfit. In turning back toward the center of the highway and turning his tractor due east, it can readily be seen that the left front end of defendant's trailer could project itself over the center line without any encroachment of the north lane by the tractor itself. The first impact occurred at the front left corner of defendant's trailer. It was this impact which set in motion the chain of events resulting in the death of plaintiff's decedent. If this impact was the result of defendant's negligence as the jury found, what happened thereafter does not appear too important in determining the proximate cause of the accident. The evidence that the trailer could not swing or whip to the right or left does not appear conclusive as the exact location and route of defendant's tractor is not indisputably fixed. The expert evidence leaves open the possibilities of defective equipment, or that damage to the hitch may have occurred at the first impact, that skidding or sliding may have occurred, and the phenomena that often results when multiple forces assert themselves in a collision between moving objects. We do not think that the situation is one in which it can be said that undisputed physical facts control the result. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The trial court therefore properly submitted the issues to the jury for its determination.

The defendant contends that the trial court erred in giving instruction No. 2. The instruction told the jury

in part that defendant alleged the death of plaintiff's decedent was caused solely by the negligence of the decedent in the premises, "specifically that the said Russell K. Kroeger failed to exercise due care or to take the proper precautions for his own safety after said deceased, a truck driver by profession, had driven his vehicle into the cornfield and failed to exercise due care for his own safety in alighting from said vehicle and approaching the electric light wires." It is the contention of defendant that the court should have enumerated the three specifications of contributory negligence set forth in an amendment to his amended answer. From an examination of the specifications of contributory negligence, it is readily apparent that they are three different allegations of the same act, to wit, the failure to look for and avoid the electric light wires after being warned of their presence by a bright flash at the time decedent's truck broke off the power pole and caused the electric wires to sag near the ground. The court properly submitted the issue of contributory negligence. It is not required to submit repetitious allegations of the same act of negligence. Defendant's assignment of error as to instruction No. 2 is without merit.

Instruction No. 5 informed the jury that the burden of proving contributory negligence was upon the defendant. Defendant's assignment of error is that in failing to mention the specifications of contributory negligence mentioned in our discussion of instruction No. 2, he was prejudiced. Since the court properly submitted the issue of contributory negligence, as we have heretofore stated, instruction No. 5 was in all respects proper. This assignment of error is without merit.

Complaint is made as to the correctness of instruction No. 6. By that instruction the court defined contributory negligence as follows: "By 'contributory negligence' is meant any negligence of the plaintiff's decedent directly and proximately contributing to cause the accident." Defendant urges that this is misleading in

its application to the present case in that the jury would tend to apply it only to the collision of the trucks and not to the decedent's alleged contributory negligence in walking into the electric light wires. The instruction applied to "any negligence" of plaintiff's decedent. The jury could not have been mislead in the respects claimed by the defendant. The instruction correctly stated the law. If defendant desired that its application be made more clear as it related to the facts in the case being tried, he should have requested a more specific instruction. Not having done so, he is in no position to complain.

Defendant complains of instructions Nos. 14 and 17 in that they permitted the jury to consider the value of services contributed to the widow, such as caring for the garden, maintaining the home, and assisting in supervising and raising the child, when there is no evidence of their monetary value in the record. In the decision on the former appeal we quoted Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A 698, with approval. We there said: "In an action to recover for the loss to a husband of the services of a wife, it is not essential that the exact money value per day, week or month, of her services be proved with mathematical certainty. If the wife is able to perform ordinary household duties, the lack of such services constitutes an element of damages. Ordinarily, the matter must be left to the good judgment and ordinary common sense of the jurors, considering the circumstances of each case, and, unless the verdict is manifestly unjust and excessive, it will not be disturbed on appeal." There being no special services involved, concerning the value of which a jury might not be expected to have general knowledge, we think the issue was submitted in accordance with the holdings of this court.

The jury returned a verdict for plaintiff in the amount of $46,165. Defendant contends that this amount is excessive. The deceased husband and father was 29 years of age at the time of his death. Mildred Kroeger, his

wife, was 31 years of age, and Diana Susan, the daughter, was 5 years of age. It was shown by recognized expectancy tables that the deceased had a life expectancy of 38 years. The evidence shows that at the time of his death the deceased was earning an average salary of $122 per week. He was a strong man and a willing worker, as was indicated by his past history. The jury was entitled to determine the earning capacity of the deceased, his life expectancy at the time of his death, the ages and expectancies of the next of kin, the monetary loss they sustained by the death of decedent, and the purchasing power of money, the interest it would earn, and its present value. We must assume that proper consideration was given to these matters and, if it was, the verdict returned is clearly within the limits permitted by the evidence. Before this court can properly determine a verdict to be excessive, the evidence must disclose that it can be accounted for only on the basis of passion and prejudice on the part of the jury. Where the verdict is sustained by ample evidence of the pecuniary loss sustained by the wife and next of kin, it would amount to an invasion of the province of the jury for this court to interfere. Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627; Tate v. Barry, 144 Neb. 517, 13 N. W. 2d 879. We think the evidence was sufficient to sustain the verdict.

There being no prejudicial error in the record, the judgment of the district court is affirmed.

AFFIRMED.

COUNTY OF DODGE, STATE OF NEBRASKA, APPELLEE, V. MORRIS CHRISTENSEN ET AL., APPELLEES, IMPLEADED WITH WILLIAM MIDDAUGH, APPELLANT.

86 N. W. 2d 780

Filed December 20, 1957. No. 34237.

1. **Liens: Parties.** By the provisions of section 68-215.08, R. S.

Supp., 1955, an old age assistance lien may be foreclosed either in the name of the county board of public welfare or in the name of the State Director of Public Welfare.

2. ———: ———. Under section 68-215.08, R. S. Supp., 1955, the State Director of Public Welfare is not a necessary party to the foreclosure of an old age assistance lien when the county board of public welfare is a party.
3. **New Trial.** Under the provisions of section 25-1143, R. R. S. 1943, an application for a new trial must be made within 10 days, either within or without the term, after the verdict, report, or decision was rendered.
4. ———. The district court has an inherent power as a matter of judicial grace to consider assignments of error and to grant a new trial even though the motion was not made within the time required by statute. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered.
5. **Appeal and Error.** On appeal, error will not be presumed, but must affirmatively appear from the record.
6. ———. In the absence of a bill of exceptions it will be presumed that issues of fact raised by the pleadings were supported by the evidence and that such issues were correctly determined.
7. ———. A question requiring an examination of the evidence will be disregarded in the absence of a bill of exceptions preserving the evidence.
8. ———. In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment.

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

Edward J. Robins, for appellant.

Clarence S. Beck, Attorney General, *Homer L. Kyle, E. D. Warnsholz, William G. Line,* and *George E. Svoboda,* for appellees.

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

SIMMONS, C. J.

This appeal involves the seventeenth cause of action

in a tax foreclosure suit brought by the County of Dodge.

The property involved is that of Anna Sasse, an old age assistance beneficiary. The action went to decree, sale, and confirmation. At a subsequent term, on a motion filed out of time, the trial court granted a new trial. The trial court also set aside the confirmation of the sale. The purchaser at the sheriff's sale, William Middaugh, appeals.

Three questions are presented:

Was the State Director of Public Welfare a necessary party? We hold that he was not.

Did the trial court err in setting aside the foreclosure decree? We hold that it did.

Did the trial court err in setting aside the order confirming the sale? We hold that it did not.

The petition herein was filed June 12, 1956. The land involved in this cause of action is Lots 1 to 7, inclusive, Block 12, Snyder, Nebraska. The record owner of the real estate is Anna Sasse.

The county alleged it had a lien for general taxes in the total amount of $932.76, and that the old age assistance board had a lien in the sum of $4,971.

The prayer of the petition was for the determination of liens, and orders for payment and for sale, if not paid.

On August 8, 1956, the court rendered a decree in the matter, finding that service had been had on the parties as required by law. The court found that there was due the plaintiff a total of $1,024.54 which was a first lien on the premises, and that there was due the old age assistance board the sum of $4,971 which was a second lien.

The court ordered the property sold if the amounts found due were not paid within 20 days. Order of sale was issued on August 29, 1956. The sheriff made return on October 11, 1956, showing sale of the premises to William Middaugh for $15. On the same day, October 11, 1956, the court ordered the sale confirmed and

ordered sheriff's deed to issue upon payment of the purchase price.

On October 19, 1956, the plaintiff filed a motion to vacate the decree and confirmation and grant a new trial. This was 72 days after the entry of the decree of foreclosure and 8 days after the order of confirmation. The motion was directed only as to the decree insofar as it affected Lots 6 and 7. Mr. Middaugh filed objections and asked for a hearing.

On December 15, 1956, Clara Muir, purporting to represent the State and county as "Welfare Director" filed objections to confirmation and offered a bid in the amount of the old age assistance lien. Mr. Middaugh filed objections. It does not appear that anything further was done about this in the proceedings. The State and county do not rely on this filing here.

On December 17, 1956, the court rendered an order that deed should not issue until further order.

On January 14, 1957, the September 1956 term adjourned and the January 1957 term commenced.

On January 15, 1957, the State and the State Director of Public Welfare filed a motion, joining in the motion of the plaintiff for an order vacating the decree insofar as it related to Lots 6 and 7. The grounds were: (1) Irregularity and abuse of discretion preventing a fair trial; (2) the failure to serve process upon the State Director of Public Welfare; and (3) a grossly inadequate sale price.

On March 21, 1957, the State and the director filed an amended motion, the effect of which was to include Lots 1 to 7, inclusive, in the scope of the motion. A supporting affidavit was filed.

On April 6, 1957, the trial court ruled on the "motion for new trial and partial vacation of order" filed by the county, and on the amended motion filed by the State and the director. It referred to an affidavit in support of the motions and a "letter" filed by Mr. Middaugh's attorney. It recited that it was fully advised in the premises.

It found that the motions for new trial and vacation of order should be sustained.

It granted a new trial, with leave to the State Director of Public Welfare to appear and plead, and ordered the $15 deposit on bid returned to Mr. Middaugh. Mr. Middaugh appeals.

We confine this opinion to the questions presented by the parties.

There is a contention advanced here by the appellees that the State Director of Public Welfare is a necessary party to a proceeding involving a lien such as we have here. Apparently the theory is that the director being a necessary party, the decree and the order of confirmation should be set aside so as to permit him to appear and plead. See Prudential Ins. Co. v. Diefenbaugh, 129 Neb. 59, 260 N. W. 689, wherein we held: Defect of parties defendant is not a ground for refusing confirmation of a judicial sale.

The "Old Age Assistance Board of Dodge County" was a named defendant in the action. The court found that legal service was had on all defendants. By the provisions of section 68-711, R. S. Supp., 1955, "Old Age Assistance Board" was legislatively declared to mean the county board of public welfare. By the provisions of section 68-215.08, R. S. Supp., 1955, an old age assistance lien may be foreclosed either in the name of the county board of public welfare or in the name of the State Director of Public Welfare. It follows that under section 68-215.08, R. S. Supp., 1955, the State Director of Public Welfare is not a necessary party to the foreclosure of an old age assistance lien when the county board of public welfare is a party.

Under the provisions of section 25-1143, R. R. S. 1943, an application for a new trial must be made within 10 days, either within or without the term, after the verdict, report, or decision was rendered. See Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265. Here the plaintiff's motion for a new trial was made 72 days after the

decree was rendered. It obviously was of no force and effect as to the decree. It was clearly within time as to the confirmation.

The rule, also, is: The district court has an inherent power as a matter of judicial grace to consider assignments of error and to grant a new trial even though the motion was not made within the time required by statute. The inherent power of the court to grant a new trial is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered. Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772.

Here, however, the court did not act on the motion within the term of court at which the judgment was rendered. It accordingly follows that the order of the court purporting to grant a new trial was without authority of law and must be set aside.

This brings us to the contention of claimed error in setting aside the order of confirmation after the term in which it was rendered.

On the face of the pleadings, it appears that property situated in an urban community consisting of 7 lots and a dwelling thereon sufficient to furnish shelter for two persons was sold for $15. The petition shows that general property taxes on it for the years 1953, 1954, and 1955 average over $100 a year. There is in the transcript an affidavit that the reasonable value of the property is $750.

However, there is no bill of exceptions or case stated here to show what evidence was considered by the trial court in setting aside the order of confirmation.

Under these circumstances the applicable rules are: On appeal, error will not be presumed, but must affirmatively appear from the record. In the absence of a bill of exceptions it will be presumed that issues of fact raised by the pleadings were supported by the evidence and that such issues were correctly determined. A

question requiring an examination of the evidence will be disregarded in the absence of a bill of exceptions preserving the evidence. In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment. State ex rel. League of Municipalities v. Loup River P. P. Dist., 158 Neb. 160, 62 N. W. 2d 682. See, also, Abbott v. State, 160 Neb. 275, 69 N. W. 2d 878.

It follows that there has been no record presented which permits a review of the discretion exercised by the trial court. See Reeker v. Reeker, 152 Neb. 390, 41 N. W. 2d 231.

The judgment of the trial court in setting aside the order of confirmation is affirmed.

The judgment of the trial court in granting a new trial is reversed. The cause is remanded with directions to deny the motion for a new trial and for further proceedings.

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

BONNIE C. HEIDER ET AL., APPELLEES, V. WILLIAM H. KAUTZ ET AL., APPELLANTS.
87 N. W. 2d 226

Filed December 20, 1957. No. 34261.

1. **Trial: Appeal and Error.** In a case tried to the court in equity the presumption obtains that the trial court, in arriving at decision, considered only such evidence as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if, upon a trial de novo, we find that a preponderance of competent and relevant evidence appearing in the record sustains the judgment.
2. **Boundaries: Waters.** Where an island in a nonnavigable stream has been separately surveyed, platted, and deeded by government patent and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center of the thread of each surrounding channel.

3. ———: ———. The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.
4. ———: ———. The right of title and possession of land formed by accretion follows the ownership of the riparian lands to which it is attached.
5. ———: ———. Generally, where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the shores opposite to the island is in other owners, the same riparian rights appertain to the island as to the mainland.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Donald V. Lowe and *Baskins & Baskins,* for appellants.

Edward E. Carr and *Robert E. Roeder,* for appellees.

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

CHAPPELL, J.

Plaintiffs, Bonnie C. Heider and Charles F. Heider, wife and husband, brought this action in equity against defendants, William H. Kautz and Vivian Thelma Kautz, husband and wife, to determine title to certain alleged accretive land claimed by plaintiffs, which land is attached to and a part of Lot 3 owned by plaintiffs at the east end of Ware Island in the North Platte River. Plaintiffs sought a decree adjudging them to be the owners of the land, together with injunctive relief against trespass thereon by defendants, and an award of damages for removal of a fence placed on the land by plaintiffs. In their answer, defendants denied generally and claimed title to the land by adverse possession and by accretion to Lots 4 and 5 owned by them. They sought a decree adjudging them to be the owners of the accretive land, together with injunctive relief against trespass by plaintiffs. For reply, plaintiffs denied generally and alleged that they had been in open, notorious pos-

session, claiming title to the land involved since 1942.

Upon trial to the court, a decree was rendered, finding and adjudging the issues generally in favor of plaintiffs, enjoining defendants from trespass on the land, and awarding plaintiffs $100 as damages. Thereafter, defendants' motion for new trial was overruled, and they appealed, assigning in substance that: (1) The trial court erred in the admission of certain evidence; and (2) the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We do not sustain the assignments.

Being a suit in equity, it is the duty of this court to try the issues de novo, in conformity with rules reaffirmed in Uptegrove v. Elsasser, 161 Neb. 527, 74 N. W. 2d 61.

In regard to defendants' first contention, we are mindful of the controlling rule that: "In a case tried to the court in equity the presumption obtains that the trial court, in arriving at decision, considered such evidence only as was competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment." Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711. In the light thereof and the record before us, we conclude that defendants' first assignment has no merit. To discuss it further would serve no useful purpose.

Defendants admitted in their brief that there was no evidence in this record that would either establish adverse possession by plaintiffs or defendants in the land. On the other hand, as stated by plaintiffs in their brief: "* * * the plaintiffs did not make a claim to this land by adverse possession" but "they did claim title to it" by accretion. In the light of such admissions, the issue of adverse possession requires no further discussion. The primary question here is whether the land involved was accretive land belonging to plaintiffs or to defendants.

We conclude that it was accretive land belonging to plaintiffs.

In that connection, defendants offered the complete record and the opinion of this court in State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782. They relied thereon, contending that such authority determined the case at bar. A mere reading of the opinion in that case discloses that it is factually distinguishable and not controlling. That case simply involved a controversy between two riparian landowners on opposite banks of the North Platte River and presented the question of who owned relicted rights to land in the old river bed. Ware Island was not directly involved. The holding therein simply was that the facts fell within an exception to the general rule as between such riparian owners, and that the property line remained where it originally was before the main channel shifted over, hence the land in dispute belonged to defendants. As a matter of fact, the opinion cited and quoted with approval, then distinguished Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502, which, together with other comparable authorities as hereinafter observed, is controlling in the case at bar.

Defendants also relied upon the opinion in Haney v. Hewitt, 105 Neb. 746, 181 N. W. 861, which is entirely distinguishable. Plaintiffs therein claimed unplatted Haney Island in the Platte River, which had become a part of Hewitt Island owned by plaintiffs. Haney Island was a separate body located between the thread of the main channel and platted lots owned by plaintiffs, thus the court concluded that it belonged to plaintiffs as riparian proprietors before it ever became a part of Hewitt Island, and that plaintiffs owned it subsequently because they owned the unplatted land in the river south of the thread of the main channel of the river. No such situation is presented here.

Herein we have the following situation: It is admitted or without dispute that plaintiff, Bonnie C. Heider, was the owner of deeded Lots 1, 2, and 3 in Sec-

tion 7, Township 14 North, Range 32 West of the 6th P. M., in Lincoln County, and that such land was a part of an island in the North Platte River, a nonnavigable stream, which island had been separately surveyed and platted by the United States, and was known as Ware Island. It was admitted that defendants were owners of deeded Lots 4 and 5 in Section 7, Township 14 North, Range 32 West of the 6th P. M., in Lincoln County, which land is located just south of the North Platte River and joins the south bank thereof, with a river channel beween the land owned by defendants south of the river, and that owned by plaintiffs, on Ware Island, north of the river. It was established that Ware Island was completely surrounded by the river, with a channel on the north as well as the south. Whether or not the south channel was as large as the north channel is of no importance here.

The record discloses that Ware Island was originally surveyed and platted by the United States in 1870 and that it then consisted of Lot 1 in Section 11, Lots 1, 2, 3, and 4 in Section 12, and Lots 1, 2, and 3 in Section 7, all in Lincoln County. Lot 3 in Section 7 comprised the east end of Ware Island, the easterly point of which did not extend to the east line of Section 7 when the island was originally so surveyed and platted. However, since 1870 the river has slowly deposited land upon the east end of said Lot 3 in the form of gradual accretions which have extended the island farther east in a course roughly parallel with the north bank of the south channel of the river to the east line of Section 7 beyond the land owned by defendants. Defendants' land lies directly south of Lot 3 and the land in question. It lies south of the south channel of the river. In that connection, other facts require no recitation.

As recently as Ziemba v. Ziemba, *ante* p. 419, 86 N. W. 2d 190, we reaffirmed that: "Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by

deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.

"Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.

"The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.

"Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel." Those are fundamental rules which have application here, with the distinction that herein we are dealing with accretions of land to an island.

The applicable rules in such a comparable situation were stated and applied in Higgins v. Adelson, *supra,* wherein this court held: "Where title to an island in a nonnavigable stream is conveyed to a grantee by government patent, and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center or thread of each surrounding channel.

"The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow.

"The right of title and possession of land formed by accretion follows the ownership of the riparian lands to which it is attached."

In that opinion, this court said: "And, 'The right of title and possession of land formed by accretion follows the ownership of the riparian lands to which it is attached.' Independent Stock Farm v. Stevens, 128 Neb.

619, 259 N. W. 647." This court, citing authorities, then said: "The right to 'accretions' is certainly to be deemed identical as between the owner of a surveyed island and the owner of a mainland tract opposite to the same and possessing the identical water boundary. True, the owner of land entirely surrounded by a water boundary may receive accretions from any direction, but the principles which determine their ownership to the tract in dispute are identical." See, also, Hardt v. Orr, 142 Neb. 460, 6 N. W. 2d 589.

In Roll v. Martin, 164 Neb. 133, 82 N. W. 2d 34, citing Higgins v. Adelson, *supra,* and other authorities, we said: "Appellants contend, since they were and are the owners of land on Frazer's Island and the area involved was the bed of the river, that they are entitled to all accretions to their land on the island to the thread of the closed channel as a matter of right; that they were not required to take possession thereof; and that failure to do so did not forfeit such right unless someone actually had established the right thereto by adverse possession. With these principles we find no fault and they are supported by the authorities cited."

Also, as said in In re Application of Central Nebraska Public Power & Irr. Dist., 138 Neb. 742, 295 N. W. 386: "An owner of land on the shore of an unnavigable river, in the absences of restrictions in his grant, owns to the center line of the stream. Haney v. Hewitt, 105 Neb. 746, 181 N. W. 861; McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966; Wiggenhorn v. Kountz, 23 Neb. 690, 37 N. W. 603. * * *

"Where title to an island, bounded by the waters of a nonnavigable stream is in one owner, and title to the land on the shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502."

Further, as said in Wiggenhorn v. Kountz, 23 Neb. 690, 37 N. W. 603, 83 Am. S. R. 150: "In the case under

consideration, it is clearly shown that there is a well-defined channel of the river on each side, between the main-land and the island. The grant of main-land, therefore, would, at the most, merely extend to the center thread of the stream between the shore and the island, so that in no event could an owner of the main-land claim an interest in the island."

In the light of evidence heretofore recited, the foregoing rules and statements are applicable and controlling in the case at bar. They conclusively support the judgment of the trial court which found and adjudged that plaintiffs owned the land involved and enjoined defendants from trespass thereon.

There remains then the question of damages awarded plaintiff in the sum of $100 which defendants argued was not established by competent evidence. We do not agree. There is competent evidence that plaintiff, Charles F. Heider, constructed the fence involved in 1951, and defendant, William H. Kautz, admittedly removed the fence, which was about 600 feet long, by taking out 11 creosote posts and 2 strands of wire. The fence extended along the north bank of the south channel from a north and south fence which was at the east side of the surveyed part of the island to the east section line of Section 7. Plaintiff, Charles F. Heider, testified that he bought and paid for the material and labor and had the fence constructed. He was the owner thereof, as heretofore observed, and he estimated that the reasonable value of the material and labor required to put the fence back as it was when taken out by defendant, William H. Kautz, would be $60 to $75 for material and $25 to $35 for labor; that the cost to so restore the fence would be $100. There is no evidence to the contrary.

As recently as Sorensen Constr. Co. v. Broyhill, *ante* p. 397, 85 N. W. 2d 898, we held: "There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of

such value flows from the evidence adduced." Defendants' contention has no merit.

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

AFFIRMED.

JOHN A. KRIEGER ET AL., APPELLANTS, V. ROBERT SCHROEDER ET AL., APPELLEES, CLARENCE M. ANDERSON ET AL., INTERVENERS-APPELLEES.

87 N. W. 2d 367

Filed December 20, 1957. No. 34285.

1. **Judges.** A district judge has no inherent authority to act in chambers. He has in this regard only the jurisdiction given him by statute.
2. **Judges: Judgments.** There is no statutory authority in this state for a district judge in chambers to vacate or modify a judgment of the district court after the term at which it was rendered.
3. ———: ———. The invalidity of an order made in chambers without statutory authorization does not result from procedural irregularity but from absence of jurisdiction.

APPEAL from the district court for Clay County: EDMUND P. NUSS, JUDGE. *Reversed and remanded with directions.*

John F. McCarthy, for appellants.

Massie, Bottorf & Massie and *S. W. Moger,* for appellees.

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

BOSLAUGH, J.

The relief sought by appellants was that the defendants and interveners in the district court be permanently enjoined from continuing and enlarging the condition which had diverted surface waters from their natural

course of drainage to and upon the land of appellants causing them, as they alleged, frequent, recurring, and irreparable damage. The original defendants were Robert Schroeder, Ralph R. Gerlach, and Eugene Dunleavy as members of the Harvard township board. Clarence M. Anderson and Vance A. Anderson became parties by intervention.

The substance of the part of the amended petition of appellants relevant to the subject of this appeal is as follows:

Appellants own and occupy the east half of the northwest quarter of Section 28 and the east half of the southwest quarter of Section 21, Township 8, Range 7, in Clay County. The improvements and farmstead are on the north part of the east half of the northwest quarter of Section 28 and adjacent to the east-and-west public highway between the two tracts of land. There is a small swale or draw which originates near the improvements and proceeds to the north. The land at that location slopes to the north and is drained by the swale or small draw. It crosses the highway in front of the improvements of appellants and continues north and east across the east half of the southwest quarter of Section 21 and the land of others farther to the east. There is a 30-inch culvert in the draw in front of the improvements of appellants to conduct water therein moving to the north to, under, and across the highway. The east-and-west highway extends between Sections 21 and 28 and between Sections 20 and 29 of said township and range in Clay County, and there is a north-and-south highway between these sections of land.

West of the buildings of appellants the land and the east-and-west highway rises as it approaches the intersection of the highways described. The waters west of the intersection did not naturally flow to the east to the swale or draw because of the natural rise of the land to the west of it. The board constructed a deep artificial ditch along the south of the east-and-west highway from

west of the higher land above described to the swale near the buildings of appellants. A 26-inch culvert was placed under the north-and-south road at the intersection west of the land of appellants to conduct water in the ditch to the east to and upon their land. The natural elevation of the ground at the intersection was higher than the ground immediately west thereof and the water did not naturally flow to the east and to the land of appellants. It would not do so except for the ditch and culvert constructed by the board. The land in Section 29 is somewhat flat and swampy. The board has permitted the owners of the northwest quarter of Section 29 to construct, and they have excavated, a drainage ditch thereon with its discharge into the highway ditch described above and the surface waters from the land are caused to flow to and upon the land of appellants. The surface water from the northeast quarter of Section 29 is diverted by the board to and through the highway ditch toward and upon the land of appellants. The interveners own the northeast quarter of Section 29 and they have made ditches to drain surface waters from ponds which form thereon into a highway ditch to the east of their land, excavated by the board, from which the water flows north to the east-and-west highway ditch above described and thence to and upon the land of appellants. The surface water upon Section 29, when the lands were in their natural condition, formed ponds thereon and excess surface water drained therefrom to the north over and across Section 20 away from and not upon the land of appellants. There were formerly culverts in the east-and-west highway to conduct the surface waters from this area under the highway, onto Section 20, and thence into a natural draw or watercourse. The culverts were removed some time before the commencement of this action and the natural drainage of the waters northward has been prevented. The grade of the highway has been and is used as a dam to divert them to the east to the land of appellants.

The board intends to remove the culvert at the intersection west of the land of appellants and there construct one of much larger capacity to increase and accumulate the drainage of surface water from the low land to the west, through the artificial highway ditch, to the swale aforesaid, and onto the appellants' land. The surface waters complained of herein do not naturally belong in the watershed drained by the swale on the land of appellants. The course they now follow is artificial and is not a natural course or means of drainage. The wrongful change in the drainage of the waters has not been caused by proper or necessary road construction but for the purpose of discharging surface waters from land contrary to the natural situation and opposed to the natural course of drainage of the area affected. A nuisance has thereby been created which is repetitious, substantially continuous, and thereby appellants have suffered and will continue to sustain irreparable injury and damage. They have no adequate remedy at law.

The board and interveners respectively joined issues by denials of the claims of appellants except they pleaded some admissions and other matters which do not require further notice.

Trial of the cause was had upon stipulation of the parties at the conclusion of which the district court found on June 14, 1949, that it had been stipulated by the parties that an excessive amount of surface waters accumulated in the northeast corner of the northeast quarter of Section 29, Township 8, Range 7, in Clay County, and in and around the buildings of appellants located on the east half of the northwest quarter of Section 28, Township 8, Range 7, in Clay County, by virtue of the manner in which the township road immediately north of said properties had been graded and culverts placed; that formerly there was a culvert across the township road approximately 160 feet west of the northwest corner of the northeast quarter of said Section 29 which permitted water to flow in natural drainage from and over the

surrounding lands; that at some time in the past the culvert was removed; that it would be for the best interests of all concerned that a 48-inch culvert be placed on the road at said place; that road ditches on the above-described road have been cut through and below the surrounding grade; that there was a rise in the surrounding land approximately 150 feet east of the northwest corner of said northeast quarter of Section 29; that the grade of the township road was cut through said land and permitted the water to flow out of its natural watershed; and that it would be for the best interests of all concerned that the said road ditch at the above-described place be filled to a level with the surrounding land.

The judgment rendered by the court was that the township board be and it was directed to place a 48-inch culvert in the township road above described which runs in an east-and-west direction on the north side of Section 29 at a point approximately 160 feet west of the northwest corner of the northeast quarter of said section and to fill the road ditches of said township road to the height of the surrounding land at a point approximately 150 feet east of the northwest corner of the northeast quarter of said section.

The record exhibits an "ORDER" bearing date of "First day of September, 1951," resulting from "the application of Harold F. Smith and Forrest Pense for a change in procedure under the order heretofore made by the court on June 14, 1949," because "the dike in the north ditch south of said Section 20 (and north of Section 29) fails to force the water in said ditch north across the real estate of said Smith and Pense as was the intention of the court in making said order of June 14, 1949." The order recites that it is ordered that the county and township officers interested in the roads between Sections 20, 21, 28, and 29 be authorized to remove the dike in the north ditch south of Section 20, if they think best; to rebuild a driveway and place a larger

and adequate culvert under it at the southeast corner of Section 20; and, if they find it necessary to place a large culvert under the road between the ditches lying between Sections 20 and 21 in order that the water which accumulates therein along the south side of Section 20 may be carried into the ravine or waterway into which it would have originally been carried if no deep roadway ditches had been constructed by the county and township officers south of Section 20, then they may do so. The order concluded "that this order be carried into effect as soon as the said county and township officials deem it advisable."

The record does not show that there was on September 1, 1951, an "application of Harold F. Smith and Forrest Pense" in this case "for a change in procedure" or for anything. They were not then nor have they since been parties to this litigation. They verbally on August 9, 1956, asked leave to intervene and leave was granted them to do so but they did not at any time file any pleading of intervention. They did nothing further concerning this case until they appeared in this court and filed a brief designating themselves as appellees.

Appellants filed a motion for an order of the court vacating the order dated September 1, 1951, to which reference is made above. A hearing of the motion at which evidence was taken was had on May 8, 1957, and the motion to vacate was overruled. The motion of appellants for a new trial was denied. This appeal contests the correctness of the order of the court refusing to vacate the order of September 1, 1951.

The date of June 14, 1949, on which the judgment herein was rendered was a day of the regular January 1949 term of the district court for Clay County. It may be assumed that the adjournment thereof was some time during the year 1949 or, in any event, before September 1, 1951, because the judges of the district courts are required within the last 2 months of each year to fix the time of holding terms of court in the counties of their

respective districts during the ensuing year. § 24-303, R. R. S. 1943. In the absence of anything to the contrary appearing in the record it must be presumed that the judges of the tenth judicial district of Nebraska recognized and timely performed that duty. The judgment herein of June 14, 1949, became final before September 1, 1951. The order bearing that date was an attempt to modify and partially at least vacate the judgment rendered on June 14, 1949, without notice to or opportunity to be heard by any of the parties to this case. It does not purport to have been made on any day of a term of court in open court. It was conceded at the submission of the case that the order was made by the judge in chambers. This may be accepted as the fact. A district judge has no inherent authority to act in chambers. He has only the jurisdiction in this regard given him by statute. In Vasa v. Vasa, 163 Neb. 642, 80 N. W. 2d 696, it is said: "Under the Constitution judges of the district courts, as such, have no inherent judicial authority at chambers and possess only such authority or jurisdiction thereat as is conferred on them by statute." See, also, Mueller v. Keeley, 163 Neb. 613, 80 N. W. 2d 707.

There is no statute of this state which confers power on a district judge in chambers to modify or vacate a judgment of the district court after the term at which it was rendered. The court said in Kime v. Fenner, 54 Neb. 476, 74 N. W. 869: "A judge at chambers possesses no jurisdiction to vacate or modify orders or judgments of the district court." In Fisk v. Thorp, 51 Neb. 1, 70 N. W. 498, it is said: "Our statute does not confer power upon a judge, as contradistinguished from a court, to hear a motion to vacate or modify the judgment of the court after the term at which it was rendered. Usually a judge has no power to vacate or amend orders and judgments in vacation or at chambers. It may or must be conferred by statute. * * * An examination of the provisions of our Code of Civil Procedure on the subject of proceedings to reverse, vacate, and modify

judgments, etc., after the term at which they were rendered * * * develops that the authority therein given, and jurisdiction conferred, are upon the court, and not in any sense or to any extent upon a judge thereof at chambers or in vacation." See, also, Nicholson v. Getchell, 113 Neb. 248, 202 N. W. 618.

The invalidity of the order dated September 1, 1951, does not result from procedural irregularity but because of absence of jurisdiction or power of the author of it. It was a nullity. It created no rights and imposed no obligation. It could be assailed at any time. Kime v. Fenner, *supra;* Mueller v. Keeley, *supra.*

The adjudication of the district court overruling the motion of appellants for an order vacating the order in this case bearing date of the first day of September 1951, should be and it is reversed and the cause is remanded with directions to the district court for Clay County to sustain the motion of appellants to vacate, and to vacate and expunge from the record of the court the said order bearing date of the first of September 1951. The costs in this court should be taxed to Harold F. Smith and Forrest Pense.

REVERSED AND REMANDED WITH DIRECTIONS.

SPIDEL FARM SUPPLY, INCORPORATED, APPELLANT, V. WILLIAM G. LINE, APPELLEE.
86 N. W. 2d 789

Filed December 20, 1957. No. 34287.

1. **Appeal and Error.** An affidavit used as evidence in the district court cannot be considered on an appeal of the cause to this court unless it is offered in evidence in the trial court, and preserved in and made a part of the bill of exceptions.
2. ———. An affidavit used as evidence in the district court, filed in the office of the clerk of the court, and exhibited in the transcript is unimportant to a consideration and decision of an appeal in the cause to this court.
3. **Judgments.** All presumptions exist in favor of the regularity

and correctness of a judgment of a court of general jurisdiction and the litigant who asserts the contrary is required to establish the claimed defect or error by an exhibition of the record.

4. **Trial: Judgments.** The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law.

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

John McArthur, for appellant.

Clarence S. Beck, Attorney General, *Clarence A. H. Meyer,* and *William G. Line,* for appellee.

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

BOSLAUGH, J.

Appellant by its petition in this cause asserted that appellant was incorporated under the laws of the State of Iowa; that appellant was the owner and entitled to the possession of a 1956 Diamond T truck, the license number of which was Iowa 78-0758; that it was wrongfully detained by appellee; that it was not taken on any adjudication or execution against or for the satisfaction of any fine, tax, or amercement assessed against or by any legal process issued against appellant; and that appellant had been damaged by the wrongful taking and holding of the truck by appellee in a detailed and stated amount. Appellant asked for the return of the truck and for damages. An affidavit on behalf of appellant containing the matters required in an action of replevin was filed contemporaneously with the petition. § 25-1094, R. R. S. 1943.

A writ of replevin was issued and delivered to the sheriff. His return of it was that he was unable to find the truck in the possession of appellee. A motion for a summary judgment was made by appellee. The basis for it, as stated therein, is that he had not at any time had and did not have at the commencement of this

case possession, either actual or constructive, of the truck, and that he had not concealed, removed, or disposed of it for the purpose of avoiding or defeating the writ of replevin or at all. The district court sustained the motion for summary judgment and dismissed the action. The action of the court is the subject of this appeal.

At the hearing of the motion for summary judgment affidavits were presented by the parties and considered by the court. The court also interrogated counsel for the parties as to the evidence of any issue of fact in the cause.

There is no affidavit preserved or contained in the bill of exceptions in this case. The effect of this omission is that any affidavit considered by the district court is not before and may not be considered by this court. An affidavit used as evidence in the district court cannot be considered on an appeal of a cause to this court unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. Berg v. Griffiths, 127 Neb. 501, 256 N. W. 44, 102 A. L. R. 1124; Harder v. Harder, 162 Neb. 433, 76 N. W. 2d 260. The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court. Harder v. Harder, *supra;* Frye v. Frye, 158 Neb. 694, 64 N. W. 2d 468.

A judgment of the district court brought to this court for review is supported by a presumption of correctness and the burden is upon the party complaining of the action of the former to show by the record that it is erroneous. It is presumed that an issue decided by the district court was correctly decided. The appellant, to prevail in such a situation, must present a record of the cause which establishes the contrary. Village of

Winside v. Benshoof, 90 Neb. 131, 132 N. W. 944; Combes v. Anderson, 164 Neb. 131, 81 N. W. 2d 899. The condition of the record prevents this court from knowing the evidence presented to the trial court or which part of the evidence before it was accepted and acted upon. It must therefore be presumed that the conclusion of that court was justified by the evidence and that it is correct.

The record shows that during the hearing of the motion for summary judgment the trial court interrogated the counsel for appellant and by his statements it was established that appellant had or knew of no evidence that appellee had obtained possession of the truck. The primary issue in the case concerned the possession of the truck by appellee and his wrongful retention of such possession. The admission made by counsel for appellant fairly established that it had no legal evidence to support that issue in its favor. The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to a judgment as a matter of law. Eden v. Klaas, *ante* p. 323, 85 N. W. 2d 643. The record shows that there was no genuine issue of fact in this case and that appellee was entitled to a judgment as a matter of law.

The judgment should be and it is affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

MARY E. FAIRCHILD, APPELLEE, V. HAROLD G. SORENSON ET AL., APPELLANTS.
87 N. W. 2d 235

Filed December 27, 1957. No. 34203.

1. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be re-

solved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

2. **Automobiles: Negligence.** The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats a recovery.
3. ———: ———. It is the duty of the driver of an automobile on approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger.
4. ———: ———. A driver of an automobile about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection.
5. **Husband and Wife: Negligence.** The negligence of a husband while driving his automobile with his wife as his guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger and in failing to protest against unsafe driving by him.
6. **Automobiles: Negligence.** It is the duty of a guest in an automobile driven by another to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances, and for failure so to do he is guilty of contributory negligence.
7. ———: ———. Where there is a duty in the exercise of ordinary care on the part of a guest passenger in an automobile, under the circumstances, to look, or having looked, to see, coupled with a duty to warn, but there has been a failure so to do and a collision between two automobiles comes about in consequence of such failure coupled with negligence of the driver of the other automobile, such guest is guilty of contributory negligence more than slight as a matter of law, in consequence of which a recovery of damages may not be sustained against the driver of the other automobile.

APPEAL from the district court for Jefferson County: CLOYDE B. ELLIS, JUDGE. *Reversed and remanded with directions.*

John E. Dougherty, for appellants.

George A. Skultety and *Robert V. Denney*, for appellee.

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

YEAGER, J.

This is an action for damages by Mary E. Fairchild, plaintiff and appellee, for personal injuries, against Harold G. Sorenson and Geraldine Morgan, defendants and appellants. The action was tried to a jury at the conclusion of which a verdict was returned in favor of plaintiff and against the defendants for $12,500. Judgment was rendered on the verdict. Separate motions for judgment notwithstanding the verdict or for a new trial were filed which were overruled. From the judgment and the order overruling the motions the defendants have appealed.

The basis of the action as substantially alleged in the petition to the extent necessary to state it for the purpose of the appeal is that on May 30, 1955, the plaintiff was a guest passenger in an automobile owned and operated by Herman E. Fairchild, her husband; that while she was such passenger she and her husband proceeded eastward on a public highway in Jefferson County, Nebraska, known as the Pawnee-Wymore-Fairbury highway; that they approached the intersection of the Pawnee-Wymore-Fairbury highway with another highway known as State Highway No. 103 which extends north and south; that Herman E. Fairchild stopped or slowed down at the stop sign on the west side of the intersection and then proceeded to about the center or east half of the intersection when his automobile was struck on the right side just in front of the rear wheel by an automobile driven by the defendant Sorenson and owned by the defendant Morgan; that the defendant Morgan was an occupant of the automobile; and that as a result of the collision the plaintiff was injured and damaged.

It was alleged that the collision came about by reason of the negligent operation of the automobile by the defendant Sorenson. It was alleged that the negligence

of Sorenson was attributable to the defendant Morgan, by reason of the fact that she was the owner of the automobile and that she knew or should have known of the careless and reckless propensity of Sorenson in driving automobiles, but notwithstanding this knowledge she permitted him to drive her automobile. The negligence of the defendants is set forth with particularity but a repetition of the particulars is not deemed necessary.

By answer the defendants denied any negligence on their part. They alleged that the collision was proximately caused by the negligence of Herman E. Fairchild. They further alleged that the plaintiff was guilty of negligence in a degree more than slight which contributed to the causing of the collision and her injuries and damage.

At the close of the evidence the defendants moved for a directed verdict on various grounds. The motions were overruled in their entirety. Substantially one of the grounds was that the evidence disclosed that the plaintiff was guilty of contributory negligence in a degree which prohibited a recovery against the defendants or either of them. This contention was renewed in the motions for new trial and for judgment notwithstanding the verdict to which attention has been directed. This has been made the basis of an assignment of error.

This assignment of error will be considered first herein. If the determination upon it is favorable to the defendants the other assignments of error require no consideration in this opinion. This determination must be made agreeable to the following rule: "In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom." Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. See, also, Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Fuss v. Williamson, on motion for rehear-

ing, 160 Neb. 141, 69 N. W. 2d 539; Pospichal v. Wiley, 163 Neb. 236, 79 N. W. 2d 275.

The facts which are essential to a determination of whether or not the defendants were entitled to a directed verdict at the close of the evidence are not in dispute. The plaintiff herself gave no information as to any incident or incidents having immediate connection with the collision. The location of the collision was several miles from Fairbury. The plaintiff and her husband drove from Fairbury to this location. She testified that she did not remember anything after they left Fairbury.

Herman E. Fairchild testified as a witness for plaintiff. He described his approach and entry from the west into the intersection. He testified substantially that he was familiar with the intersection; that Highway No. 103 was protected by stop signs with which he was familiar; that back to the west of the stop sign was a warning sign which he saw; that he operated his automobile up to the stop sign where he stopped; that he proceeded to the west line of Highway No. 103 where he stopped; that he proceeded into the intersection at a speed of 10 or 12 miles an hour and after he had proceeded into about the middle his automobile was struck on the right rear by the automobile operated by the defendant Sorenson; that the view south on Highway No. 103 was unobstructed for as much as 500 feet; and that he never at any time observed the automobile in which the defendants approached the intersection. There is no evidence by this witness or any other that the automobile in which the defendants were riding was being operated at any time in excess of 55 miles an hour or that it was being operated in an unlawful position on the highway. There was no evidence from which a reasonable inference could flow that the defendants had notice of danger in entering the intersection at the rate of speed and the manner in which their automobile was being operated as it approached the intersection until Herman E. Fairchild drove his automobile into it. There was no

evidence of other vehicles on the highway in or adjacent to the intersection except the two involved and one other which was stopped back of the stop sign on the east side of the intersection. The only direct evidence or evidence from which a reasonable inference could be drawn of the location of the automobile of the defendants when Herman E. Fairchild drove into the intersection was given by the defendants and one other witness. Their testimony was that it was a maximum of 75 feet south. An exclusive inference is to be drawn from the testimony of Herman E. Fairchild that he stopped before entering the intersection and thereafter entered without looking, or having looked he failed to see that which in the exercise of ordinary care he should have seen.

Under this state of facts it must be said that Herman E. Fairchild was guilty of contributory negligence, assuming that the defendants or either of them was guilty of negligence, which as a matter of law would defeat a recovery in his favor. "The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery." Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491. See, also, Wendel v. Carlson, 162 Neb. 742, 77 N. W. 2d 212; Barajas v. Parker, *ante* p. 444, 85 N. W. 2d 894.

In Barajas v. Parker, *supra,* it was said: "It is the duty of the driver of an automobile on approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger." See, also, Wendel v. Carlson, *supra.*

The defendants in this case had the right-of-way under the law. "A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it

would be obviously dangerous for him to proceed across the intersection." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. See, also, Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751.

Thus it becomes clear that Herman E. Fairchild was guilty of negligence more than slight as a matter of law. The question then arises, was the plaintiff under the facts and circumstances guilty of contributory negligence which defeats a recovery in her favor?

The court has held that the negligence of a husband while driving an automobile is not attributable to the wife, but her own acts or failure to act under certain circumstances may be treated as negligence. In Murphy v. Shibiya, 125 Neb. 487, 250 N. W. 746, it was said: "The negligence of a husband while driving his automobile with his wife as his guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger and to protest for her own safety against his recklessness." See, also, Whitney v. Penrod, 149 Neb. 636, 32 N. W. 2d 131.

It is the duty of a guest in an automobile driven by another to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances, and for failure so to do he is guilty of contributory negligence. See, Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Fulcher v. Ike, 142 Neb. 418, 6 N. W. 2d 610; Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178; Costello v. Hild, 152 Neb. 1, 40 N. W. 2d 228.

Under these rules it may well be said that the plaintiff had the right to assume that her husband would take the necessary precautions to avoid known danger or danger which in the exercise of ordinary care should have been known, and if she had so assumed and acted upon the assumption in probability she would not have been guilty of contributory negligence. In this respect however she failed.

Herman E. Fairchild testified that as he came up to

the stop sign on the west side of Highway No. 103 he saw an automobile stopped at the stop sign on the east side. It is evident that the plaintiff also saw the automobile to the east. When she saw the automobile to the east, according to the undisputed evidence, she directed her husband to drive his automobile into the intersection in face of the danger presented by the approach of the automobile occupied by the defendants. Herman E. Fairchild testified as follows: "Well, she said the car on the other side is stopping. You can go on." He further testified that he started across the intersection and was struck as he got past the center or about the center of the intersection.

Obviously at the time that Herman E. Fairchild proceeded to move into the intersection pursuant to the direction of the plaintiff the automobile occupied by the defendants was in plain view and in the exercise of ordinary care could have been seen by the plaintiff as well as her husband. The minimum open distance to the south was 500 feet. It was probably much farther, but for the purpose of this opinion the distance of 500 feet will be accepted, since it presents the view most favorable to the plaintiff.

In Whitney v. Penrod, *supra,* this court said: "To be guilty of contributory negligence as a matter of law, the law requires that if the guest knew, or in the exercise of ordinary care would have known, of the danger threatened and that the driver was remiss in guarding against it, and the guest failed to warn the driver with reference thereto, the guest cannot recover." This pronouncement was made in a case presented under the law of Missouri where contributory negligence of a plaintiff in any degree prohibits a recovery, whereas in this jurisdiction slight negligence does not defeat a recovery if by comparison the negligence of the defendant was gross. § 25-1151, R. R. S. 1943.

Attention has not been called to any case in exact parallel with this one point of fact, but in reason and in

application of the principles of the cases cited herein it cannot well be said that the plaintiff was not guilty of contributory negligence more than slight as a matter of law in directing her husband to drive into the intersection in the light of the danger which in the exercise of ordinary care she could and would have observed.

In the case of Murphy v. Shibiya, *supra,* it is pointed out that where there is a duty in the exercise of ordinary care on the part of a guest passenger in an automobile under the circumstances to look but there has been a failure so to do, and a collision between two automobiles comes about in consequence of such failure coupled with negligence of the driver of the other automobile, such guest is guilty of contributory negligence more than slight as a matter of law, in consequence of which a recovery of damages may not be sustained against the driver of the other automobile.

It becomes necessary therefore to say that at the close of the evidence the defendants were entitled to have a verdict directed in their favor. This determination renders unnecessary a consideration of the other assignments of error.

The judgment of the district court is reversed and the cause is remanded with directions to render judgment notwithstanding the verdict in favor of the defendants and against the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

LEONA SPENCER, APPELLEE, V. WILLIAM CLAYTON SPENCER, APPELLANT, JOSEPH O. SPENCER, EXECUTOR OF THE ESTATE OF WILLIAM CLAYTON SPENCER, DECEASED, ET AL., APPELLANTS.
87 N. W. 2d 212

Filed December 27, 1957. No. 34227.

1. **Judgments.** A judgment is the final determination of the rights of the parties in an action.

2. **Divorce: Judgments.** By statute, judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered.
3. ———: ———. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment, and survives the death of the husband.
4. **Divorce.** A father's obligation under a divorce decree to pay a stated sum per month for the support of his minor children until the youngest child becomes of age or the children become self-supporting, or until the further order of the court, survives the father's death.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Jesse D. Cranny and *Merle M. Runyan,* for appellants.

Miles N. Lee, for appellee.

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

MESSMORE, J.

In the original action appealed to this court, Spencer v. Spencer, 158 Neb. 629, 64 N. W. 2d 348, the plaintiff appellant, Leona Spencer, was granted an absolute divorce from the defendant appellee William Clayton Spencer. She was awarded alimony and division of property as follows: "* * * we conclude that there should be an award in favor of plaintiff in the amount of $75,000, payable $15,000 within 60 days from the date of issuance of mandate herein and $6,000 annually thereafter until the full sum of $75,000 shall have been paid." After the divorce became final, the defendant, William Clayton Spencer, died testate. At the date of his death nine annual installments of alimony had not yet matured and were unpaid. The decree of divorce

also awarded the care, control, and custody of the three minor children of the parties to the plaintiff, and further provided that the defendant pay to the plaintiff $200 a month for the support of the children. The provision as to custody and support of the children was to remain in force until the children became of age or self-supporting or until the further order of the court.

After the death of her husband, the plaintiff filed a motion for revivor of judgment as to alimony and division of property, and also for revivor of judgment for child support, making the three minor children of the parties and the executor of her former husband's estate parties.

There is apparently no question but that revivor is the proper procedure to reinstate a judgment. Since the appellants do not assign error to the form of proceedings, we may assume that they do not object to the same. See In re Estate of Rusch, 89 Neb. 265, 131 N. W. 209.

After trial to the court, the trial court found in favor of the plaintiff as to the revivor for alimony and division of property, and found against the plaintiff and in favor of the minor defendants and executor of the estate of William Clayton Spencer, deceased, as to the attempt to revive the judgment for child support. Judgment was entered in accordance with the findings.

The guardian ad litem filed a motion for new trial, on behalf of the minor defendants, to that part only of the judgment reviving the alimony and division of property. A separate motion for new trial to the same effect was filed by the executor of the estate of William Clayton Spencer, deceased. The plaintiff filed a motion for new trial with reference to the trial court's denial of the revivor of child support. All motions for new trial were overruled. From the overruling of the motions for new trial, the guardian ad litem appeals, as does the executor of the estate of William Clayton Spencer, deceased. The filing of the appeal vests the right of the appellee to a cross-appeal which is asserted in her

brief, as provided for by the rules of this court. See, also, In re Estate of Dalbey, 143 Neb. 32, 8 N. W. 2d 512.

Motion for revivor was filed in the original action which had been decided on appeal in Spencer v. Spencer, *supra*. The motion alleged that William Clayton Spencer, the defendant, died testate on February 14, 1956; that probate proceedings of his estate were instituted in Cherry County and are now pending; that Joseph O. Spencer is the executor thereof; that the defendant left surviving three minor children, Sally Spencer, Betty Lou Spencer, and John Spencer, ages 14, 13, and 12 respectively; and that said minors are the sole beneficiaries of the estate, except for the judgment awarded their mother, Leona Spencer, by the district court in pursuance of the mandate of this court on June 28, 1954. It is further alleged that the judgment and decree entered in the district court pursuant to the mandate provided: "(a) Judgment against defendant for alimony and division of property in the sum of $75,000.00, payable $15,000.00 within sixty days from June 21, 1954, $6,000.00 on or before June 21, 1955, and $6,000.00 on or before each 21st day of June thereafter until the full sum of $75,000.00 shall have been paid. (b) Judgment against defendant for $200.00 per month for the support of said three children, to remain in full force until the children shall become of age or self-supporting, or until further order of the court, with the first payment of $200.00 to become due and payable on July 2, 1954, with a like sum payable on the 2nd day of each month thereafter, as provided." It is further alleged that the alimony and division of property payments remain unpaid except the first two payments, leaving an unpaid amount of $54,000 alimony; and that monthly child support payments of $200 each have been paid to and including June 2, 1956, but that all subsequent monthly payments for child support remain unpaid. The prayer is for the appointment of a guardian ad litem to represent the minor children and that the

plaintiff's judgment and award be revived against Joseph O. Spencer, the executor of the estate of William Clayton Spencer, deceased, and the minor children.

The guardian ad litem filed objections to the revivor proceedings and alleged therein that the laws of Nebraska do not provide for payments of alimony after the death of the defendant William Clayton Spencer; and that the payments as set forth in the decree do not survive the death of the defendant William Clayton Spencer. The prayer was that judgment be entered in accordance with this pleading.

The guardian ad litem filed a separate answer, so far as it relates to the $200 per month child support allowance, which alleged in substance that the district court had no jurisdiction to now provide for child support for the three minor children of the parties in the original action; and that the children, being sole beneficiaries of a large estate, have become self-supporting. The prayer was for a denial of the revivor insofar as the child support is concerned.

Similar and separate answers were filed by Joseph O. Spencer, executor of the estate of William Clayton Spencer, deceased, praying for the same relief as in the answer and objections of the guardian ad litem.

An order nunc pro tunc was entered by the trial court which in effect extended the alimony payment dates from June 21 to August 20 of each year, so as to make the installment "periodic payments" extend beyond a 10-year period, the effect of which was to shift the tax responsibility from the William Clayton Spencer estate to Leona Spencer, the plaintiff, personally. When the order was entered, the plaintiff filed a waiver and agreed to pay the income tax due or to become due on her alimony installments if it would prove beneficial to the children.

The record discloses that Leona Spencer and William Clayton Spencer were married, and as a result of their marriage they became the parents of the three minor

children named as defendants in this proceeding, namely: Sally, born on October 6, 1941, Betty Lou, born on November 25, 1942, and John, born on June 24, 1944; and that the ages of the minor children were Sally 15, Betty Lou 13, and John 12. Leona Spencer, as plaintiff, instituted an action for absolute divorce and custody of the children of the parties in the district court for Custer County. Upon trial had to the court, she was denied a divorce. On appeal to this court, the judgment of the district court was reversed and Leona Spencer, as plaintiff, was granted an absolute divorce from the defendant William Clayton Spencer, the custody of the three minor children of the parties, and judgment for alimony and child support as heretofore set forth.

The record further shows that William Clayton Spencer paid $15,000 as provided for in the decree of divorce, on or about August 24, 1954, and $6,000 on or about June 21, 1955, also that he paid on support money as provided in the decree or judgment the sum of $4,800, these payments being in monthly installments for child support from July 2, 1954, to June 2, 1956.

William Clayton Spencer died testate, a resident of Cherry County, Nebraska, on February 14, 1956. At the date of the death of William Clayton Spencer, no installments of alimony payments were delinquent, nor was any payment of child support in default.

The will of William Clayton Spencer was duly admitted to probate in the county court of Cherry County. In his will he devised and bequeathed all of his property, real, personal, and mixed to his three minor children, the defendants in this proceeding.

Joseph O. Spencer, brother of the decedent, was named executor of the last will and testament of William Clayton Spencer, deceased. He qualified and is now the duly appointed, qualified, and acting executor of the said will.

Leona Spencer, the plaintiff herein, filed a claim

against the estate in the county court of Cherry County for $76,600 which consisted of nine unmatured annual installments of alimony totaling $54,000, and child support payments to be paid in the future. This claim is still pending and undisposed of.

It was testified that William Clayton Spencer left approximately 5,000 acres of land appraised at $10 an acre for inheritance tax purposes. The record also shows that the executor sold 743 head of cattle for $61,860.90, 6 horses for $410.70, miscellaneous property for $583.68, and collected the first half payment on the ranch lease in the amount of $8,287.47. In all, the executor collected about $100,000.

The executor testified that prior to the death of his brother, William Clayton Spencer, they owned land together. A partition action was brought by William Clayton Spencer against Joseph O. Spencer, his brother, in the district court for Cherry County. By the proceedings had therein, it appears that they owned together approximately 13,000 acres of land. By the decree in partition, Joseph O. Spencer received about 8,000 acres of land and William Clayton Spencer approximately 5,100 acres of land. The decree was entered on September 19, 1955. In the decree of the district court it was adjudged that the plaintiff's alimony and support awards were absolute first liens and charges on the real estate awarded to William Clayton Spencer, that is, that all of said real estate allotted and made firm and effectual in William Clayton Spencer was charged with and made subject to the full balance due Leona Spencer on the judgment recovered by her against William Clayton Spencer in the district court for Custer County for alimony, child support, court costs, and attorney's fees.

The will of William Clayton Spencer was received in evidence. It provided in part: "I will, give and bequeath and devise to my beloved children, Sallie Leone Spencer, Betty Lou Spencer and John Clayton Spen-

cer, all of my real, personal and mixed estate of every kind whatsoever and wheresoever situate, in equal shares, share and share alike, * * *." The will further provided: "I especially provide, will and direct that no part of my said estate of any kind whatsoever shall descend to or vest in the said Leona Spencer other than such share as is my (by) said divorce decree awarded to her."

The plaintiff testified that she is the holder of a judgment awarded to her; that she had never remarried; that her three minor children are living with her, going to school at Broken Bow, and are under her care and custody; that she has been supporting her children; and that family expenses amount to at least $300 a month.

For convenience we will refer to the parties as designated in the district court unless occasion demands otherwise, that is, Leona Spencer as plaintiff, William Clayton Spencer, deceased, as the deceased, and Joseph O. Spencer as executor.

The assignments of error set forth by the executor, deemed pertinent to a determination of this appeal, and the assignments of error made by the guardian ad litem are substantially the same and may simply be stated as follows: The trial court erred in holding that the unmatured installments of alimony, nine in number, totaling $54,000, could be collected from the estate of the deceased and the minor defendants, there being no provision to this effect in the decree of divorce awarded to the plaintiff, and there being no statute in Nebraska so providing. The judgment and decree of the district court is contrary to the evidence and the law.

The pertinent assignment of error relating to the cross-appeal of the plaintiff may be stated as follows: The trial court erred in adjudging that the original judgment against the deceased for $200 a month for child support in accordance with the decision in Spencer v. Spencer, *supra,* and the trial court's judgment and

decree on the mandate of this court did not survive the death of William Clayton Spencer, deceased.

We will take up the assignments of error in continuity.

All matters relating to divorce are purely statutory. The statutes of the different states in some particulars are different from those relating to the subject in this state. We look first to the law of this state for a solution of the problems presented by this appeal.

The right of a wife to enforce a judgment for alimony and division of property is a clear vested right as will appear by the following applicable statutes.

Section 25-1301, R. R. S. 1943, provides: "A 'judgment' is the final determination of the rights of the parties in an action."

Section 42-319, R. R. S. 1943, provides in part: "All judgments and orders for payment of alimony or of maintenance in actions of divorce or maintenance shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by executions and proceedings in aid thereof, * * *."

Section 42-323, R. R. S. 1943, provides in part: "* * * Judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered."

Section 42-340, R. R. S. 1943, provides that unless proceedings are pending, the original decree shall at the expiration of six months become final without any further action of the court.

Section 25-2226, R. R. S. 1943, construes the words "decree" and "judgment" as being synonymous terms.

In Nygren v. Nygren, 42 Neb. 408, 60 N. W. 885, the court said: "* * * the state legislature, in 1883, passed 'An act to provide additional remedies for enforcement and collection of judgments and orders for alimony or maintenance.' Sections 1 and 2 of said act, the same being sections 4a and 4b, chapter 25, Compiled Statutes

of 1893, read as follows: * * *." Section 4a referred to in the opinion is substantially the same as section 42-319, R. R. S. 1943. The court held: "Since the enactment of section 4a, chapter 25, Compiled Statutes, a decree for alimony is a lien upon real estate the same as a judgment at law, and is enforceable in the same manner."

In Graham v. Graham, 135 Neb. 761, 284 N. W. 280, it is said: "The alimony judgment is legislatively endowed with the same qualities as 'other judgments,' and by the same authority may 'be enforced and collected by * * * other action' as 'other judgments' are."

The plaintiff in the instant action was the holder of a final judgment which could be enforced, insofar as the alimony is concerned, as set forth in the above-cited authorities and as indicated by the sections of the statutes heretofore cited.

With reference to the defendants' contention that the annual alimony award as decreed in Spencer v. Spencer, *supra,* does not survive the death of the former husband of the plaintiff, the defendants argue that the corresponding duty to make such payments being personal, the same are generally considered as terminating upon the death of either of the parties where no statute to the contrary exists and judgment and decree are silent on the subject, and that the same are not collectible by the plaintiff in the instant case.

In this connection our attention is called to Masters v. Masters, 155 Neb. 569, 52 N. W. 2d 802. There is a clear distinction between the cited case and the instant case. In the Masters case the plaintiff, the divorced wife of the defendant, filed an application in the district court to revive a judgment entered in her favor in a divorce action. The second wife of the deceased defendant, as executrix of his estate, appeared specially, objecting to the jurisdiction of the court over the subject matter of the action. The district court sustained the special appearance of the executrix. This court affirmed the district court's judgment. At the time of the defendant's

marriage to his second wife he had no property other than the income he received from his earnings from which he was obligated to pay the monthly installments awarded in the divorce action. The judgment was not based upon an award of alimony in gross. The monthly installments of alimony were paid out of the husband's income. There was no provision in the court's decree fixing the total amount of alimony and no date of termination of such payments. Under such circumstances, in the absence of any disclosing intention, alimony for monthly support does not survive the death of the husband. In the instant case the judgment of this court definitely described the alimony payments and fixed the same in a definite amount, as well as the time of payment of the same, and when the payments would terminate.

The following cases from this jurisdiction are applicable.

In Wharton v. Jackson, 107 Neb. 288, 185 N. W. 428, it was held: "A decree of the trial court in a divorce case in favor of the wife, granting $15 a month during the minority of a daughter, aged five, and of a son, aged three, or of either of them, where the term of court has ended and there have been no proceedings to review nor revise, is a final judgment and became a lien upon the real estate owned by the husband * * *. * * * Such a judgment is for a definite amount and is a lien, not only for the amount of the matured unpaid instalments (sic) and interest thereon, but also as security for the payment of those instalments (sic) yet to become due during the minority of the younger child."

In Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921, it was held: "An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in instalments (sic), and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife

as to be capable of a present vesting and to constitute an absolute judgment." See, also, Beard v. Beard, 57 Neb. 754, 78 N. W. 255; Graham v. Graham, *supra;* Dunlap v. Dunlap, 145 Neb. 735, 18 N. W. 2d 51; Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617.

In the case of Anglim v. Anglim, 140 Neb. 133, 299 N. W. 346, it was held: "Where a wife secured a decree for separate maintenance, upon personal service, and the husband, subsequently in another jurisdiction on constructive service, without bringing the former decree to the attention of the latter court, secured a divorce, and never paid the maintenance decree, said separate maintenance decree will continue in full force and effect until directly modified, especially where the former court retained such right, and where the husband dies before such modification, all instalments (sic), due and unpaid, and other rights thereunder, unless modified by the court, or prohibited by specific statute, may be enforced against the estate of the deceased husband in this state."

As stated in Holmberg v. Holmberg, 106 Neb. 717, 184 N. W. 134: "An action for divorce does not survive. The purpose of the action being to dissolve the marriage relation, and that relation being dissolved by death, the proceedings after the death of one of the parties would be useless and of no avail. Where, however, property rights are involved and a judgment for alimony or determining the separate property rights between the parties has been had in the case, the cause generally will survive as to such matters. 1 C. J. 208, sec. 404; 1 R. C. L. 39, sec. 35."

In Annotation, 39 A. L. R. 2d 1413, it is said: "Where a divorce decree calls for a designated sum as alimony in gross then, even if it is provided that the sum named should be paid in instalments (sic) over a period of time, an intention is easily found that such payments should not cease with the husband's death prior to the time the full amount called for has been paid."

In the case of Hagerty v. Hagerty, 222 Mich. 166, 192 N. W. 553, a case somewhat in point with the instant case, it was said, in substance, that on principle, there is no escape from the conclusion that a decree for alimony in gross, if without reservation, becomes a vested right from the date of its rendition and survives the death of the husband. See also, Garber v. Robitshek, 226 Minn. 398, 33 N. W. 2d 30.

In the light of the foregoing authorities we think the judgment, upon its face, manifests an intention to make the defendants liable for alimony to continue as a charge against the estate of William Clayton Spencer, deceased. In the instant case the plaintiff's alimony judgment should be and stand revived, and held to be in full force and effect and collectible against the former husband's estate. The assignments of error asserted by the defendants are not sustainable.

This brings us to the cross-appeal of the plaintiff relating to the child support award as decreed in Spencer v. Spencer, *supra,* and whether or not the same may be revived after the death of the father of the minor children here involved.

The decree in Spencer v. Spencer, *supra,* specifically provides child support payments "* * * shall remain in force until the children shall become of age or self-supporting or until the further order of the court."

In the case of In re Estate of Rusch, *supra,* the controversy was over a $2,000 claim filed in the deceased father's estate for the purpose of increasing the allowance for child support. The court said, in substance, that the county court had no jurisdiction to increase child support allowance for the reason that the district court had original jurisdiction and this jurisdiction was not lost because of the death of a party in such proceeding. The court reviewed the facts in relation to what are now sections 42-311, 42-312, and 42-318, R. R. S. 1943. The court said: "It thus appears that the district court not only had jurisdiction to make full provision for the care,

custody and maintenance of the child, but in acting within that jurisdiction retained power to revive and alter the decree to meet changing circumstances and conditions. * * * This jurisdiction was not lost by the death of a party to the suit. * * * It is insisted by plaintiff, however, that she is without a forum, if she cannot obtain redress in the county court, because the statute, so she asserts, provides no way to revive the decree of divorce after the death of the husband. This argument is not persuasive. The decree relates to both divorce and maintenance. Revivor as to the latter subject alone is necessary. The divorce would not be disturbed. The statute quoted expressly provides that the court, from time to time, may revive (revise) and alter the decree 'concerning the care, custody and maintenance of the children.' (§ 42-312, R. R. S. 1943.) As to maintenance the decree is subject to change. It may bind the father while he is living and his estate when he is dead. The obligation of a father to support his helpless offspring may survive both divorce and death. Miller v. Miller, 64 Me. 484; Seibly v. Person, 105 Mich. 584."

The cited case clearly indicates that an allowance for child support in a fixed sum payable monthly, as under the decree in Spencer v. Spencer, *supra,* survives the death of the father of the minor children.

The case of In re Estate of Rusch, *supra,* relied upon the case of Miller v. Miller, 64 Me. 484, where it was held that a decree made in a divorce suit that the mother shall have the care and custody of her minor children, and that the father shall pay a certain sum quarterly toward their support, which by its terms is to continue until further order of the court, is not disturbed by his death, and a bond given to secure performance of such a decree is binding upon the surety notwithstanding the death of the principal obligor.

In Edelman v. Edelman, 65 Wyo. 271, 199 P. 2d 840, it was held, as in Miller v. Miller, *supra,* where a divorce decree in favor of a wife awarded her custody of a minor

son, obligation of the husband under provision in decree requiring husband to pay wife $30 a month for support of minor son until further order of the court did not terminate upon husband's death, but survived his death as a proper claim against his estate.

This question usually arises, however, in cases of divorce where the mother is given the custody of the child and the father is ordered to pay her stipulated amounts for its support. The general rule is that such an obligation does not terminate upon the death of the father in cases where he dies before the child arrives at his majority, but survives his death. Especially is this so where the divorce decree is made a lien upon the father's estate.

Cases from other jurisdictions generally hold that, in the absence of statutory inhibitions, the weight of authority seems to be to the effect that a father's obligation under a divorce decree to pay a stated amount per month for the support of his minor children does not necessarily terminate upon his death, but may survive against his estate as to such subsequently accruing installments thereunder, after his death and during the minority of the children; and that such is particularly true where the divorce decree is made a lien upon the father's property, or where the judgment on its face manifests an intention to make defendant's liability for maintenance a continuing one after his death and a charge against his estate. See, 27 C. J. S., Divorce, § 323 (c), p. 1252; Newman v. Burwell, 216 Cal. 608, 15 P. 2d 511; Gainsburg v. Garbarsky, 157 Wash. 537, 289 P. 1000; Creyts v. Creyts, 143 Mich. 375, 106 N. W. 1111, 114 Am. S. R. 656; Murphy v. Moyle, 17 Utah 113, 53 P. 1010, 70 Am. S. R. 767; Mansfield v. Hill, 56 Or. 400, 107 P. 471, 108 P. 1007; Stone v. Bayley, 75 Wash. 184, 134 P. 820, 48 L. R. A. N. S. 429; Silberman v. Brown (Ohio Com. Pl.), 72 N. E. 2d 267; Garber v. Robitshek, *supra;* Annotation, 50 A. L. R. 241; Annotation, 18 A. L. R. 2d 1130, 1131, 1133.

Section 42-312, R. R. S. 1943, provides: "If the cir-

cumstances 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." See, also, § 42-324, R. R. S. 1943.

By statute, the district court has original jurisdiction over the custody, maintenance, and support allowances of minor children involved in a divorce action.

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, marriage, or the reaching of majority, 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; Gibson v. Gibson, 147 Neb. 991, 26 N. W. 2d 6; Dunlap v. Dunlap, *supra*.

We are not here determining whether or not the children are self-supporting. Insofar as the evidence in this case shows, the mother has the care, control, and custody of the children and at the present time is expending her own funds for their support. In addition, she claims that the amount she receives is inadequate for their support. However, that is a matter for future determination if it should be required.

Some reference is made to a claim filed by the plaintiff in the estate of her former husband in the probate court of Cherry County. This claim is not before the court for determination.

For the reasons given herein, we conclude that the judgment of the trial court denying the revivor for child support constituted error. The trial court is directed to enter judgment reviving the child support in conformity with this opinion.

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

LAWRENCE E. PRIBYL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

87 N. W. 2d 201

Filed December 27, 1957. No. 34256.

1. **Homicide: Automobiles.** In an action charging motor vehicle homicide the burden is on the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles.
2. ———: ———. In an action charging motor vehicle homicide the burden is on the State to prove that the unlawful acts were the proximate cause of the death.
3. **Intoxicating Liquors.** A witness may give his opinion from observations made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor.
4. **Automobiles: Witnesses.** Speed of a motor vehicle is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate.
5. **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.
6. **Habeas Corpus.** Where a person stands charged with a criminal offense and he seeks discharge therefrom by writ of habeas corpus, which writ is denied, he is not entitled to have the trial on the criminal charge delayed until an appeal from the denial of the writ of habeas corpus has been ultimately determined.
7. **Juries: Appeal and Error.** Where the method pointed out for securing jurors is disregarded and due and timely objection is made by a defendant in a criminal case, error will be presumed.
8. ———: ———. Where the method pointed out for securing jurors is disregarded and due and timely objection has not been made by a defendant in a criminal case, a reversal may not be had on account thereof in the absence of the appearance of prejudice.
9. **Juries.** By section 25-1634.02, R. R. S. 1943, the right to summon persons from bystanders or the body of the county, commonly referred to as talesmen, for jury service was made to depend upon necessity, which necessity is determinable by the judge presiding.

10. **Homicide: Automobiles.** Motor vehicle homicide is a separate and distinct crime and so defined by statute.
11. **Criminal Law: Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything of which a verbal description by a witness is competent and relevant.
12. ———: ———. Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle.
13. **Criminal Law: Witnesses.** The general rule is that the segregation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court.
14. **Homicide: Negligence.** Negligence or gross negligence is not an element of the crime of motor vehicle homicide.
15. **Criminal Law: Witnesses.** A county attorney is not prohibited from becoming a witness in a criminal action.
16. **Criminal Law: Evidence.** In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony.
17. ———: ———. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.
18. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion.

ERROR to the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Dryden & Jensen and *Crosby, Pansing & Guenzel,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for defendant in error.

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

YEAGER, J.

This is a criminal action wherein, in the district court for Buffalo County, Nebraska, Lawrence E. Pribyl was charged with the crime of motor vehicle homicide.

The action was prosecuted in the name of the State of Nebraska by the deputy county attorney of Buffalo County. On trial of the case Pribyl was convicted of the charge and was sentenced to a term of not less than 1 year nor more than 1½ years in the Nebraska State Reformatory for Men. A motion for new trial, a supplemental motion for new trial, and a motion in arrest of judgment were filed. These motions were overruled. By petition in error Pribyl seeks a reversal of the conviction and sentence. He will hereinafter be referred to as the defendant.

The statute which provides the basis for a prosecution such as this is in pertinent part as follows: "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 * * *." § 28-403.01, R. R. S. 1943.

Before proceeding to a consideration of the grounds on which the defendant seeks a reversal it appears that it should be pointed out that the information charged in general terms that while he was engaged in the unlawful operation of a motor vehicle he caused it, without malice, to collide on a city street in Kearney, Nebraska, with the body of Vera Bartu, injuring her and causing her death. The thing which was unlawful in the operation is not described. This failure to describe or designate the thing which was unlawful was not attacked either before or at the trial.

The court, by its instruction No. 6, limited the area of consideration of unlawful operation by the jury to: (1) Operation of a motor vehicle on a highway at a speed in excess of what was reasonable and prudent under the then existing conditions, (2) speed in excess of 25 miles an hour in any city or village except when 25 miles an hour would be unsafe or was hazardous, (3) speed greater than was reasonable and proper with regard to traffic conditions and use on any road, avenue, or boulevard running within, through, or along the

grounds of state institutions, and (4) operation while under the influence of alcoholic liquor. Of this instruction no complaint by assignment of error has been made.

The brief of the defendant contains numerous assignments of error. The primary contention however is that the admissible evidence is not sufficient upon which to base a finding that at the time and place in question the defendant was operating a motor vehicle unlawfully and that such unlawful operation was the proximate cause of the death of Vera Bartu. It is admitted that Vera Bartu came to her death as the result of the collision with a motor vehicle operated by the defendant, but the substantial contention of the defendant is that there has been a failure of proof that the operation was unlawful and the proximate cause of the death.

In an action of this kind the burden is upon the State to prove beyond a reasonable doubt that the person charged operated his motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles. Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592.

The burden is on the State also to prove that the unlawful act or acts were the proximate cause of the death. Birdsley v. State, 161 Neb. 581, 74 N. W. 2d 377.

Facts about which there is no controversy, but which must be considered in determining whether or not the conviction in this case shall be sustained, are the following: On October 22, 1956, at about 7:30 p.m., Vera Bartu was standing on the north side of Twenty-sixth Street in Kearney, Nebraska, at a point directly south of a building on the grounds of the Kearney State Teachers College known as Case Hall. This street extends east and west and separates the buildings on the north from the main buildings of the college which are to the south. The place where she was standing was not in a cross walk but it was in an area not used for parking automobiles. To the east about 169 feet is

Ninth Avenue which extends north and south. Vera Bartu started to cross over Twenty-sixth Street to the south or southwest and while she was crossing the defendant came from the east in a 1948 Plymouth automobile. The left front corner of the automobile struck her, as a result of which she was thrown through the air and westward the distance of about 75 feet, and the force of the impact caused her to be propelled on the surface of the street until she had reached a point about 170 feet from the point of the collision. On examination immediately thereafter it was found that she was dead. The defendant did not stop or reduce the speed of the automobile until he reached Eleventh Avenue which was to the west. He returned to the scene a few minutes later and reported that he was the operator of the automobile which struck Vera Bartu. Thereafter he was taken to a local hospital where with his consent blood samples were taken for the purpose of determining whether or not in his blood there was evidence of alcohol or of intoxication. Thereafter he was taken to the police station where he was interviewed and where observations were made of his appearance, his conduct, and his speech.

Other facts disclosed by the record are that within a few minutes after the collision Dr. O. R. Hayes appeared on the scene. It was he who took the blood samples. The analysis of the samples indicated an alcoholic content of 0.14 percent. This witness talked with and observed the defendant at the hospital and later at the police station. He related at length what took place on these occasions, the details of which it is not deemed necessary to set forth here. He also testified to a broad experience in the observation of persons under the influence of intoxicating liquor. At the conclusion of this foundation he was allowed over objection to give his opinion as to whether or not at the time in question the defendant was under the influence of in-

toxicating liquor. He gave it as his opinion that there was some degree of alcoholic influence.

The sheriff of Buffalo County gave it as his opinion that at the time the incidents involved here came about the defendant was under the influence of intoxicating liquor. The opinion was given after exhaustive foundation was laid, which foundation does not require restating herein.

The defendant contends that the evidence was inadmissible as proof that he was operating his automobile while under the influence of alcoholic liquor at the time Vera Bartu was killed. The contention is without merit. In Howard v. State, 109 Neb. 817, 192 N. W. 505, it is said: "The rule, as deduced from the weight of authority, is that a witness may testify, from observation, whether a person was intoxicated. Intoxication is a fact which a witness may ascertain in the same manner in which he ascertains other facts. He may give the details and then may state the ultimate fact of intoxication as derived from observation." See, also, Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588; Franz v. State, 156 Neb. 587, 57 N. W. 2d 139.

The evidence of these witnesses was admissible. The weight and sufficiency of it was for the jury. Franz v. State, *supra.*

Four witnesses on behalf of the State who observed the movements of the automobile of the defendant at the time of the occurrence were allowed to give their respective opinions as to the rate of speed at which it was moving. The defendant urges that no proper and sufficient foundation was laid for the admission of these opinions. Each of the witnesses had driven automobiles and testified that he was able from observation to reasonably accurately estimate the speed of moving vehicles. A brief summary of the other foundational testimony of the four witnesses is the following:

One of the witnesses testified that he was about 75 feet north of Twenty-sixth Street, walking south; that

he heard the automobile coming from the east; that he heard the impact; that he saw the car and the body of Vera Bartu west of the walk which leads out of Case Hall; that the street lighting was very good; that he observed the movement of the automobile for 325 to 350 feet and its speed did not appear to increase or decrease while he watched; and that in his opinion the speed was from 35 to 40 miles an hour.

Another testified that he saw the automobile about 50 feet before and about 200 feet after it struck Vera Bartu; that it did not slow down; and that in his opinion the speed was over 45 miles an hour.

Another testified he saw the automobile and watched it for 300 to 350 feet. He testified that in his opinion the speed was 35 miles an hour. Incidentally no objection as to foundation in this instance appears in the bill of exceptions.

The other witness testified that he heard the automobile hit a dip at the intersection of Ninth Avenue and Twenty-sixth Street, that he first saw it 10 or 15 yards west of that point and saw it for as much as 250 feet thereafter, and that at that time he did not arrive at an opinion as to the rate of speed but after putting everything together he arrived at an opinion that the speed was 40 miles an hour.

In the light of controlling principles the conclusion is reached that there was sufficient foundation for the receipt in evidence of the opinions of these witnesses as to the speed at which the automobile of the defendant was being operated at the time Vera Bartu was struck and killed.

In Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893, it was said: "Speed of an automobile is not a matter of exclusive knowledge or skill, but anyone with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony." See, also, Schluter v. State, *supra;* Haight v. Nelson,

157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1.

The testimony of these witnesses was competent proof that the defendant was operating his automobile in excess of 25 miles an hour in the city of Kearney, Nebraska. Coupled with other evidence in the case it was competent proof that at the time and under existing conditions the speed, whether it was greater or less than 25 miles an hour, was unreasonable and imprudent. The operation of the automobile was along the grounds of a state institution. Again coupled with other evidence in the case it was competent proof that the speed of the automobile was unreasonable in the light of the condition and use of the street.

Other evidence to which reference has been made is that Twenty-sixth Street was well-lighted and that objects on the street were readily observable. The street was crossed in custom by the students at the college of which the defendant was one. Vera Bartu was in a position where the defendant could readily have observed her after crossing Ninth Avenue. There was no apparent effort by defendant to avoid driving into Vera Bartu or to stop for a considerable distance after she had been struck.

Of course this evidence as to speed, the summary of related events, and the evidence as to the defendant being at the time under the influence of intoxicating liquor does not stand without controversion. The defendant denied that he was under the influence of intoxicating liquor and there was other evidence to support his denial including evidence from expert witnesses elicited through hypothetical questions. As to speed the defendant testified that he was driving 20 to 25 miles an hour. He further testified in substance that at the time he did not know what he struck but, whatever it was, it came in front of his automobile so suddenly that he as unable to avoid striking it.

In a criminal case such as this where there is conflicting evidence the rule is the following: "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." Birdsley v. State, *supra*. This principle has been announced in varying terms but in a like sense in other decisions of this court. See, Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349; Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761.

It must be said therefore that the verdict and judgment are not to be vacated and set aside unless there is found some fatal error in the proceedings leading up to the trial or there was prejudicial error occurring at the trial as contended by the defendant in his assignments of error.

Following the acts which are the basis of the prosecution herein the defendant was charged by formal complaint in the county court of Buffalo County, Nebraska, with motor vehicle homicide. A hearing was had at the conclusion of which the defendant was held to the district court for trial. Thereafter he filed an action in habeas corpus the purpose of which was to obtain his release on the ground that the evidence in the county court was insufficient upon which to hold him for trial in the district court. A trial was had and his release was denied. From that adjudication the defendant appealed to this court. The appeal was pending at the time the defendant was called for trial on the charge of motor vehicle homicide in the district court. On that ground he made application for continuance pending the final disposition of the appeal. The application was denied. He contends that this was error. Incidentally by opinion of this court in Pribyl v. Frank, *ante* p. 239, 85 N. W. 2d 328, the appeal was decided adversely to the defendant herein.

This subject is considered at length in the annotation in 63 A. L. R. 1460. Cases from various jurisdictions

are cited and reviewed therein. The conclusion reached as to instances wherein the writ of habeas corpus has been denied, in the absence of controlling statute, is that a continuance of the trial of the criminal action until the appeal in the habeas corpus action has been decided may properly be denied. The opposite is true if the writ has been allowed and the respondent has taken the appeal.

In this state there is no statute relating to the subject, therefore the assignment must be resolved against the defendant herein.

On the trial of this case the regular panel of jurors was exhausted and under the direction of the court talesmen were called. This action has been assigned as error. At the outset it should be said that no objection to this procedure was made at the time. The objection was first registered in the motion for new trial. It should further be said that there is nothing in the record to indicate that by this the defendant was or could have been thereby prejudiced.

By the terms of section 25-1634, R. R. S. 1943, prior to 1953, the calling of talesmen in the manner in which it is claimed they were called, provided objection had been timely made, would have been reversible error. The section at that time permitted the calling of talesmen in the case of "great emergency." In Losieau v. State, 157 Neb. 115, 58 N. W. 2d 824, in interpretation of this emergency provision, this court, by quotation from Russell v. State, 77 Neb. 519, 110 N. W. 380, said: " 'If the method pointed out by the statute for securing jurors is disregarded, no doubt the defendant may object to being tried upon a criminal charge before the jury so obtained. In such case the law will presume prejudice.' "

This statute however was amended by the Legislature in 1953. The amendment appears in part as section 25-1634.02, R. R. S. 1943. In it the following was substituted: "When it is deemed necessary the judge shall direct * * * the sheriff of the county * * * to summon

from the bystanders or the body of the county a sufficient number of persons * * * to fill the panel, in order that a jury may be obtained." It appears that the intent and purpose of the amendment and change was to cause the question of whether or not talesmen were necessary to reside in the sound discretion of the judge.

There is in addition to this conclusive reason why the defendant in this case may not now be heard to complain. While the statute contained the emergency provision this court, in considering the question presented by this assignment of error, said in Jordan v. State, 101 Neb. 430, 163 N. W. 801: "Defendant made no objection at the time, nor is any complaint made against the character or conduct of the juror so summoned. While perhaps the order ought to have been in the language of the statute, no objection was made at the time and no prejudice is shown. In the absence of such showing, it will be treated as error without prejudice." The assignment does not present error which may be regarded as prejudicial.

The defendant contends that it was error to submit the case to the jury on the charge of motor vehicle homicide rather than manslaughter. The contention is fallacious. This court, in Birdsley v. State, *supra*, pointed out that motor vehicle homicide was not manslaughter but was distinct therefrom. It was said: "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."

The next question is that of whether or not the court erred in permitting photographs of the appearance of Vera Bartu to be admitted in evidence. There is no substantial contention that they failed to accurately display and to expose to the jury the observable condition of Vera Bartu immediately after and caused by being struck by the defendant's automobile. The contention is that the evidence of her condition was fully disclosed

by testimony and that the only purpose and effect of the presentation of the photographs was to inflame the passions of the jury.

This court said in Vaca v. State, *supra*: "A photograph proved to be a true representation of the person, place, or thing which it purports to represent, is competent evidence of anything of which it is competent and relevant for a witness to give a verbal description."

In the same case it was said: "Where a photograph illustrates or makes clear some controverted issue in the case, a proper foundation having otherwise been laid for its reception in evidence, it may properly be received, even though it may present a gruesome spectacle." See, also, MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45; Lee v. State, 147 Neb. 333, 23 N. W. 2d 316.

It cannot well be said that the condition of Vera Bartu was not a matter proper for consideration of the jury in determining the manner and speed at which the defendant was operating his automobile. The assignment of error may not be sustained.

The next question to be considered is that of whether or not the court erred in refusing to exclude the witnesses for the State from the courtroom until called as witnesses.

The general rule is that the segregation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court. See, Binfield v. State, 15 Neb. 484, 19 N. W. 607; Maynard v. State, 81 Neb. 301, 116 N. W. 53; Johns v. State, 88 Neb. 145, 129 N. W. 247; Roberts v. State, 100 Neb. 199, 158 N. W. 930, Ann. Cas. 1917E 1040. In the opinions in these cases attention has been directed to conditions under which the advisability of segregation has been indicated, but no standard has been declared whereby it may be said that discretion has been abused by failure to segregate.

In Maynard v. State, *supra*, an indication appears that abuse of discretion may not be declared arbitrarily but it may be declared only if there are facts and circum-

stances indicating abuse. In the opinion it was said: "Aside from what was developed later in the trial, and of which the court presumably had no knowledge at the time of the ruling upon the request, we are not advised of any abuse of discretion on the part of the court." It was further stated: "That such a request, in cases of the importance of this one, should be granted cannot be questioned." Despite the quoted admonitory statement the conviction was affirmed.

In the case at bar there is nothing to indicate that the defendant was in anywise prejudiced by the refusal to segregate the State's witnesses, in consequence of which the conclusion reached is that there was no abuse of discretion.

By the next assignment of error to be considered the defendant contends that the court erred in refusing to give three instructions which were requested. The substance of the first offered instruction was a request that the court instruct the jury that before the defendant could be convicted of the charge against him the jury must find that he was guilty of gross or great and excessive negligence.

This court made it clear in Hoffman v. State, *supra,* that negligence or gross negligence as such is not an element of the crime of motor vehicle homicide. There must be proof of unlawful operation. Negligence may be and usually is a basic element in unlawful operation and may be proved but the essential element of the crime as declared by the statute is the unlawful act.

The second of the three instructions was a request that the jury be instructed that it must be proved that the unlawful act was the proximate cause of the death. The jury was clearly so instructed by instruction No. 4 given by the court on its own motion.

The third of the three instructions, to the extent necessary to consider it here, was a request that the court charge that before the collision the defendant was engaged in the felonious operation of his automobile. There

is no merit to the contention. The subject will be dismissed with the statement that the gist of the offense of causing death as the result of unlawful operation is not felonious operation but only unlawful operation.

The county attorney was allowed to testify as a witness for the State. The defendant insists that this was error. The theory of disqualification as a witness is not made clear. No case cited or found contains a rule disqualifying a county attorney as a witness. The rule in this state is stated as follows in Frank v. State, 150 Neb. 745, 35 N. W. 2d 816: "It is improper in a criminal prosecution for the court to allow one who testifies as a witness to the principal facts to also as attorney conduct the trial in the examination of witnesses or argument to the jury, or to conduct himself in any manner inconsistent with his position as a witness or his interest as an officer of the state." Citations supporting the rule appear in the opinion. The county attorney by his conduct fully conformed to the rule with its inhibitions and took no part in the trial except as a witness. He did not even inform against the defendant. There is no merit in the assignment of error.

The defendant urges as error that there were two incidents of the admission of evidence on rebuttal which were not properly rebuttal. The first relates to the evidence of the witness Hayes. In the case-in-chief he testified that he took the samples of blood for the purpose of ascertaining whether or not there was alcohol in the blood. As a part of the technique he testified that he used an antiseptic before the extraction of blood. The lapsed time between the application of the antiseptic and the taking of the sample was not described with certainty. Witnesses for the defendant testified in substance that if alcohol was used as an antiseptic the showing of alcoholic content in the sample would probably not be accurate in the absence of the lapse of a given length of time between the application of the alcohol and the extraction of the sample. The witness Hayes

was called on rebuttal to and he did explain the technique of taking the samples as to the time elapsing after the application of the antiseptic, which antiseptic was alcohol.

This evidence was not strictly rebuttal but was admissible on rebuttal, being merely elucidative of evidence already given by the witness in the case-in-chief. "In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony." Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113.

In the same opinion it was said: "It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting." See, also, Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322; Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. It may not well be said that the court abused its discretion in the admission of this evidence.

The second relates to separate incidents of evidence of two conversations with the defendant after the fatal incident. One related to what the defendant purportedly said about the consumption of alcoholic liquor. The defendant responded to it on surrebuttal. The other related to a matter having no pertinence in any manner. It related to loss of antifreeze. Though not competent evidence it is not possible to see how it prejudiced the defendant. The evidence in neither instance has been shown to have been in anywise prejudicial.

The remaining question to be considered under the assignments of error is a contention that the sentence imposed by the court is excessive. The statute defining the crime of motor vehicle homicide provides the range in penalty which may be imposed in case of conviction. The minimum is a fine in any amount not exceeding $500 and the maximum is 10 years imprisonment in the penitentiary and a fine of $500. What the penalty shall be

resides in the discretion of the court in each case. See § 28-403.01, R. R. S. 1943.

Under circumstances such as are present in this case the rule is as follows: "Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of such discretion." Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576. See, also, Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698. There is nothing in the record in this case to justify a conclusion by this court that the trial court abused its discretion in the assessment of the penalty.

Finding no prejudicial error the judgment of the district court is affirmed.

AFFIRMED.

JULE ROBINSON, APPELLANT, V. H. F. MEYER ET AL., APPELLEES.
87 N. W. 2d 231

Filed December 27, 1957. No. 34260.

1. **New Trial.** Objections to instructions in a motion for a new trial must be made separately to each instruction to which exception is taken. An objection to the instructions en masse is not sufficient.
2. ———. The instructions to which exception is taken may be grouped together in a motion for a new trial and they will be deemed a separate exception to each instruction in the group. The instructions objected to, however, must be specifically designated by number.
3. **New Trial: Appeal and Error.** When the refusal of the trial court to give a requested instruction is not alleged as error in the motion for a new trial, it may not be asserted as error in this court on appeal.
4. **Trial: Appeal and Error.** For an error at law occurring at the trial to be considered by this court, the alleged error must be properly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal.

5. **New Trial.** The following rule of practice is hereby prospectively abrogated by this court: Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct, and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any of the defendants.

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

Spear, Lamme & Simmons, for appellant.

Sidner, Lee, Gunderson & Svoboda, for appellees.

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

CARTER, J.

This is an action for damages for personal injuries sustained in an automobile accident. The jury returned a verdict for the defendants and the plaintiff has appealed from the judgment entered thereon.

The accident occurred on January 20, 1954, at 4:30 a.m., about 1 mile east of Rogers, Dodge County, Nebraska. Plaintiff was riding in an automobile being driven by Fred Schwartzlander in an easterly direction on U. S. Highway No. 30 immediately prior to the accident. He testified that he was riding in the front seat with the driver and was asleep until awakened when the left rear tire went flat. The evidence of plaintiff and Schwartzlander is that the car was stopped partly off the pavement and, at the direction of plaintiff, Schwartzlander drove the car off the pavement onto the shoulder of the highway. They testified that the car was pulled off on the shoulder to the edge of the ditch, leaving the left wheels 1 foot south of the paved portion of the highway.

While plaintiff was loosening the lugs on the left rear wheel he and the car were hit by an automobile coming from the west, causing the injuries for which re-

covery is sought. Plaintiff and Schwartzlander both testified that the front and rear lights of their automobile were burning. They testified also that they had a trouble light hooked up which shown on the rear of their car and on the left wheel on which plaintiff was working.

The automobile which struck the plaintiff was occupied by Betty Meyer and Eileen Sabo, each of whom were about 17 years of age. Betty Meyer was driving. The automobile belonged to H. F. Meyer, the father of Betty. Both girls testified that they were driving east in the right lane of the two-lane highway at a speed of 45 to 50 miles an hour. They testified that they were watching the road and that they did not see the Schwartzlander car standing in the south lane until the moment of the impact. They testified that there were no lights on the standing automobile and that it was in the right lane of the highway on which they were traveling. There was evidence of debris and marks on the pavement from which it could be inferred that the Schwartzlander car occupied approximately the south 3 feet of the paved portion of the highway.

It was still dark when the accident happened. The pavement was dry. The weather was very cold, it being approximately 18 degrees below zero at the time. A strong north wind was blowing. There was no snow on the ground, but some fine snow was swirling about in the wind. All witnesses who were participants in the accident testified that the swirling snow was very light and did not interfere materially with driving visibility. In this connection we point out that there is no contention advanced that the case was not one for the jury.

The plaintiff complains in his brief of certain instructions given by the trial court. The record shows that these questions were not properly raised. In his motion for a new trial the only reference made to the incorrectness of the instructions is the following: "15. The court erred in giving its instructions." It has been the rule in this state, since our decision in McReady

v. Rogers, 1 Neb. 124, 93 Am. Dec. 333, that an exception to all of the instructions is unavailable if any one of them is correct. While it is not necessary that each instruction excepted to in the motion for a new trial be set forth in a separate paragraph, it is necessary that the instructions excepted to be specified in accordance with the rule announced in Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104, and Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56. The foregoing rule, however, does not relieve a party from designating by number the instructions to which exception is taken.

The plaintiff complains of the failure of the trial court to give certain instructions requested by the plaintiff. The motion for a new trial asserts no such error on the part of the trial court. In fact, the transcript of the proceedings in the trial court does not show any proposed instructions which were requested by the plaintiff. It is a fundamental rule that an issue not presented and ruled on by the trial court will not be considered on appeal. Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227; Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686. The failure of the plaintiff to preserve the alleged error of the trial court in not giving the instructions requested by him prevents the consideration of such claimed error on this appeal.

Assignments of error numbered 2, 3, 4, 5, 7, and 8 assert that the trial court erred in instructing the jury with reference to certain issues in the case. No instructions are specified as being erroneous in the motion for a new trial or in the assignments of error themselves. This court has repeatedly held that instructions not objected to in a motion for a new trial will not be reviewed in this court. Being a court of review, this court will consider on appeal such alleged errors as are properly preserved and submitted to this court.

It is the rule, of course, that the trial court must instruct on the issues in the case which are supported by

evidence without a request therefor. By his assignment of error No. 6, the plaintiff asserts that the trial court should have instructed the jury without request that the defendant Betty Meyer was negligent as a matter of law in failing to keep such a lookout that she could see an obstruction as soon as it was illuminated by her lights, and in driving in such a manner that she was unable to stop to avoid a collision with the Schwartzlander automobile. At no time during the trial did the plaintiff move for a directed verdict against Betty Meyer. He tendered no instruction on the subject. But what is more important still, the matter was not raised in his motion for a new trial in the district court. In other words, the question is raised for the first time on appeal by plaintiff's assignment of error No. 6. This court has consistently held that errors of law occurring at the trial and not made grounds of a motion for a new trial will not be considered on appeal. There are exceptions to this rule such as want of jurisdiction of the court over the subject matter, Gomez v. State ex rel. Larez, 157 Neb. 738, 61 N. W. 2d 345, and the sufficiency of the petition to state a cause of action, Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497. Plaintiff's assignment of error No. 6 does not fall under any exception to the rule. In State ex rel. Spillman v. Citizens State Bank, 115 Neb. 271, 212 N. W. 616, we said: "In order that 'error of law occurring at the trial' may be considered by this court, it is necessary, under our uniform holding, that the district court's attention must have been called to the same by way of a motion for a new trial." By failing to object to and preserve any error with respect thereto, the defendant is ordinarily precluded from raising it for the first time on appeal. As early as Creighton v. Newton, 5 Neb. 100, this court said: "The rule is well settled that 'before a party is entitled to be heard in this court, he must have exhausted his remedy in the court below.' If he is dissatisfied with the verdict or judgment, he must by motion present the

questions of law fairly and fully to the court below, and as no such course has been taken by the plaintiff in the court below, the judgment must be affirmed." In the instant case the plaintiff failed to raise the question in any manner in the district court. There was therefore no error of law occurring at the trial duly excepted to as required by section 25-1142, R. R. S. 1943. He may not do it for the first time in this court.

The defendants assert that the motion for a new trial filed by the plaintiff requires an affirmance of the case under the rule announced in Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N. W. 2d 397. In that case we reiterated the following rule: "Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct, and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants." While it is not necessary to discuss the application of this rule to the present case in view of the result at which we have arrived, we do think the basis of the rule is unsound and that the rule should be prospectively abrogated.

The rule has been long established and applied. We have come to the conclusion that if there was ever a reasonable basis for its existence it has now disappeared. It appears to be a rule which is highly technical, serving only to entrap the unwary, and to provide an unnecessary pitfall for litigants who bring their causes to this court for review. We therefore abrogate the rule as to all cases tried after the release date of this opinion.

For the reasons stated in the opinion the judgment of the trial court is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1958

LOUIS J. WORM, APPELLEE, V. JOHANNA C. CROWELL ET AL., APPELLEES, IMPLEADED WITH FREDERICK PACE WOODS ET AL., APPELLANTS.
87 N. W. 2d 384

Filed January 3, 1958. No. 34267.

1. **Appeal and Error.** The aggregate time allowed for the performance of any of the statutory steps in securing an allowance of a bill of exceptions will not be shortened, or advanced, by completing any of the steps enumerated in advance of the time limited by the statute.
2. **Waters.** Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.
3. **Waters: Boundaries.** When, by gradual erosion, a river becomes the boundary of land the owner thereof then becomes a riparian owner and is entitled to all accretions thereto.
4. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
5. ———. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.
6. **Boundaries: Adverse Possession.** It is the established rule in this state that when a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control

during that time they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.

7. **Adverse Possession.** The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years.
8. ———. If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor.
9. **Evidence.** An exception to the general rule which requires maps, surveys, and the like, to be authenticated by the testimony of the party making the same exists where the documents are ancient. Maps, surveys, etc., purporting to be 30 years old or more are said to prove themselves and are admissible in evidence without the ordinary requirements as to proof of execution or handwriting if relevant to the inquiry, when produced from proper custody, on their face free from suspicion, and authorized or recognized as official documents.
10. ———. An ancient map made under the direction of a private person, or one for which no official authorization or recognition appears, is inadmissible in evidence.
11. ———. An ancient survey made by competent authority, recorded or accepted as a public document, and produced from proper custody, is admissible in evidence to prove the location of boundary lines.
12. ———. An ancient survey which appears to have been made for a private purpose, and not officially authorized or recognized, is inadmissible as an ancient document.

APPEAL from the district court for Washington County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded with directions.*

O'Hanlon & O'Hanlon, for appellants.

Walter G. Huber and *Cranny & Moore,* 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 Wash-

ington County. It involves an action brought by Louis J. Worm whereby he seeks to have quieted and confirmed in himself his title in and to "The Northeast Quarter of the Southwest Quarter (NE¼SW¼) and the Southeast Quarter of the Northwest Quarter (SE¼ NW¼) and Government Lots One (1) and Two (2) in Section Twenty-five (25) in Township Eighteen (18) North, Range Twelve (12) East of the 6th P. M. in Washington County, Nebraska, and the accretions thereto directly East of these Government Lots to the West bank of the Missouri River" on the basis that he is the record title owner of the described lands in fee and therefore entitled to all accretions thereto, and that he and his predecessors in title have been in the adverse possession of all of the lands for more than 10 years.

Defendants Frederick Pace Woods, Olive Black Woods, Marilyn Woods Kilbourne, Mark William Woods, and Marjorie William Woods, who are the owners of the west half of the northwest quarter of said Section 25, filed an answer and cross-petition alleging themselves to be the owners of the "Southeast Quarter of the Northwest Quarter and Government Lots One and Two in Section 25, Township 18 North, Range 12, East of the Sixth Principal Meridian in Washington County, Nebraska, and the accretions thereto directly East of said Government Lots to the West bank of the Missouri River." Their claim of ownership thereto is based on the contention that it belongs to them as accretions to the land they own and also by reason of adverse possession. They ask that the title thereto be quieted and confirmed in them. We shall herein refer to these defendants as the Woods and to the west half of the northwest quarter of Section 25 as the Woods 80.

Defendant Blanche E. Jones, owner of the northwest quarter of the southwest quarter of said Section 25, filed an answer and cross-petition alleging she is the owner of "The North 600 feet of the Northeast Quarter of the Southwest Quarter of Section 25, Township 18

North, Range 12, East of the Sixth Principal Meridian in Washington County, Nebraska, and all accretions thereto, directly East of said above described real estate to the West bank of the Missouri River, * * *." She claims the same by accretion to her land and by adverse possession. We shall herein refer to the northwest quarter of the southwest quarter of Section 25 as the Jones 40.

Plaintiff, by his replies, generally denied the claims made by the foregoing defendants.

The trial court rendered a default judgment in favor of the plaintiff and against all the defendants who had been properly served and had failed to answer or appear, including certain cotenants of the plaintiff. That such can be properly done if the facts so justify see Severson v. McKenzie, 122 Neb. 827, 241 N. W. 774.

At the trial it was "stipulated by and between the parties that for the purpose of this lawsuit that accretion lands be considered as being directly east of the riparian land instead of being measured by a proportional basis to eliminate extensive measurement of the original 1856 survey line and the subsequent lines of the river and the present boundary of the Missouri River."

The cause was tried on the issues raised. During the course of the trial the judge personally viewed the premises. The trial court found generally for the plaintiff and against the answering defendants and rendered a decree accordingly, quieting and confirming in the plaintiff title to the lands he claimed to own and dismissing the cross-petitions of the Woods and Blanche E. Jones. From this decree the Woods and Blanche E. Jones have perfected this appeal.

Appellee contends there is no proper bill of exceptions for this court to consider and that consequently he is entitled to have the judgment rendered by the trial court affirmed because his pleadings are sufficient to support it, citing Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312, and Jones v. City of Chadron, 156 Neb. 150,

55 N. W. 2d 495, to that effect. As stated in Jones v. City of Chadron, *supra:* "In the absence of a bill of exceptions, it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment." This claim of appellee is based on the theory that since the bill of exceptions was not presented to and settled by the trial judge until 11 days after it was returned by appellee's attorney to the attorney for appellants it did not meet the requirements of section 25-1140.05, R. R. S. 1943. This statute provides in this respect that: "The bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who heard or tried the case, * * * at which time the judge shall settle the bill of exceptions."

Sections 25-1140 to 25-1140.07, R. R. S. 1943, provide the statutory steps for the allowance and settlement of a bill of exceptions in case of an appeal. Section 25-1140, R. R. S. 1943, provides for an initial 40-day period from the date of appeal, here May 17, 1957, for the preparation of the bill of exceptions. Section 25-1140.07, R. R. S. 1943, provides the trial judge may, upon a showing of due diligence, extend the time for this purpose up to a maximum of 40 days. That was done and the time for preparing the bill of exceptions was thus extended to August 5, 1957. The bill was prepared by the reporter within that time and delivered to the attorney for the appellants on that day. Section 25-1140.03, R. R. S. 1943, provides 10 days thereafter, or in this case to August 15, 1957, for serving the bill of exceptions on the adverse party or his attorney of record. That was done here on August 13, 1957, or within time. Section 25-1140.04, R. R. S. 1943, provides 10 days within which the adverse party shall return the bill of exceptions. That would here be August 25, 1957. It was returned on August 23, 1957, or within time. Section

25-1140.05, R. R. S. 1943, then provides as hereinbefore set forth. In this case that was September 4, 1957. The bill of exceptions was allowed and settled by the trial judge on September 3, 1957, or within time.

It is apparently appellee's thought that by returning the bill of exceptions to appellants' attorney on August 23, 1957, he could thereby accelerate the date for its allowance and settlement. But such is not the fact. As we said in Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 33, 74 N. W. 2d 854: "* * * the aggregate time allowed for the performance of any of the statutory steps in securing an allowance of a bill of exceptions will not be shortened, or advanced, by completing any of the steps enumerated in advance of the time limited by the statute." Appellee's contention in this respect is without merit and our review on this appeal will be de novo since this is an equitable action. See James v. McNair, 164 Neb. 1, 81 N. W. 2d 813.

In doing so we shall consider the following principles:

"While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." Johnson v. Erickson, 110 Neb. 511, 194 N. W. 670. See, also, McDermott v. Boman, *ante* p. 429, 86 N. W. 2d 62; James v. McNair, *supra;* Hehnke v. Starr, 158 Neb. 575, 64 N. W. 2d 68.

"This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight." Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647. See, also, James v. McNair, *supra;* Hehnke v. Starr, *supra.*

It should be understood that these principles are

merely standards to be considered by us in weighing the evidence adduced and in no way are they conclusive in regard to the result which we must ultimately reach. In the latter respect it is our duty to arrive at an independent conclusion based solely on the record before us.

Section 25, Township 18 North, Range 12 East of the 6th P. M., as originally surveyed in 1856 when Nebraska was a territory, was not a full section because it was cut by the Missouri River on which it bordered. As a result certain tracts of irregular shape were given numbers instead of the usual subdivision descriptions. The lands lying to the east of the northwest quarter of the northwest quarter thereof, consisting of a triangular tract of 22.60 acres, was designated Lot 1; the lands lying to the east of the southeast quarter of the northwest quarter thereof, consisting of a triangular tract of 28.80 acres, was designated as Lot 2; and the irregular tract lying east of the northeast quarter of the southwest quarter thereof, consisting of 56.10 acres, was designated as Lot 3. On July 20, 1868, the northeast quarter of the southwest quarter and the southeast quarter of the northwest quarter of Section 25, together with Lots 1 and 2 thereof, containing a total of 130.90 acres according to the official plat of the survey thereof by the Surveyor General, were patented to Constant Cachelin. Through various means of conveyance the title to these lands became vested in appellee except for certain cotenants whose rights, if any, have already been referred to as having been defaulted herein. Whenever it is convenient to do so we shall herein refer to these two 40-acre tracts claimed by appellee as appellee's north or south 40. It was stipulated that the Woods own the west half of the northwest quarter of Section 25 and that Jones owns the northwest quarter of the southwest quarter thereof. The first evidence of the Woods ownership of this 80-acre tract is a warranty deed dated February 26, 1921, conveying to Mark W. Woods

it and other real estate. The Woods also own a large number of acres of land lying immediately to the west and north of the lands here involved. The Jones 40 has been in the Jones family since at least 1926.

The first question presented by this appeal is, did the Missouri River, after these lands were patented to Constant Cachelin, ever move far enough west so that the Woods land and the north 600 feet of the Jones land became riparian to the right or west bank thereof and, if it did, did appellee and his predecessors in title ever regain the ownership thereof by adverse possession? Second, if the river did not go far enough west to cause the Woods and Jones lands to become riparian, did either of these parties (appellants) become the owners of the land they here claim by adverse possession?

There are some basic principles applicable to the foregoing questions which we will cite before entering into any discussion of the facts relating thereto. They are as follows:

"Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner." Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458. See, also, Gill v. Lydick, 40 Neb. 508, 59 N. W. 104; Topping v. Cohn, 71 Neb. 559, 99 N. W. 372; Kinkead v. Turgeon, on rehearing, 74 Neb. 580, 109 N. W. 744, 121 Am. S. R. 740, 7 L. R. A. N. S. 316; Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538; Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117. As stated in Kinkead v. Turgeon, *supra:* "* * * the rights of riparian owners upon the Missouri river to land formed by accretion are the same as if the river were not navigable, and that the common law applies in full force."

When, by gradual erosion, a river becomes the boundary of land the owner thereof then becomes a riparian

owner and is entitled to all accretions thereto. See, Yearsley v. Gipple, 104 Neb. 88, 175 N. W. 641, 8 A. L. R. 636; Wiltse v. Bolton, 132 Neb. 354, 272 N. W. 197; Conkey v. Knudsen, *supra;* Dailey v. Ryan, 71 S. D. 58, 21 N. W. 2d 61. As correctly stated in Dailey v. Ryan, *supra:* "It is the settled law of Nebraska that erosion of a river, which cuts entirely across riparian land and into the land of an adjoining owner, operates to obliterate the title of him whose land was originally riparian, and that he may not reassert his title if the river thereafter reverses its transverse wanderings and new land is formed within what were his original boundaries."

"A subsequent conveyance by such grantee, without describing such lands by metes and bounds, but by the number or numbers by which the same are designated in the government survey, passes the title, not only to the land originally constituting the grant from the United States, but to the accretions thereto." Topping v. Cohn, *supra.* And such would be true if the grantee died intestate and property he owned was inherited by his heirs at law.

"The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years." Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331. See, also, McDermott v. Boman, *supra.*

The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. See, James v. McNair, *supra;* Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504. As stated in Walker v. Bell, *supra:* "'* * * Ordinarily the law does not undertake to specify the particular acts of occupation by which alone title by adverse possession may be acquired since the existence and establishment of the continuity must necessarily depend greatly on the circumstances of each case, and the use to which the property is adapted, the actual manner of its use, the circumstances of the occupant, and to some extent his intention must be

considered. * * *.' 2 C. J. S., Adverse Possession, § 125, p. 681."

"It is the established rule in this state that when a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own." James v. McNair, *supra.* See, also, Horbach v. Miller, 4 Neb. 31; Levy v. Yerga, 25 Neb. 764, 41 N. W. 773, 13 Am. S. R. 525; Tourtelotte v. Pearce, 27 Neb. 57, 42 N. W. 915.

"* * * taxation of the land for a series of years to the person claiming it, and the payment of taxes by him are competent evidence tending to show ownership." Horbach v. Miller, *supra.* See, also, Walker v. Bell, *supra.*

"The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years." Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494. See, also, Walker v. Bell, *supra;* James v. McNair, *supra.*

A person claiming title by adverse possession must establish it. Hehnke v. Starr, *supra;* McDermott v. Boman, *supra.* As held in Hehnke v. Starr, *supra:* "One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of his adversary." And: "A person claiming title by adverse possession must to establish it prove open, notorious, exclusive, continuous, and adverse possession of the real estate, claiming title to the same against all persons for the full period of 10 years." See, also, McDermott v. Boman, *supra.* The same would be true of claims based

on the rights of a riparian owner to accretion, that is, he must establish his right thereto.

"If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title, and such occupant claims title from such prior possessor, then the possession of the occupant may be tacked to that of such prior possessor." Walker v. Bell, *supra.*

As already stated the patent granted Constant Cachelin to this land in 1868 was based on the government survey of 1856. Thereafter the federal government apparently again surveyed this area in both 1879 and 1890 for a map of this area of the Missouri River published in 1893 cites as reference for the source thereof as to topography to a "survey of 1879" and as to shore line to a "survey of 1890." This map shows the land patented to Cachelin in 1868 as almost completely intact and the topography shows no high bank across the lands now owned by either the Woods or Jones. It does evidence the fact that in 1890 the lands patented to Cachelin in 1868 were apparently still in existence. The next map introduced in evidence by appellee is one based on a survey by the United States Corps of Engineers in October 1923. This map, in addition to showing the river as it then existed, also shows the river banks as of 1890. The topography shown thereon discloses no high bank across appellants' lands. It does show that most of the land originally patented to Cachelin in 1868 to be in existence. The same is true of the maps of the United States Corps of Engineers dated April 27, 1932, based on their "Topographic Survey" of this area except that it does disclose a bank running from the river northwesterly across the southwest corner of appellee's south 40 and extending up onto the Jones 40. The same is true of the United States Engineers' map of 1946-1947 except that it does not show this bank. Based solely on these maps it would seem that the patented land, or at least the major part there-

of, has always remained intact. It is, however, apparent from these same maps that no survey of this area was made by the federal government between 1890 and 1923. This is the period during which appellants contend the patented land, or at least all but a very small portion (about 3 acres) in the southwest corner of appellee's south 40, was washed away.

To cover this period appellee, who had been familiar with the land he now claims to own since 1909, produced himself and others as witnesses who testified they had been familiar with it prior to 1909 and one of whom testified he had been familiar with it even before the turn of the century. They all testified to the effect that the river had never been as far west as any part of the western boundary of the land patented to Constant Cachelin and never farther to the west than the eastern part of the two 40-acre tracts and Lot 1 thereof.

Appellants produced witnesses on this issue, including appellant Frederick Pace Woods who testified he had been familiar with the river at this point since 1913. The other witnesses produced testified they had been familiar with the river at this point since shortly after the turn of the century and one of them testified he had been familiar with it even before that. These witnesses testified to the effect that they had observed the river when its west or right-hand bank was on and across the Woods 80, stating the river was then flowing across the 80 from the north in a southerly direction; that it continued its flow onto and across the Jones 40 in a southeasterly direction until it crossed the east line thereof at a point 600 feet south of the northeast corner thereof; and that it flowed from there onto and across the appellee's south 40 in a southeasterly direction, leaving intact only a very small part of the 40-acre tract, which small tract was located in the southwest corner thereof.

Appellants introduced in evidence a photostatic copy of page 269 of book No. 1 of the official survey records

of Washington County. It represents field notes made by W. H. Hill, county surveyor of Washington County, at the request of M. T. Murphy and, according to the heading thereon, relates to Sections 23, 25, and 26 in Township 18 North, Range 12 East of the 6th P.M. They are dated as having been made on April 11, 1888. When these field notes are extended to the area it places the west bank of the Missouri River at that time at a point 130 feet west of the northwest corner of appellee's south 40. A photostatic copy of a page covering Section 25, taken from the County Surveyor's Irregular Tracts Drawing Book found in the office of the county clerk of Washington County, shows in pencil a meander line of the Missouri River in 1895 as running across the Woods 80 from north to south and then, as it enters onto the Jones 40, angling to the southeast across it and the appellee's 40, leaving only a very small tract of the latter located in the southwest corner thereof. There is also a County Surveyor's Irregular Tracts Drawing Book in the office of the county surveyor. It is the county surveyor's duty to take care of both books and make all entries therein. However, no such meander line was placed across this land in Section 25 in the book kept in the county surveyor's office. The official tax records of DeSoto precinct in Washington County, wherein this land is situated, also evidences the fact that the river, at some time, changed its course and washed away almost all of the land patented to Constant Cachelin because, for a long period of time, only a fractional part (3 acres) of appellee's south 40 was assessed for taxation purposes. Considering the way in which this land was assessed over the years herein involved we do not think the payment of taxes thereon by either the Woods or appellee to be very significant. A plat book of Washington County, including this area, which was put out by the C. H. Scoville Co. of Blair, Nebraska, and Philadelphia, Pennsylvania, in 1908 shows the change in the course of the

river as claimed by appellants. This map was never adopted by any public authority as an actual map of the conditions of this real estate. It was found stored in the vault of the county surveyor as part of the records of his office although he testified it was not a part of his official records. A map of a survey made by Christ Rohwer, a civil engineer, dated November 23, 1910, was also introduced in evidence. It is based on the field notes of a survey of land then apparently owned by C. H. Blakeslee located to the north and northwest of Section 25. The map, as drawn, includes Section 25. Christian or Christ Rohwer had been county surveyor of Washington County prior thereto. The field notes are a part of the survey records of Washington County but they are not considered official records of the office. A map of Washington County put out in 1916 by M. H. LaDougeur was also received in evidence. The evidence shows the county surveyor has the same map in his office. This documentary evidence all shows the change in the river which appellants claim occurred and on which they base their claim of being riparian owners.

These documents are not all official documents and admissible, as such, when proper foundation therefor has been laid. As to the admissibility of official documents see sections 25-1278, 25-1279, 25-1281, 25-1284, and 25-1292, R. R. S. 1943. Some of those that are not would be admissible under the authorities hereinafter cited. We shall consider only those that are admissible thereunder. Even though admissible they would not be conclusive of the issue here presented but the quality and weight thereof, for the purpose of our determining the issue to which they relate, is a matter for our consideration. As stated in Anderson v. Noleman, 90 Neb. 53, 132 N. W. 719: "Where the evidence relating to an issue of fact in an equity case is in direct conflict, the finding should be in favor of the party whose proofs are the more convincing, after all of the competent

testimony and the credibility of the witnesses have been considered."

"An exception to the general rule which requires maps, surveys, and the like, to be authenticated by the testimony of the party making the same exists where the documents are ancient. Maps, surveys, etc., purporting to be thirty years old or more are said to prove themselves and are admissible in evidence without the ordinary requirements as to proof of execution or handwriting if relevant to the inquiry, when produced from proper custody, on their face free from suspicion, and authorized or recognized as official documents." Annotation, 46 A. L. R. 2d 1320.

"An ancient map made under the direction of a private person, or one for which no official authorization or recognition appears, is inadmissible in evidence." Annotation, 46 A. L. R. 2d 1333.

"An ancient survey made by competent authority, recorded or accepted as a pubic document, and produced from proper custody, is admissible in evidence to prove the location of boundary lines." Annotation, 46 A. L. R. 2d 1336.

"An ancient survey which appears to have been made for a private purpose, and not officially authorized or recognized, is inadmissible as an ancient document." Annotation, 46 A. L. R. 2d 1338.

Stewart A. Smith, the county surveyor of Washington County, who examined and surveyed this area in 1956, said he encountered a definite change in elevation or a shelf therein at a point about 250 feet west of the northwest corner of appellee's south 40; that this shelf runs southwesterly from that point across the Jones 40 to where it crosses over onto appellee's south 40 at a point about 600 feet south from the northwest corner thereof; that this shelf or bank averages about 6 feet in height and is about 30 to 40 feet in width from top to toe; that it comes out of appellee's south 40 about 300 feet east of the southwest corner thereof; and that it

also traverses the Woods 80, doing so in a northwesterly to southeasterly direction.

Maurice E. Kirby, a qualified geologist, also examined this area in 1957 and noted this drop off or bank which he describes as being a drop of from 3 to 6 feet. He testified the land to the west thereof was level and being farmed; that the triangular piece remaining in the southwest corner of appellee's south 40 contained much older timber, including elms; and that on the land to the east thereof the trees were much younger and included only willows and cottonwoods. He also testified that in his opinion the land west of this bank had not been under water for at least 100 years. To the east of this bank he found a chute left by the river which, in flood times, still fills up with backwater from the river.

There is also an aerial map in evidence dated June 7, 1955, which fully supports this evidence. By a careful examination thereof this line can easily be observed.

We have fully and carefully considered all of the evidence. We realize the oral testimony in respect to whether or not the river ever crossed over onto appellants' lands is in irreconcilable conflict but, in view of the entire record, we think the following from 32 C. J. S., Evidence, § 763, p. 677, has application: "Documentary evidence relating to a long past event, prepared by parties not affected by it, and not appearing to have been changed, has great probative force, and is entitled to greater consideration than oral testimony as to circumstances, which occurred years ago, by witnesses subject to all the frailties of memories; * * *." We can come to no other conclusion than that at some time after 1879, and before 1923, the west or right-hand bank of the Missouri River crossed over onto appellants' lands and then, in moving back to the east, left the high bank which we have herein fully set out as to location. Thus the Woods 80 and the north 600 feet of the Jones 40 became riparian lands and the owners thereof, and their

successors in title, became entitled to all lands joining thereon to the east by either accretion or reliction. This would entitle appellants to have their title thereto quieted and confirmed in them unless they are prevented from doing so by appellee having been in adverse possession thereof for more than 10 years.

The evidence shows that about 1922 the Woods interests built a fence from near the southeast corner of their 80 out to the river and have maintained it in that location ever since. This fence was not built exactly on the east-west center line of Section 25 but just a little to the north thereof, being about 30 feet north thereof on the west end and 120 feet to the north thereof on the east end. After this fence was built the Woods used the land north thereof, which would include most of the area formerly occupied by appellee's north 40 and Lots 1 and 2 together with all lands east thereof, for varying purposes, including the pasturing of cattle, farming, cutting of wood, etc., and built a road thereon just north of this fence to permit them to so use it. We think, from 1922 on, the Woods have continuously used the land north of this fence for such purposes as, by its topography, it was naturally adaptable. During this time appellee and his friends used it only on occasions for hunting and fishing. We would find, if it were necessary to do so, that all land lying north of this fence belongs to the Woods by right of adverse possession.

As to the land south of this fence we think a different situation exists. It should first be stated that Lot 3, which, as originally platted, was to the east of appellee's south 40, completely disappeared when the river changed its course and the west bank thereof was across the Jones 40 and appellee's south 40. Consequently all land east of the west line of the appellee's south 40 is accretion land except a small acreage in the southwest corner thereof.

After appellee's father, E. A. Worm, and the other three grantees in that deed, acquired title in 1911 from

Urban Cachelin, son of Constant Cachelin, to whatever then remained of the patented land, they occupied and used it for recreation purposes, which included hunting, fishing, boating, etc. They used the cabin located thereon for that purpose, putting in a well in 1911 to be used in connection therewith. They also built a road from the cabin to a slough or chute, which lay to the east. At first they reached the cabin by a road coming in from the south. Then, in 1919, they built a road so they could get to the cabin from the north, coming in over the Jones 40 and the south 40 of the Woods land, which was then owned and occupied by a Mr. Swoboda. They also maintained a fence that had been put in along the south side of this south 40 before they purchased it, which fence extended east to the river. They put in and maintained a fence along the west side thereof. The area was, by nature, adapted to the recreational uses to which it was put. In this respect they later built a road thereon as far east as the river so they could get to it in connection with their hunting and fishing, putting in a temporary dock for their boat. We have already spoken of the fence on the north side of the south 40. We find Jones, and those in possession of her land, made little or no use of this area during these many years. We think the record entitles appellee to have his title quieted in and to the northeast quarter of the southwest quarter, together with all land lying to the east thereof as far as the west bank of the Missouri River and as far north as the fence that was constructed by the Woods just north of the center line of Section 25. Thus the appellee will be entitled to a small area just north of his south 40 acres and to the east thereof along the south side of this fence.

Having come to the conclusion that the trial court was in error in rendering the judgment that it did we set aside that judgment and remand the cause to it with directions to render a judgment in accordance with this opinion. As to costs the Woods should be relieved

thereof. In fairness to all parties we direct that one-half of the costs be taxed to appellee and one-half to appellant Jones.

REVERSED AND REMANDED WITH DIRECTIONS.

DAISY BOURELLE, APPELLANT, V. SOO-CRETE, INC., ET AL., APPELLEES.
87 N. W. 2d 371

Filed January 3, 1958. No. 34311.

1. Witnesses. A person claiming a right descending to him from a deceased person is not barred from testifying under section 25-1202, R. R. S. 1943, when the adverse party is not a representative of the deceased person.
2. Marriage. A common-law marriage is not valid in this state unless entered into prior to the adoption of section 42-104, R. R. S. 1943, in 1923.
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.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Reversed and remanded with directions.*

Leamer & Graham, for appellant.

Mark J. Ryan, for appellees.

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

MESSMORE, J.

This is a case under the Nebraska workmen's compensation law. The case was originally instituted in the compensation court by Daisy Bourelle as plaintiff against Soo-Crete, Inc. and Guinther Ditching and Piping, defendants. The case was tried to a judge of the workmen's compensation court, wherein the plaintiff obtained an award of $300 for burial expenses and $30 per week

for a period of 325 weeks from and after February 15, 1956, as a dependent of Arthur Bourelle, deceased. The defendants filed a waiver of rehearing and elected to appeal directly to the district court. After hearing in the district court for Dakota County, judgment was rendered in favor of the defendants. The plaintiff filed a motion for new trial which was overruled. From the overruling of her motion for new trial, the plaintiff appeals. The action is for review here de novo.

For convenience we will refer to Daisy Bourelle as the plaintiff or as Daisy, and to Arthur Bourelle as Arthur or as the deceased.

The record shows that the plaintiff was married to John O'Connor in 1918, at Pierce, Nebraska. John O'Connor left the plaintiff in 1933, and the plaintiff testified that she had not seen him since that time. She further testified that she received a letter from him in 1935 to the effect that he was obtaining a divorce and proposed to remarry. This letter is not in evidence. She was under the impression that he had obtained a divorce in 1935. John O'Connor was awarded a divorce from Daisy O'Connor by the circuit court of Pennington County, South Dakota, on December 26, 1944, on the grounds of desertion. Service was obtained by publication, and it was a default decree.

Arthur Bourelle had been married twice prior to the time he started living with plaintiff. On January 24, 1925, Emma Bourelle was awarded a divorce from Arthur Bourelle by the district court for Thurston County, Nebraska. On January 28, 1937, Olivia Bourelle was awarded a divorce from Arthur Bourelle in the district court for Thurston County.

On March 17, 1937, Daisy started to live with Arthur in Walthill, Nebraska, and lived with him until he was killed in an accident arising out of and in the course of his employment with the defendants on February 15, 1956. Arthur and Daisy never went through a ceremonial marriage, and she claimed to be his wife by

virtue of a common-law marriage. They lived in Walthill, Nebraska, from March 17, 1937, until the fall of 1939 when they moved to Sioux City, Iowa. In the fall of 1942, they moved from Sioux City, Iowa, to Kearney, Nebraska, where Arthur had work. They returned to Walthill in the fall of 1944, and lived there until the summer of 1945, at which time they again moved to Sioux City, Iowa. The first 2 weeks after they moved they lived in the home of Marie Miles, a niece of Arthur, and subsequently moved to 1415 Grandview Boulevard. During all of the time from March 17, 1937, until his death, Arthur supported the plaintiff, paid all the bills contracted by her, and introduced her as his wife in the various communities where they lived and when they made visits to other states. They lived in Sioux City, Iowa, in 1945 and 1946, and held themselves out to the public as husband and wife, and the plaintiff never went by any other name than Daisy Bourelle during that time. During the time they lived in Sioux City, Iowa, they had a joint bank account in the Woodbury County Savings Bank. The signature card was signed by Arthur Bourelle and Mrs. Arthur Bourelle. On May 23, 1946, Arthur O. Bourelle and Daisy A. Bourelle entered into a real estate contract in Sioux City, Iowa, to purchase real estate in Crystal Lake Park, an addition to South Sioux City, Nebraska. On May 31, 1946, this property was conveyed by warranty deed to Arthur O. Bourelle and Daisy A. Bourelle as husband and wife, while they were living in Sioux City, Iowa. They moved to this home in Nebraska sometime in June 1946, and lived in Nebraska thereafter.

The plaintiff testified that since 1937 she and Arthur had filed joint federal income tax returns which she signed as Arthur's wife; that she wears a ring evidencing a marriage; and that she wore the ring in public. Since 1945, she and Arthur took trips with relatives to Bristol, Rhode Island, Chicago, Illinois, and New Orleans, Louisiana. On the trip to Bristol, Rhode Island, they stopped

at the home of Arthur's son at Waterloo, Iowa. On these trips they stayed in hotels, occupied the same bedroom, were registered as husband and wife, and held each other out as husband and wife. During the period just prior to Arthur's death, they lived in Rapid City, South Dakota, where Arthur was working on a construction job. They lived in an apartment for which Arthur paid the rent. In November 1955, Arthur made application for life insurance, designating Daisy M. Bourelle as beneficiary. They also had a bank account in the Nebraska State Bank of South Sioux City, Nebraska, with the right of survivorship. Daisy has since withdrawn the funds from this account.

The plaintiff further testified that they always spent New Years with the Miles and other relatives in Sioux City, Iowa, and on those occasions Arthur held her out as his wife; that on many occasions since 1937, he introduced her as his wife; and that they observed wedding anniversaries together. The plaintiff further testified that mail addressed to her as Mrs. Arthur Bourelle, and mail addressed to Arthur Bourelle was delivered to the address of 1415 Grandview Boulevard, Sioux City, Iowa.

The record shows that Arthur was a patient in the hospital at Sioux City, Iowa, from April 22 to May 7, 1946. He gave his address as 1415 Grandview Boulevard, Sioux City, Iowa, his nearest relative as his wife, Mrs. Daisy Bourelle, and his occupation as a mechanic at Wagner Johnson Company, Sioux City, Iowa.

On cross-examination the plaintiff testified that she did make claim of a common-law marriage to Arthur Bourelle prior to his death, and it was her belief that since March 17, 1937, she was married to Arthur, and held herself out as his wife since that time.

Marie Miles, a niece of Arthur, testified that she resided in Sioux City, Iowa; that she had known the plaintiff as Daisy Bourelle since 1937, and had visited her home many times; that they lived with her in 1945 for approximately 2 weeks or more before they moved to

Grandview Boulevard; that Daisy and Arthur occupied the same bedroom; that at all times Arthur held Daisy out as his wife and never introduced her in any other manner and that was the only name she ever went by; and that he supported her and gave her money. This witness was present when Daisy and Arthur bought the property in South Sioux City. Before Arthur would purchase the property he insisted that "Mom," as he called Daisy, look at it and see if it was satisfactory. She was with Daisy and Arthur every New Years Eve and Day since 1937. It was a "friendship tradition." When Arthur was in the hospital in Sioux City, Daisy stayed with this witness and visited the hospital every evening. She went with Daisy. Daisy was in the hospital on one occasion in Sioux City. This witness went to visit her and inquired as to which room Mrs. Daisy Bourelle occupied. Daisy was living with Arthur at the time of his death and Arthur was supporting her.

Mrs. Shoop testified to substantially the same set of facts. She further testified that she visited Arthur and Daisy; that Arthur referred to Daisy as "Mom" or "Mama" and always introduced her as his wife; and that Arthur supported Daisy. This witness was a niece of Arthur.

Mary Ann O'Connor testified that she is the daughter of Daisy, and lives in South Sioux City; that she acknowledged Arthur as her stepfather and was living at his home with her mother at the time of his death; that Arthur had supported Daisy since 1937; that at the time of Arthur's death Daisy and Arthur were living together and reputed in the community to be husband and wife; that she stayed with Daisy and Arthur many times over weekends in Sioux City, Iowa, and on these occasions Arthur and Daisy occupied the same bedroom; that Arthur always held Daisy out as his wife on these occasions; that they received their mail at that address; that since 1937 her mother was always referred to as Daisy Bourelle; and that Arthur was her sole support.

This witness further testified that she had seen Arthur give Daisy money and write checks for her; that the three of them went to Bristol, Rhode Island; that they stopped at hotels and at the home of Arthur's son at Waterloo, Iowa; and that Arthur introduced Daisy as his wife on such occasions.

The defendants offered in evidence certain sections of the Iowa statutes and section 200 of the Soldiers' and Sailors' Civil Relief Act of 1940.

The plaintiff contends that the decision of the trial court is contrary to the evidence and the law.

There is no dispute in this case that the accident resulting in the death of Arthur Bourelle arose out of and in the course of his employment with the defendants.

We deem it advisable to first take up the question with reference to the competency of the testimony of the plaintiff as related to section 25-1202, R. R. S. 1943. In this respect, the record discloses the following: "Q During the time that you and Arthur Bourelle lived in the State of Iowa in the year 1945 and 1946, did you have a conversation with him concerning your marital relationship? * * * A Yes. * * * Q Where did they take place? A 1415 Grandview, Sioux City, Iowa. Q What did you say and what did Arthur Bourelle say, if anything?" This question was objected to for the reason that it called for a transaction or conversations with a deceased person and was barred under the provisions of section 25-1202, R. R. S. 1943. The trial judge stated that in his opinion the objection was good, but that he would permit the plaintiff to make her record and would reserve final ruling until the cause was submitted and came up for final disposition. The plaintiff answered: "Well, just as near as I can remember it was when we wanted to buy a home we agreed to go ahead and buy it as husband and wife and to continue together. Q Did you have any other conversations while living in the State of Iowa in 1945 or 1946 concerning your marital relations? A We repeated our vows together. Q And

what do you mean by 'you repeated your vows'?" There was an objection, and the answer of the witness was stricken. The plaintiff made an offer to prove that Arthur Bourelle and Daisy Bourelle, while in the State of Iowa during 1945 and 1946, on numerous occasions repeated their vows and stated to each other that according to the Bible and in the eyes of God they were man and wife. The same objection was made to the offer to prove, on the ground that such testimony was in violation of section 25-1202, R. R. S. 1943. The objection was sustained.

Section 25-1202, R. R. S. 1943, provides in part: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, * * *."

This section has been the cause of controversy and the subject of frequent interpretations by this court. In Sorensen v. Sorensen, 68 Neb. 509, 103 N. W. 455, in the opinion on the third rehearing, this court quoted from the case of McCoy v. Conrad, 64 Neb. 150, 89 N. W. 665, as follows: " 'If a party is so placed in a litigation that he is called upon to defend that which he has obtained from a deceased person, and make the defense which the deceased might have made, if living, or to establish a claim which the deceased might have been interested to establish, if living, then he may be said, in that litigation, to represent a deceased person; but where he is not standing in the place of the deceased person, and asserting a right of the deceased which has descended to him from the deceased (that is, where the right of the deceased himself, at the time of his death, is not in any way involved), and the question is, not what was the right of the deceased at the time of his death, but merely to whom has that right descended, in such a contest neither party can be said to represent the deceased.' "

The same question as here presented arose in the case of Gilmore, Gardner & Kirk Oil Co. v. Harvel, 208 Okl. 664, 258 P. 2d 632. This was an original proceeding brought by the employer and Tri-State Insurance Company, the insurance carrier, to review an award made to the wife of the deceased under the provisions of the Death Benefit Statute, 85 O. S. 1951, § 3.1. There was no dispute as to the cause of the death or that it arose out of and in the course of the employment of the deceased. One of the questions raised in the case was whether the claimant's testimony with reference to conversations had with the deceased person was competent under 12 O. S. 1951, § 384, referred to as the "Dead Man's Statute." While the statute is not worded the same as section 25-1202, R. R. S. 1943, it embodies practically the same subject matter. The statute provided: "No party to a civil action shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir at law, next of kin, surviving partner or assignee of such deceased person, where such party has acquired title to the cause of action immediately from such deceased person; * * *." The court held that under such statute the claimant had a right to testify in her own behalf as against her adversary. This case also involved a common-law marriage. The effect of the holding in the above-cited authorities is applicable to this case.

The benefits claimed by the plaintiff were benefits which descended to her by virtue of the death of Arthur Bourelle and she is the person whose right to such benefits is here involved. The defendants, as employers, did not stand in the relationship of representatives of the deceased Arthur Bourelle. The plaintiff's testimony heretofore set out is not barred by section 25-1202, R. R. S. 1943. We conclude that the court should have permitted this witness to testify, and

in failing to do so committed prejudicial error.

This brings us to the question as to whether or not a common-law marriage existed between the plaintiff and Arthur Bourelle as contended by the plaintiff.

A common-law marriage is not valid in this state unless entered into prior to the adoption of section 42-104, R. R. S. 1943, in 1923. See, Ragan v. Ragan, 158 Neb. 51, 62 N. W. 2d 121; Abramson v. Abramson, 161 Neb. 782, 74 N. W. 2d 919.

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; Abramson v. Abramson, *supra.*

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." See, also, In re estate of Medford, 197 Iowa 76, 196 N. W. 728.

In the case of In re Estate of Boyington, *supra,* the court said: "It is well settled that, while cohabitation and the reputed relation of husband and wife may be shown as tending to give color to the relation of the parties and the recognition each by the other of the existence of a marriage between them, the fundamental question is whether their minds have met in mutual consent to the status of marriage which will be sufficiently established if it appears that they have lived together, intending thereby to be husband and wife. Neither such intention nor consent can be inferred from cohabitation alone, and reputation is of no significance, save as it has a bearing on the question of intent. Sup-

porting this statement of the law as it has been recognized by this court, see Brisbin v. Huntington, 128 Iowa, 166; State v. Rocker, 130 Iowa, 239; McFarland v. McFarland, 51 Iowa, 565; Pegg v. Pegg, 138 Iowa, 572. It will be important, therefore, to examine the evidence relied upon for appellant, first, as to cohabitation; second, as to the general conduct of the parties toward each other in their relations with the public bearing upon the question of whether they held themselves out to the world as being husband and wife; and, third, as to the general repute in the community with reference to whether they were living together as husband and wife or in some other relation."

As stated in Love v. Love, *supra:* "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."

In the case of In re Estate of Clark, 228 Iowa 75, 290 N. W. 13, it is indicated clearly that marriage may be established by direct testimony of eyewitnesses, by testimony of one of the contracting parties, by admissions and confessions of the parties while living together, by testimony as to cohabitation and repute during the time the parties are living together, and by other recognized legal testimony. See, also, State v. Wilson, 22 Iowa 364; State v. Nadal, 69 Iowa 478, 29 N. W. 451; Hanford v. Hanford, 214 Iowa 839, 240 N. W. 732.

As indicated by the above-cited cases, among the facts which, although not conclusive, are to be considered as evidence tending to prove marriage, are the facts that the woman assumed the man's name; that the parties introduced each other, or held each other out, as husband and wife; and that they were recognized as husband and wife by their relatives.

As stated in 55 C. J. S., Marriage, § 45, p. 902: "Marriage is a fact which may be proved like any other fact, and may be proved by direct or circumstantial evidence, or by documentary or parol evidence; and the weight and sufficiency of the evidence to prove marriage are governed by general rules of evidence." See, also, In re Estate of Clark, *supra.*

This court has held that 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. See, Forshay v. Johnston, 144 Neb. 525, 13 N. W. 2d 873; Abramson v. Abramson, *supra.*

The defendants make claim that where cohabitation is in its beginning illicit and meretricious, affirmative proof of a subsequent intention to change that relationship into the legitimate relation of husband and wife is essential to establish a common-law marriage where such marriages are recognized, and this intention must be shown by competent evidence.

The rule in Iowa is stated in In re Estate of Boyington, *supra,* as follows: "But 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. Henry v. Taylor, 16 S. D. 424 (93 N. W. 641); Terry v. White, 58 Minn. 268 (59 N. W. 1013); Grimm's Appeal, 131 Pa. 199 (18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. Rep. 796); Weidenhoft v. Primm, 16 Wyo. 340 (94 Pac. 453)."

While it appears that there was at one time an im-

pediment to any marriage being consummated by the plaintiff to Arthur Bourelle because of her marriage to John O'Connor, a divorce was obtained by John O'Connor from her in South Dakota on December 26, 1944. It is apparent that the impediment had been removed when the parties resided in Sioux City, Iowa, and there is no evidence to the contrary.

Bearing in mind the foregoing authorities and applying the same to the facts in this case, the evidence shows that Arthur Bourelle and Daisy Bourelle, while living in Sioux City, Iowa, in 1945 and 1946, asserted their vows of marriage to each other; that the parties held themselves out in the community in which they lived as husband and wife; that they were reputed by all who knew them to be husband and wife; that Arthur Bourelle, on all occasions, introduced the plaintiff to persons as his wife; that they lived together and cohabited together as husband and wife at their residence at 1415 Grandview Boulevard in Sioux City, Iowa; that mail was delivered there to Daisy Bourelle and to Arthur Bourelle and received by them as husband and wife; that they negotiated a contract for the purchase of real estate as husband and wife while residing in Sioux City, Iowa, and received a deed to real estate which they subsequently occupied in Nebraska, the deed being made and delivered in Iowa to the parties as husband and wife; that they attended New Years celebrations and birthday celebrations with relatives who considered the parties as husband and wife and never knew the plaintiff by any other name than Daisy Bourelle; that Arthur Bourelle gave her money with which to pay indebtedness and supported her; and that Arthur Bourelle referred to Daisy Bourelle affectionately as "Mom" or "Mama" and in all respects during his lifetime considered the plaintiff as his wife and she considered Arthur Bourelle as her husband. The defendants introduced no evidence to contradict any of the facts heretofore set out.

We conclude that the facts are sufficient to show a common-law marriage in the State of Iowa during the period that the parties lived in Iowa, in 1945 and 1946, and that the plaintiff was a dependent within the contemplation of the Nebraska workmen's compensation law, section 48-124, R. R. S. 1943, and entitled to compensation as set forth in the award of the workmen's compensation court in conformity with section 48-122, R. S. Supp., 1955, as the result of the death of Arthur Bourelle on February 15, 1956.

Some contention is made by the defendants that in the divorce obtained by John O'Connor from the plaintiff in South Dakota, it is not shown that there was any compliance with the provisions of the Soldiers' and Sailors' Civil Relief Act, section 200 of the act. It is the contention of the defendants that this is a mandatory provision of federal law which takes precedence over state law and must be strictly complied with in order to have a valid decree, consequently, such decree was void and of no force and effect. The plaintiff testified on rebuttal that she had never been in the military service of the United States nor with any country with which the United States was allied in the prosecution of any war at any time, and never served in the armed forces of the United States at any time. As we view the act it has no application to the plaintiff in this action.

For the reasons stated herein, the judgment of the trial court is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

S. A. SORENSEN CONSTRUCTION CO., APPELLEE AND CROSS-APPELLANT, V. ROY F. BROYHILL ET AL., APPELLANTS AND CROSS-APPELLEES.
87 N. W. 2d 439

Filed January 10, 1958. No. 34187.

SUPPLEMENTAL OPINION

APPEAL from the district court for Dakota County: ALFRED D. RAUN, JUDGE. For former opinion see ante p. 397. *Former opinion modified. Motion for rehearing overruled.*

Sherman W. McKinley, Jr., for appellants.

Edward L. Moran and *Mark J. Ryan*, for appellee.

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

YEAGER, J.

On a review of the record on rehearing we conclude that certain additional credits should be allowed against the amount of the mechanic's lien as determined by our former opinion.

Plaintiff and the defendant, Roy Broyhill, entered into a written agreement whereby defendants were to pay a materialman's lien filed by G. F. Hughes & Son. The amount paid on this lien on July 13, 1953, was $5,117.87. In our former opinion we allowed only $4,943.81. Under the terms of the agreement the full amount paid should have been allowed as a credit to the defendants. An additional credit of $174.06 is therefore allowed on this item.

The record shows that plaintiff installed a 4-inch box gutter to carry water from the roof. The gutter was improperly installed and had to be replaced at a cost of $444. This item of expense to the defendants should be and is allowed as a credit on the amount due the plaintiff.

The evidence shows that plaintiff made a charge of

$216.38 for installing a heat duct from the furnace. This item was unauthorized by the defendants and is not a proper charge. It was clearly the result of improper supervision by the plaintiff and should be surcharged against plaintiff's claim.

The amount of these three items is $834.44. The amount found due by our former opinion should be reduced by this amount. We now find the amount due plaintiff to be $5,266.03, and our former opinion is modified to this extent. With this modification our former opinion is adhered to and the motion for a rehearing overruled.

FORMER OPINION MODIFIED. MOTION FOR REHEARING OVERRULED.

MARY JANE GUSTASON, A MINOR, BY AND THROUGH JAMES GUSTASON, HER FATHER AND NEXT FRIEND, APPELLANT, V. SALLY VERNON, APPELLEE.

87 N. W. 2d 395

Filed January 10, 1958. No. 34247.

1. **Trial: Appeal and Error.** When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
3. ———: ———. For a guest to recover damages from a host for injuries received while riding in an automobile operated by the host, he must prove by a preponderance of the evidence the gross negligence relied upon, and that it was the proximate cause of the accident.
4. **Negligence.** When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of whether or not they support a finding of gross negligence is one of law.

5. **Automobiles: Negligence.** In an action for gross negligence under the motor vehicle guest statute where there is proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.
6. **Negligence.** The question of the existence of gross negligence must be determined from the facts and circumstances in each case.
7. **Automobiles: Negligence.** Momentary inattention to the operation of a motor vehicle may not ordinarily amount to gross negligence, and this is true even where such inattention is voluntary and in no manner induced by a distracting influence. However, the continued or protracted voluntary failure of the operator to maintain a proper lookout along the street or highway and give his motor vehicle proper attention and guidance may constitute gross negligence.
8. **Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has the right to keep the benefit of that verdict with judgment rendered thereon, unless there is prejudicial error in the proceedings by which it was secured.

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

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

Gross, Welch, Vinardi & Kauffman, for appellee.

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

CHAPPELL, J.

Plaintiff, Mary Jane Gustason, a minor, brought this action by her father and next friend, seeking damages alleged to have been proximately caused by gross negligence of defendant, Sally Vernon, while she was driving a car in which plaintiff was a guest passenger. Plaintiff's petition contained two causes of action. The first

sought damages for personal injuries suffered by plaintiff. The second sought recovery upon a claim for medical and dental expenses which plaintiff's father had duly assigned to plaintiff. Plaintiff's petition alleged in substance that defendant was guilty of gross negligence because, while driving an automobile north on Twenty-fifth Street in Omaha: (1) She abandoned control of the car by turning around facing the rear while the car was in motion; (2) she purposely ceased to maintain a lookout ahead; and (3) she permitted the car to roll uncontrolled into another car parked on the left side of the street. Defendant, for answer, admitted that an accident occurred at about the time and place alleged, causing some injury to plaintiff, but denied that defendant was guilty of gross negligence in any respect as alleged by plaintiff.

The cause was tried to a jury, whereat defendant's motions to dismiss or direct a verdict for want of sufficient evidence to establish gross negligence made at conclusion of plaintiff's evidence and at conclusion of all the evidence, were overruled. Thereafter, upon submission of the issues to the jury it returned a verdict awarding plaintiff $6,000 on her first cause of action and $241 on her second cause of action. A judgment was accordingly rendered thereon. No motion for new trial was filed by defendant, but she did file a motion to set aside the verdict and judgment and for judgment notwithstanding the verdict, which was sustained, and plaintiff appealed, assigning that the trial court erred in so doing. We sustain the assignment.

The sole question presented here is whether or not the evidence adduced was sufficient to require submission of the issue of gross negligence to the jury for its determination. We conclude that it was.

In Holliday v. Patchen, 164 Neb. 53, 81 N. W. 2d 593, we held: "When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal 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.

"Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.

"For a guest to recover damages from a host for injuries received while riding in an automobile operated by the host, he must prove by a preponderance of the evidence the gross negligence relied upon, and that it was the proximate cause of the accident.

"When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of whether or not they support a finding of gross negligence is one of law.

"Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence." The opinion therein cited and discussed several guest cases upon which defendant relies, but, as hereinafter observed, they are all distinguishable upon the facts.

As held in Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310: "In an action for gross negligence under the automobile guest statute * * * where there is proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.

"The question of the existence of gross negligence must be determined from the facts and circumstances in each case." See, also, Bishop v. Schofield, 156 Neb. 830, 57 N. W. 2d 207.

In Black v. Neill, 134 Neb. 764, 279 N. W. 471, quoting with approval from Lemon v. Hoffmark, 132 Neb. 421,

272 N. W. 214, this court said: " 'It is true that it is not necessary, in order to show gross negligence, to prove several acts of negligence; that is, a continuous course of negligent conduct, * * * or protests on the part of the guest to the driver at and prior to the time of the accident.

" 'It is also true that gross negligence may consist, in some cases, in turning the head or taking the eyes off the road, but all the conditions and circumstances in existence at the time of the commission of the alleged grossly negligent acts are to be taken into consideration.' "

As stated in 4 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 2327, p. 421, citing Larson v. Storm, 137 Neb. 420, 289 N. W. 792, and other authorities: "The continued or protracted failure of the operator to maintain a proper lookout along the road ahead of his vehicle may constitute gross negligence." See, also, § 2327, p. 422, citing Black v. Neill, *supra,* and other authorities.

This court has recently reaffirmed that: "Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured." Ziemba v. Zeller, *ante* p. 419, 86 N. W. 2d 190.

It is elementary that the driver of a car cannot assume that his car will keep on the road without his attention and guidance. In the light of the foregoing authorities, we conclude also that a failure to give his car such attention and guidance may be gross negligence if defendant driver knew, as in the case at bar, that the steering gear of her car was loose and required continuous attention and guidance in order to prevent it from veering, but by reason of mere curiosity she voluntarily and intentionally failed to keep a proper lookout and give her car continuous attention and guidance for some 4 seconds, which proximately caused it to veer

up and across to the opposite side of the street or highway and collide with a parked car.

In the light of such rules and conclusions, we have examined the record which discloses competent pertinent evidence from which it could be reasonably concluded as follows: The accident occurred on September 9, 1955, at about 8:41 p. m., in about the middle of the block north of M Street on Twenty-fifth Street in Omaha. The weather was clear. The paved street was well lighted. It was 55 feet wide and its lanes of travel were slightly upgrade toward the north. Quite a number of cars were parked at the curb on both the east and west sides of Twenty-fifth Street. Defendant was driving her father's car toward the north on Twenty-fifth Street at about 15 to 20 miles an hour in about the middle of the two east lanes for northbound traffic. No other car was moving either north or south on the street at the time of the accident. Defendant knew that the steering gear or wheel of her car was loose and required continuous attention and guidance in order to drive it straight and keep it from veering in the street. She was a good driver. Nevertheless, she voluntarily turned around and looked to the rear for some 4 seconds out of curiosity and intentionally in order to surprise plaintiff and play a joke upon her, in conformity with a prearranged plan, whereupon defendant's car, traveling along the street, out of control, veered to the left, clear across the street, where it collided with another car parked on the west side of the street. Plaintiff was thereby injured when she was thrown into the dashboard of defendant's car. The extent of her injuries is not involved herein. Defendant testified that she kept her hands on the steering wheel of the car while looking to the rear, but she was unable to say whether she subconsciously turned the wheel to the left or whether the car naturally veered to the left because the steering gear was loose.

There were other preceding relevant facts and events

which support the foregoing conclusions. In that connection, plaintiff was 18 years old and defendant was 20 years old at the time of the trial. They were friends, as were also two other young ladies called Margie and Shirley. Plaintiff and Shirley were employed in South Omaha where they got off duty about 8:30 p. m. on September 9, 1955. Defendant had a steady boy friend who was an airman at Offutt Air Force Base. He will be called Ed.

On September 9, 1955, defendant was given permission to drive her father's car. At about 6 or 6:30 p. m. she left her home and drove the car to Margie's home in Omaha. There she picked up Margie and drove to Offutt Air Force Base where they picked up Ed. From that point, defendant drove to a drive-in where they spent about half an hour obtaining food. Thence they drove to South Omaha and parked near the place where plaintiff and Shirley were employed. There defendant sent Margie in such place of employment to advise plaintiff and Shirley that defendant was out in front with her car and would take them home. Both accepted, and when they got off duty both entered defendant's car. Plaintiff sat in the middle of the front seat next to defendant and Shirley sat on plaintiff's right. However, the car did not reveal all of its occupants. By the time plaintiff and Shirley arrived, Ed was hidden down on the car's rear floor, back of defendant driver's seat, while Margie sat on the left side of the back seat in such manner as to hide Ed from view. Somehow, Shirley learned that Ed was in the car but plaintiff did not.

Previously, plaintiff and Shirley had been told that defendant had broken up her steady friendship with Ed. Thus, sometime before their arrival in South Omaha, defendant, Ed, and Margie had formulated and agreed upon a plan to surprise plaintiff and Shirley and play a joke upon them by so hiding Ed in the car until it had proceeded some distance along the street, at which

time defendant was to call out, " 'the cops are coming,' " or " 'Look you kids, the cops are coming,' " whereupon they would turn around and look to the rear and Ed would rise up from the floor into view.

Such plan was executed when defendant gave the agreed signal and turned to look to the rear for some 4 seconds, as did plaintiff and Shirley, while Ed rose up and surprised plaintiff. In the meantime, however, defendant's car, traveling 15 to 20 miles an hour and free of control, veered to the left toward the northwest, where it collided with a parked car at the west curb just as defendant turned back to the front to give her car proper attention and guidance.

We conclude that the evidence was amply sufficient to sustain a finding that defendant was guilty of gross negligence. Therefore, such issue was for determination by the jury, and the trial court erred in sustaining defendant's motion for judgment notwithstanding the verdict and judgment. The judgment should be and hereby is reversed and the cause is remanded with directions to overrule defendant's motion for judgment notwithstanding the verdict, and to reinstate the verdict and judgment in favor of plaintiff. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

WESLEY HARMS PEERY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
87 N. W. 2d 378

Filed January 10, 1958. No. 34258.

1. **Criminal Law: Evidence.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
2. **Larceny: Evidence.** Evidence of possession of a revolver a short time after it was stolen is admissible as a circumstance in proof that it was stolen by the person in whose possession it was found.

3. **Evidence: Appeal and Error.** Immaterial evidence which is admitted and which should have been stricken will not be regarded as prejudicial unless it fairly appears from the record that it could be calculated to mislead.
4. **Trial: Appeal and Error.** A statement made by a county attorney in the closing argument to which exception is taken must appear in the bill of exceptions, otherwise it does not become the subject of review.
5. **Witnesses.** Before a witness, not a party to the suit, can be impeached by proof that he has made statements contradicting or differing from the testimony given by him on the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements.

ERROR to the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Doyle, Morrison & Doyle, for plaintiff in error.

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

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

YEAGER, J.

This is a criminal action prosecuted in the name of the State of Nebraska, wherein Wesley Harms Peery was prosecuted for the crime of breaking and entering a residence with intent to steal property of value. He was convicted of the charge by a jury and was duly sentenced to serve a term of 5 years in the State Penitentiary. He filed a motion for new trial which was overruled. By petition in error to this court he seeks a reversal of the judgment of the district court. By his petition in error he prays for a dismissal but on his assignments of error he seeks no such relief. By his presentation he seeks only a new trial. For the purposes of this opinion he will be referred to as the defendant.

By the information on which the defendant was tried it was charged that on January 15, 1956, he broke and entered the residence of E. H. Masters with the intent

to steal in that residence property of value. The evidence adduced on the trial to sustain the conviction was in all material respects circumstantial. We are not however called upon on this review to consider the weight of the evidence and its sufficiency to convict the defendant. The assignments of error do not raise any such question. The assignments of error, except two, direct attention only to errors of law occurring at the trial. The other two collectively suggest only that the court erred in failing to grant a new trial on account of the alleged errors of law occurring at the trial pointed out specifically by the other assignments. These two are the first and the tenth. Because of their character further reference to them is not required.

The evidence discloses that at some time between 5:30 p.m. and 10:30 p.m. on January 15, 1956, the residence of Eugene Masters, named as E. H. Masters in the information, was criminally broken into and entered. A .38 caliber Colt Detective Special revolver was stolen at that time, as was also a holster. About this no question was presented on the trial. The material question presented was that of whether or not the defendant was the person who broke and entered the residence and stole the revolver and holster.

As a step in proof that the defendant had committed the crime the State called as witnesses Charles W. Winkler and his wife, Bernice Winkler. Charles W. Winkler testified that between 6:30 p.m. and 7 p.m. on January 15, 1956, a man entered their residence with a revolver in his hand; that he did not see his face; that he observed his appearance; that he heard him talk; that he saw an automobile standing across the street; and that his residence was approximately a half block east of the residence of Masters. He further testified that on January 30, 1956, he was called to the police station where he saw and identified the defendant as the person he saw in his home on January 15, 1956; that he saw the automobile at the police station which was parked across

the street from his house on the evening of January 15, 1956; and that he identified a revolver as one of the same type as the one held by the defendant on January 15, 1956. The testimony of Bernice Winkler was substantially the same as that of her husband.

The evidence without question identified the automobile as one which was owned by the defendant and found in his possession on January 30, 1956, and that on that date the revolver was found in the automobile. The revolver and holster were found in the automobile by a police officer.

Mary E. Billingsley was called as a witness on behalf of the State. She testified in substance that on January 21, 1956, as she was proceeding in an automobile eastward from Lincoln, Nebraska, through Sarpy County, Nebraska, she was stopped at gun point by the defendant and that the gun was the revolver which was exhibited to her at the trial. This was the revolver which was taken from the automobile of the defendant on January 30, 1956. She also identified the photograph of an automobile as that of the one which was being operated by the defendant on January 21, 1956. This was a photograph of the automobile owned by the defendant on January 30, 1956.

This is a brief summary of the chain of facts and circumstances on which the issue of the defendant's guilt was submitted to the jury, and as pointed out it is not contended that it was insufficient for that purpose.

The sixth assignment of error deals with the admissibility of testimony of the witness Billingsley.

The evidence of this witness related to an incident which took place 6 days after the crime for which the defendant was prosecuted in this case. It is urged that her testimony as to possession of the revolver and the automobile on that date was inadmissible. A valid reason for this contention does not appear. Evidence of the theft of the revolver a few minutes before it was seen in the possession of the defendant and further

evidence that it was possessed by him on the 6th and 15th day thereafter was certainly evidence of circumstances that the jury had the right to consider in determining whether or not he obtained it in the manner contended for by the State in this case.

This same witness was allowed to testify to the circumstances under which her attention was directed to the revolver and the automobile. By the third assignment of error it is urged that the evidence as to these circumstances was inadmissible on the ground that it was evidence of another crime and not admissible under the general rule announced in Fricke v. State, 112 Neb. 767, 201 N. W. 667, as follows: "As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution." See, also, Abbott v. State, on motion for rehearing, 113 Neb. 524, 206 N. W. 153; Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824; Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83; Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

It must be said however that this rule has no application to the situation presented here. There was no effort in the present case to prove the crime charged by evidence of another crime. It is true that the evidence adduced had in it an indication of the commission of another crime but proof of another crime was not the purpose of the evidence. The purpose and the direct effect of the evidence was to disclose possession of the revolver and the automobile in the defendant. This was proper. A comparable situation was presented in Grandsinger v. State, *supra*. The only difference was that the evidence in that case related to an incident of possession a short time before a crime was committed and here it was a short time after the crime was committed. This court in that instance said: "Such evidence was admitted for the sole and limited purpose of showing that defendant had such a pistol at that time and his ability to use it. The trial court so affirmatively instructed the

jury and defendant's contention has no merit." The evidence which provides the basis for this assignment of error was clearly admissible.

By the fourth assignment of error it is contended that the court erred in admitting in evidence a photograph of the defendant's automobile without foundation. The exhibit was properly identified. The foundation for its admission was laid in part by one witness and in part by another. Even if proper foundation had not been laid the error would be without prejudice since the record does not disclose any dispute about either identity or ownership.

By the fifth assignment of error it is urged that the court erred in allowing the police officer who saw and examined the defendant's automobile to state the reason why he made that examination. His reason was, as he stated, that the police department had a "pickup" order for an automobile with contents of a certain description and that the defendant's automobile with its contents conformed to that description. While strictly speaking this evidence was not admissible the error in its admission was clearly harmless. It is not pointed out that it was prejudicial. The applicable rule is the following: "An answer of a witness which should have been stricken out as being immaterial and the conclusion of the witness is not prejudicial unless it fairly appears from the record that the answer was calculated to mislead the jury to the injury of the moving party." Peterson v. Andrews, 88 Neb. 136, 129 N .W. 191. See, also, Berggren v. Hannan, Odell & Van Brunt, 116 Neb. 18, 215 N. W. 556; Horney v. McKay, 138 Neb. 309, 293 N. W. 98.

On the trial, as has been pointed out, Bernice Winkler was a witness for the State. In her testimony, also as pointed out, she related incidents occurring at her home on January 15, 1956, which furnished the background of the identification of the defendant made on January 30, 1956. On the trial she was asked what she did fol-

lowing the departure of the man who came into her home with a revolver in his hand. Among other things she said: "I called our daughter and told her that we had been robbed * * *." On this account the defendant moved for a mistrial which was overruled. By the seventh assignment of error he contends that this ruling entitles him to a new trial. The theory of the motion was that this was in proof of another crime and therefore prejudicial to the right of the defendant to a fair trial.

It may be conceded that under strict rules of evidence this statement was subject to objection, but it may not well be said that the defendant was prejudiced thereby. Under authority already cited herein unless prejudice flowed from the statement its appearance in the evidence furnished no ground for reversal. As indicated hereinbefore in this opinion a witness may, as foundation for identification of a person or property, testify to the facts and circumstances on which the identification is based. Under this theory the witness could properly have been allowed to testify to a robbery which furnished the basis for identification without the commission of error. This being true it is difficult to see how the same information coming in as it did in the present instance could be regarded as prejudicial error.

By the eighth assignment of error it is contended that the court erred in refusing to declare a mistrial on account of the following statement alleged to have been made by the prosecuting attorney in his closing argument: " 'We didn't go into the deal about what happened up there with Wesley Peery after she got into the car.' " This had reference to the entire occurrence taking place in Sarpy County, Nebraska, a part of the incidents of which were testified to on the trial by the witness Billingsley.

The defendant in this instance properly preserved his exception to the remark made by the county attorney. The statements made by a county attorney in the closing

argument to which exception is taken must appear in the bill of exceptions. In the absence of the appearance of the statements there is nothing which becomes the subject of review. See, Hamblin v. State, 81 Neb. 148, 115 N. W. 850; Thornton v. Davis, 113 Neb. 529, 204 N. W. 69; Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142.

The statement however may not be regarded as prejudicial. Obviously it was observable by the jurors and they knew from what had been said that this was an occurrence the full details of which were not disclosed or "gone into" on the trial. The statement was but a simple reminder of what they already knew. It may not well be said that the defendant was prejudiced by this simple reminder.

By the ninth assignment of error the defendant asserts that the court should have declared a mistrial on account of a statement of the prosecuting attorney made in the closing argument with regard to his personal experience with the Lincoln police department.

In this connection it is pointed out here that in the motion for mistrial the defendant called attention to no statement made by the prosecuting attorney either in tenor or effect. The motion made is the following: "Secondly, he, in his closing argument, referred to personal experiences with the Lincoln Police Department as Deputy County Attorney, of course, there being no evidence in the record about his experiences with the Lincoln Police Department."

As pointed out in the consideration of the eighth assignment of error, the statements to which exception is taken must appear in the bill of exceptions, and in the absence of such appearance there is nothing which becomes the subject of review.

The second assignment of error, and the last to be considered herein, contains a contention that the court admitted impeaching evidence of a witness without proper foundation. This relates to the evidence of

Charles A. Baldwin, a witness who testified on behalf of the defendant, and impeachment testimony given by Clarence A. Schwarz, a witness called in rebuttal by the State.

It was said in Meyers v. State, 112 Neb. 149, 198 N. W. 871: "Before a witness, not a party to the suit, can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements." See, also, Wood River Bank v. Kelley, 29 Neb. 590, 46 N. W. 86; Hanscom v. Burmood, 35 Neb. 504, 53 N. W. 371; Zimmerman v. Kearney County Bank, 59 Neb. 23, 80 N. W. 54; Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466.

In this case there was a strict compliance with this rule. Baldwin was asked on cross-examination if, during an investigation made by Schwarz on January 31, 1956, he had not made certain statements which conflicted with portions of his testimony given in his direct examination on the trial. His answers were in part equivocation and in part denial. Schwarz testified on rebuttal in response to proper questions that Baldwin did on January 31, 1956, make the statements about which inquiry of him had been made on cross-examination. The assignment of error is without merit.

The record in this case discloses no ground for reversal. The judgment of the district court is therefore affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

SCHOOL DISTRICT NO. 49 OF MERRICK COUNTY, NEBRASKA, ET AL., APPELLEES, V. JESSIE G. KREIDLER, COUNTY SUPERINTENDENT OF SCHOOLS OF NANCE COUNTY, NEBRASKA, ET AL., APPELLANTS, IMPLEADED WITH LENA DEININGER, COUNTY SUPERINTENDENT OF SCHOOLS OF HOWARD COUNTY, NEBRASKA, ET AL., APPELLEES.

87 N. W. 2d 429

Filed January 10, 1958. No. 34276.

1. **Appeal and Error.** An error proceeding in the district court and in this court on appeal therefrom is ordinarily tried on the appropriate and relevant questions of law set out in the petition in error and appearing in the transcript.
2. ———. However, in such proceedings, error may be predicated on sufficiency or insufficiency of the evidence as a matter of law to affirm or reverse the finding and judgment of the court or tribunal from which error was prosecuted if all of the material, relevant evidence is properly presented in a bill of exceptions.
3. **Schools and School Districts: Appeal and Error.** A judgment rendered or final order made by the board or tribunal provided for in section 79-402, R. S. Supp., 1955, may be reversed, vacated, or modified on petition in error filed in the district court for the county in which such board or tribunal, acting multilaterally in a judicial capacity, had its jurisdictional forum where the hearing was held and its judicial functions were performed.
4. ———: ———. A complete transcript of such proceedings, containing the final judgment or orders rendered by such board or tribunal in the county of its jurisdictional forum, is sufficient when properly authenticated by the county superintendent who presided at the proceedings and hearing in such forum.
5. **Schools and School Districts.** In conformity with section 79-484, R. R. S. 1943, the transfer of a child or children from or to a city or village school district, however classified, located wholly or partly within the boundaries of any city or village, is invalid and of no force and effect without written permission of the owner or owners in fee simple of the real estate involved in the transfer.
6. ———. When proper petitions are filed with the several county superintendents of schools requesting creation of a new district from other districts, or a change of boundaries of school districts across county lines under the provisions of section 79-402, R. S. Supp., 1955, it is the duty of the super-

intendents to give proper notice of and hold a multilateral public hearing, and at or after such hearing to factually determine whether or not such districts have lawfully petitioned the same, and such action is judicial in nature.

7. **Schools and School Districts: Appeal and Error.** When the record of proceedings before such county superintendents in a proper hearing by them upon petitions filed under section 79-402, R. S. Supp., 1955, discloses that the legal voters of the districts involved have severally signed and filed proper petitions requesting creation of a new district from other districts or a change of boundaries thereof, such superintendents, acting multilaterally and not unilaterally, have jurisdiction and the mandatory duty to order the changes requested by such petitions, which order may be reviewed on petition in error, thereby providing an adequate remedy. Otherwise, they have no jurisdiction and mandatory duty to order the changes requested.

APPEAL from the district court for Merrick County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Brower & Brower, for appellants.

Sampson & Armatys, for appellees.

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

CHAPPELL, J.

This case involves the validity of proceedings under section 79-402, R. S. Supp., 1955, to enlarge the boundaries of Class II school district No. 49 of the village of Palmer in Merrick County by annexing and attaching thereto all of the territory then within the boundaries of certain hereinafter enumerated Class I school districts of Merrick, Howard, and Nance counties.

The record discloses, and it is conceded, that district 49, in accord with official action of its board of education, filed duly certified petitions on April 11, 1956, with the county superintendents of each of said counties, seeking thereby to have them take such joint and concurrent action as required by law to change the boundaries of district 49 to include therein all of the territory then contained within the boundaries of the fol-

lowing constituted and enumerated school districts of their respective counties, to wit: Districts Nos. 31, 36, 47, 58, and 63 of Merrick County; districts Nos. 4, 60, and 61 of Nance County; joint district Nos. 52 of Merrick County, 69 of Nance County, and 80 of Howard County; joint district Nos. 60 of Merrick County and 51 of Nance County; and joint district Nos. 53 of Merrick County and 77 of Howard County. The petitions of district 49 also provided: "PROVIDED, HOWEVER, that this petition is on the condition that sufficient other school district file similar petitions to bring into said School District No. 49 sufficient territory and personal property to make the total valuation of all property subject to taxation in such enlarged School District No. 49 at the time of enlargement exceed Three Million Dollars.

"PROVIDED, FURTHER, that this petition is on condition that the present School District No. 49, and any other district presenting a similar petition at the same time, shall continue to be solely liable for any bonded indebtedness which may exist against said district at the time of such proposed annexation."

On the same date, each of the aforesaid Class I enumerated districts so filed separate duly certified petitions, identical in form and substance, and containing identical conditions as quoted aforesaid. Each of such petitions was purportedly signed by 55 percent or more of the legal voters in each such district, who therein petitioned the three county superintendents aforesaid to change the boundaries of district 49 of Merrick County by annexing and attaching all the territory within the boundaries of each of their respective districts to said district 49. Thereafter, the three county superintendents, acting multilaterally, fixed the time and place for public hearing upon such petitions as 1:30 p. m., Monday, May 7, 1956, in the district courtroom at the courthouse in Central City, Merrick County, and notice of such hearing was duly published in each county under the name

and by authority of the three county superintendents. At the time and place so authorized and noticed, a multilateral public hearing, with the county superintendent of Merrick County presiding, was held by the three county superintendents upon the separate petitions, whereat each was read and explained, and each and every person, some of whom as objectors were represented by counsel, was granted the right to challenge the accuracy of the filed sworn list of legal voters as the same appeared on each petition, the genuineness of the signatures thereon, their right as legal voters to sign each petition, and the validity thereof as to form and substance. It was also stipulated that the petitions should all be considered as in evidence, and evidence was adduced with relation to the correct number of legal voters in district 58 of Merrick County and the validity of certain signatures appearing upon its petition, which purportedly was signed by 55.5 percent of its legal voters.

Also, evidence was adduced upon the total valuation of all property subject to taxation in such enlarged district 49 during 1955 and 1956, in order to determine whether or not it exceeded three million dollars as required by the first condition contained in all petitions. In that connection, on May 7, 1956, all of the 1956 valuation figures were not yet available, so by agreement of all parties at the hearing, it was continued until 10 a. m., July 9, 1956, to then be resumed at the same place. At that time and place additional evidence was adduced, whereupon the merits were argued by counsel for the parties and taken under advisement.

Thereafter, on July 12, 1956, the county superintendent of Nance County signed and filed an opinion and decision in the office of each of the county superintendents, which denied any relief sought by the petitions for substantially the following reasons: (1) That the 1956 valuation of all property subject to taxation in district 49 at the time of enlargement was less than three mil-

lion dollars, because intangible property should not be included in such valuation, thus the first condition in the petitions could not be complied with; (2) that Dallas Wegner and LaNelle Wegner, who signed the petition of district 58, were not legal voters in such district, but that Mary Garrett, who was a legal voter in that district, did not sign the petition and was not included in the filed sworn list of legal voters; therefore, in either event the petition of district 58 was insufficient because it was signed by less than 55 percent of the legal voters of that district; and (3) that her opinion and decision also disapproved the merger for other reasons based entirely upon her own purported unilateral information, which reasons were either not supported by any competent evidence or were entirely immaterial. To repeat them here would serve no purpose.

Thereafter, on July 20, 1956, the county superintendents of Merrick and Howard counties signed and filed an order of annexation in the offices of each of the three county superintendents, which order the county superintendent of Nance County had refused to sign. That order found and adjudged substantially as follows: (1) That district 49 of Merrick County, through its board of education, had validly petitioned the three county superintendents acting jointly and concurrently, to change its boundaries by annexing to and including within its boundaries all of the territory contained within the boundaries of each and all the districts heretofore enumerated; (2) that each of such enumerated districts, in separate petitions signed by 55 percent or more of its legal voters, had also validly petitioned the county superintendents to change the boundaries of district 49 by annexing and attaching all territory within the boundaries of each of said districts to district 49; and (3) that each and all of the petitions contained two identical conditions heretofore recited, which were complied with. In that connection, their order found that the 1955 valuation should be considered in determining

whether or not the first condition had been met, but that in both 1955 and 1956 the total valuation of all property subject to taxation in enlarged district 49 exceeded three million dollars. With regard to district 58, their order found that such district had 36 legal voters, and its petition had been validly signed by 20 of them, or 55.5 percent of its legal voters. Also, their order found that Mary Garrett was not a legal voter in district 58, but that Dallas Wegner and LaNelle Wegner were legal voters therein. Such order of annexation then ordered and directed that the boundaries of district 49 should be enlarged to include therein all of the territory within the boundaries of each and all of the enumerated districts.

From such proceeding had before the three county superintendents, and the opinion and decision of the superintendent of Nance County, districts 49, 31, 36, and 63 of Merrick County; joint district 52 of Merrick County, 80 of Howard County, and 69 of Nance County; joint district 53 of Merrick County and 77 of Howard County; district 61 of Nance County; and Dallas Wegner and LaNelle Wegner prosecuted error to the district court for Merrick County, making all three county superintendents, all other enumerated districts, Everett Forbes, Charles Green, William Green, Merton Weller, William Blauhorn, and Mary Garrett defendants in error. Errors specifically assigned in the petition in error related primarily to the July 12, 1956, opinion and decision of the county superintendent of Nance County heretofore set forth, and her alleged refusal to act multilaterally in a judicial capacity as required by the evidence and law. A true and correct transcript of all filings and orders involved in the proceeding before the three county superintendents in Merrick County and duly authenticated by the county superintendent of that county was attached to and made a part of the petition in error, which prayed for an order enlarging the boundaries of district 49 by annexing and attaching thereto all territory embraced within the boundaries of each and all of the enumerated

districts, in conformity with the petitions therefor. Summons in error were duly issued and served upon all defendants in error, except the county superintendents of Merrick and Howard counties, who entered their voluntary appearances.

Thereafter, the county superintendent of Nance County, district 4 of Nance County, joint district 51 of Nance County and 60 of Merrick County, Everett Forbes, Charles Green, William Green, and Merton Weller filed a special appearance for themselves alone, upon the ground that the district court for Merrick County was without jurisdiction because error should have been prosecuted in the district court for Nance County. That special appearance was overruled, whereupon such defendants in error filed an answer reserving their special appearance and alleging substantially: (1) That the petitions filed by each of the enumerated districts were insufficient because they failed to specify the particular boundaries with which they intended to unite; and (2) that the transcript filed by plaintiffs in error was insufficient because it contained only a transcript of the files and orders in the office of the county superintendent of Merrick County and was authenticated only by her, when it should have also contained the files and orders in the offices of the county superintendents of all three counties and been authenticated by all such superintendents. The answer also denied that Dallas Wegner and LaNelle Wegner were legal voters of district 58 when they signed its petition. It then alleged that the valuation conditions contained in the petitions had not been met because the 1956 valuation was controlling and, without including intangibles, as was intended, such valuation did not exceed three million dollars. They also alleged that the county superintendents of Merrick and Howard counties erred in refusing to admit certain evidence, and they prayed for dismissal and a denial of consolidation.

A complete bill of exceptions, duly prepared, served,

settled, allowed, and certified by the county superintendent of Merrick County, which concededly contained all of the proceedings in and all the material, relevant evidence adduced at the hearing before the three county superintendents, was duly filed in the district court, and thereafter offered and received in evidence at the hearing upon the merits in that court. It is now the duly served, settled, allowed, and certified bill of exceptions in this court. In that connection, an error proceeding in the district court and in this court on appeal therefrom is ordinarily tried on the appropriate and relevant questions of law set out in the petition in error and appearing in the transcript. However, in such proceedings, error may be predicated on sufficiency or insufficiency of the evidence as a matter of law to affirm or reverse the findings and judgment of the court or tribunal from which error was prosecuted if all of the material, relevant evidence is properly presented in a bill of exceptions. Olsen v. Grosshans, 160 Neb. 543, 71 N. W. 2d 90.

After such hearing in the district court, a judgment was rendered, which affirmed the order of annexation signed and filed on July 20, 1956, by the county superintendents of Merrick and Howard counties; and reversed and vacated the opinion and decision theretofore made and filed on July 12, 1956, by the county superintendent of Nance County. It ordered annexation of all territory within the boundaries of each and all of the enumerated districts to district 49 so as to enlarge its boundaries as sought in each and all of the petitions. It also ordered the clerk of the district court of Merrick County to certify the judgment to each of the three county superintendents to be entered in their records. Costs were taxed to the defendants in error.

Thereafter, the motion of the answering defendants in error for new trial was overruled, and they appealed to this court, assigning and arguing substantially that the trial court erred as follows: (1) In overruling their

special appearance and concluding that the transcript filed by plaintiffs in error was sufficient; (2) in concluding that the petitions involved were sufficient in form, substance, and signatures; (3) in concluding that intangibles should be included in ascertaining whether or not the valuation of all property subject to taxation in enlarged district 49 exceeded three million dollars; (4) in excluding certain evidence; and (5) that the judgment was not sustained by the evidence and was contrary to law. We do not sustain the assignments.

The factual situation disclosed by the record has been heretofore generally set forth, so we will not more specifically refer to it except when necessary to clarify the disposition of certain assignments of error.

The primary statute involved is section 79-402, R. S. Supp., 1955, which provides in part: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected. * * * Provided, changes affecting * * * villages * * * may be made upon the petition of the school board or the board of education of the district or districts affected. * * * Territory may be annexed to a district from an adjoining county when approved by the county superintendent of each of the counties involved. A newly enlarged district shall assume any indebtedness previously incurred by any one or more districts annexed, unless otherwise specified in the petitions."

The first assignment of error questions the jurisdiction of the district court for Merrick County over the subject matter. In that connection, appellants argued that only the district court for Nance County had jurisdiction of the proceedings in error because the opinion and decision of the county superintendent of Nance County was the one primarily subject to attack. We do not agree. Neither party cited any statute or authority directly decisive of the question in this juris-

diction. Appellants relied upon Bloomquist v. County of Washington, 101 Minn. 163, 112 N. W. 253, but that opinion is distinguished by virtue of the following language used therein: "The legislature attempted to provide for those instances where the inhabitants would be more conveniently and economically accommodated with school facilities by making new districts out of old ones, even though the new districts were formed out of districts lying in different counties. The legislature also endeavored to provide for a review by the district court of the action of boards of county commissioners. To accomplish that purpose in the simplest way it enacted that the action of any board of commissioners might be reviewed by appealing to the district court of any county in which was situated any part of a proposed district, and that any petitioner, voter, or freeholder in any part of any district so affected, might take the appeal." We have no such statute in this jurisdiction.

The original jurisdiction of the proceeding at bar was in Merrick County, where the board or tribunal, composed of three county superintendents acting multilaterally in a judicial capacity, met, held a hearing on the merits, and were required to adjudicate the issues. In Olsen v. Grosshans, *supra,* and School Dist. No. 65 v. McQuiston, 163 Neb. 246, 79 N. W. 2d 413, the question of jurisdiction was not directly raised, but it was rightly assumed that error should be prosecuted to the district court for the county where such a multilateral hearing was held and the decision was made, as required.

Section 25-1901, R. R. S. 1943, provides in part: "A judgment rendered, or final order made, by a * * * tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court." Also, section 25-1903, R. R. S. 1943, provides in part: "The proceedings to obtain such reversal, vacation or modification shall be by petition entitled 'petition in

error,' filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served * * * as in the commencement of an action."

It is axiomatic that error proceedings from judgments rendered or final orders made by such board or tribunal as that at bar, should be taken to the district court for the county in which the board or tribunal as such had its jurisdictional forum, where the hearing was held, and its judicial functions were performed.

It is generally elementary that: "Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court." 14 Am. Jur., Courts, § 161, p. 364. In that connection, appellants would have us hold, contrary to Olsen v. Grosshans, *supra*, that the county superintendent of Nance County had the power and authority to act unilaterally in Nance County. We conclude that the district court for Merrick County had exclusive jurisdiction of the subject matter involved herein.

Appellants also argued that the transcript, which was duly authenticated by the county superintendent of Merrick County, and was attached to and made a part of the petition in error filed in the district court, was insufficient because it was authenticated by only the county superintendent of Merrick County and contained only all the filings and orders made in the office of the county superintendent of Merrick County, and did not contain also the filings and orders made in Howard and Nance counties authenticated by the county superintendents thereof. Concededly, the transcript correctly reflected the entire record of the filings and orders in the proceeding. The contention has no merit.

In that connection, section 25-1905, R. R. S. 1943, provides in part: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified." Also, section 25-1906, R. R. S.

1943, provides in part: "Judges of county courts, justices of the peace and other judicial tribunals having no clerk * * * shall, upon request and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final order of said courts, to either of the parties to the same, or to any person interested in procuring such transcript."

The identical filings and orders made in the office of the county superintendents of Howard and Nance counties simply perfected and protected the records of their respective offices. The inclusion of such filings and orders in the transcript would simply have resulted in a useless, expensive triplication of identical filings and orders, which no statute or authority cited or found has required. Also, it is not required that all three county superintendents shall authenticate the transcript. We conclude that it was perfectly proper for the presiding county superintendent of the jurisdictional forum in Merrick County to authenticate the transcript. The first assignment of error has no merit.

With regard to the second assignment of error, appellants argued, without citing any authority except section 79-402, R. S. Supp., 1955, that the petitions, except the one filed by district 49, were insufficient for want of any specifically-defined boundaries set forth therein. The contention has no merit. Such statute simply provides that the county superintendent or superintendents "shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five percent of the legal voters of each district affected." It contains no provisions against such petitions containing conditions or provisos if they concur substantially in the identical action requested, as was done in the case at bar. Olsen v. Grosshans, *supra*. As a matter of fact, the second identical condition or proviso contained in the petitions here involved is specifically authorized by the very statute relied upon by appellants.

In that connection, as stated in State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626, quoting with approval from Cowles v. School District No. 6, 23 Neb. 655, 37 N. W. 493: " 'These provisions are mandatory, and may, I think, be classed as jurisdictional. * * * The laws of this state, as well by policy as by letter, have left the control of the boundaries of school districts, primarily, with the legal voters of each district respectively. * * * After the first or original organization of a new county into one or more school districts, no new district can be formed, old one altered, or the boundaries of any altered, without the movement therefor originating with the legal voters thereof, and their will to that effect being expressed by petition of the strength prescribed by statute. These are matters with which the school district, as a corporation, or quasi corporation, has been vested with neither power nor duty, nor has any district officer, board, or school meeting; but they rest with the voters in their capacity of petitioners, and with them alone.' "

In the case at bar, district 49, by official action of its board of education, filed its petition to change its boundaries to include within it all territory contained within the boundaries of each and all the several named and enumerated districts and at the same time each and all of such districts filed separate petitions, identical in form and substance, to change the boundaries of district 49 by annexing and attaching all of the territory within the boundaries of each such districts to district 49. No one was or could have been mislead by the form and language of such petitions, and it is not shown by the record that the rights of any one were abrogated thereby. To hold otherwise would deny the legal voters of the districts involved their clearly expressed desires to become a part of district 49, and would place an insurmountable technical obstacle in the progressive creation of new districts from other districts and the chang-

ing of boundaries of districts under plain statutes duly enacted for such purposes.

Appellants also argued that the petition of district 58 was insufficient for want of the signatures of 55 percent or more of the legal voters of that district. Such petition appeared to have been signed by 55.5 percent of its filed sworn list of legal voters. In that connection, appellants argued that such petition was not sufficient because Dallas Wegner and LaNelle Wegner, who were listed as legal voters and signed that petition, were not then legal voters in district 58, and that in any event Mary Garrett was a legal voter who was not listed as such and did not sign the petition. With regard to Mary Garrett, it is sufficient for us to say the record conclusively establishes that she was not a qualified legal voter of district 58 at the time involved. Any contention otherwise was simply an afterthought, without merit.

With regard to Dallas Wegner and LaNelle Wegner, husband and wife, the record discloses that they were tenants on a farm owned in fee simple by one Minnie A. Wegner. Their residence was located 2¾ miles from the schoolhouse in district 58. They had three children who had not yet completed the eighth grade, so on May 18, 1955, they filed a notice with the county superintendent of Merrick County that they desired "school privileges for the coming year" in district 49, whose schoolhouse in the village of Palmer was 1¼ miles nearer their residence than the schoolhouse in district 58. Such privileges were granted, but later canceled on May 25, 1956. By virtue of such action, appellants argued that Dallas Wegner and LaNelle Wegner transferred out of district 58 and were no longer voters of that district. We do not agree.

Such privileges were evidently requested under the provisions of section 79-478, R. S. Supp., 1955, but the record shows conclusively that Minnie A. Wegner, owner in fee simple of the farm upon which Dallas

Wegner and LaNelle Wegner were tenants, did not give written permission for the allowance of such a transfer from district 58 to district 49 located in the village of Palmer. In that connection, section 79-484, R. R. S. 1943, provides: "The provisions of sections 79-478 to 79-483 shall never be construed, except with the written permission of the owner or owners in fee simple of the real estate involved in the transfer, to permit or allow the transfer of a child or children from or to a city or village school district, however classified, located wholly or partly within the boundaries of any city or village." The provisions thereof are applicable and controlling here. The mere fact that Minnie A. Wegner knew that such privileges had been requested and granted is of no controlling importance. Therefore, in the absence of written permission by Minnie A. Wegner, we conclude that such transfer had no validity. The second assignment of error has no merit.

Each petition here involved contained a like condition: "* * * that sufficient other school districts file similar petitions to bring into said School District No. 49 sufficient territory and personal property to make the total valuation of all property subject to taxation in such enlarged School District No. 49 at the time of enlargement exceed Three Million Dollars." In such respect, the record discloses without dispute that in 1955 the valuation of tangible property in such enlarged district 49 was $3,229,410, and the valuation of intangible property was $525,345, or a total of $3,754,755, and that in 1956 the valuation of tangible property was $2,789,900, and the valuation of intangible property was $564,870, or a total of $3,354,770.

In that situation, appellants argued under the third assignment of error that the valuation should be determined in 1956 "at the time of enlargement" as provided in the petition, and that such valuation was insufficient because the legal voters never intended to

include intangible property values therein. Be that as it may, we conclude that the language of the valuation condition was all-inclusive and enveloped all intangible property as well as all tangible property. Had the voters intended to limit the valuation to real and tangible personal property, it would have been easy and natural to have said "real estate and tangible personal property" or "all real and personal property except intangible property," but that was not done. Viewed in such light, it becomes purely academic whether the 1955 or 1956 valuation should be considered because both valuations were in excess of three million dollars as found by the trial court.

In that connection, intangible property was subject to taxation in enlarged district 49, and such district was entitled to its statutory apportionment of such taxes. See, §§ 77-201.01, R. S. Supp., 1955; 77-701, R. S. Supp., 1955; 77-702, R. R. S. 1943; 77-703, R. S. Supp., 1955; and 77-704, R. S. Supp., 1955. Other statutory sections and authorities relied upon by appellants are not in point or controlling here. Thus, the third assignment of error has no merit.

With regard to the fourth assignment of error, appellants argued, without assigning any authority except section 79-402, R. S. Supp., 1955, that the county superintendents of Merrick and Howard counties erred in refusing to admit evidence of distances and the conditions of certain roads and a bridge necessary to be used by the pupils of certain districts in traveling to and from district 49. However, such matters of propriety or expediency in comparable proceedings were entirely for decision by the legal voters who signed the petitions, and were not an issue for the county superintendents or any of them to pass upon. Such evidence was entirely irrelevant, incompetent, and immaterial, and was propertly excluded, because, as held in Olsen v. Grosshans, *supra:* "When proper petitions are filed with the several county superintendents of

schools requesting creation of a new district from other districts, or a change of boundaries of school districts across county lines under the provisions of section 79-402, R. S. Supp., 1951, it is the duty of the superintendents to give proper notice of and hold a multilateral hearing, and at or after such hearing to factually determine whether or not such districts have lawfully petitioned the same, and such action is judicial in nature.

"When the record of proceedings before such county superintendents in a proper hearing by them upon petitions filed under section 79-402, R. S. Supp., 1951, discloses that the districts involved have severally signed and filed proper petitions requesting creation of a new district from other districts or a change of boundaries thereof, such superintendents, acting multilaterally and not unilaterally, have jurisdiction and the mandatory duty to order the changes requested by such petitions, which order may be reviewed by petition in error, thereby providing an adequate remedy. Conversely, they have no jurisdiction and mandatory duty to order the changes requested." The fourth assignment of error has no merit.

The fifth assignment of error also should not be sustained because an examination of the record and applicable law discloses that the evidence was amply sufficient to and did sustain the judgment of the trial court, which was in every material respect in conformity with law.

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

AFFIRMED.

MILDRED M. RICE, APPELLEE, V. SAMUEL G. RICE, APPELLANT.
87 N. W. 2d 408

Filed January 10, 1958. No. 34294.

1. **Parent and Child.** In determining the reasonableness of an order fixing the amount a father should pay for the support of his minor children it is proper to consider the property of the father, whatever be its nature, as well as his earning capacity.
2. **Parent and Child: Appeal and Error.** An order of the district court directing a father to furnish a recognizance under the provisions of section 42-715, R. R. S. 1943, will not be disturbed on appeal in the absence of a showing of an abuse of discretion by the trial court.
3. **Attorney and Client.** A trial court, in the absence of statute, is not authorized to allow an attorney's fee to a county attorney for services rendered while acting in his official capacity.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Affirmed in part, and in part reversed and remanded.*

Elven A. Butterfield, for appellant.

Clarence S. Beck, Attorney General, *Richard H. Williams,* and *Harold Rice,* for appellee.

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

CARTER, J.

This is an appeal from an order entered by the district court for Antelope County under the provisions of the Uniform Reciprocal Enforcement of Support Act. The trial court found that a duty to support existed, and ordered the respondent to pay $75 a month for the support of three minor children, to furnish a recognizance in the form of a cash deposit or bond in the amount of $1,500, and to pay an attorney's fee in the amount of $100 to be taxed as costs. From the final order thus rendered the respondent has appealed.

The evidence shows that Mildred M. Rice, the petitioner, and Samuel G. Rice, the respondent, were mar-

ried at Scottsbluff, Nebraska, on June 3, 1931. The petitioner, who had become a resident of the State of Oregon, obtained a divorce from the respondent in that state on November 14, 1955, by which the care and custody of five minor children of the parties was given to petitioner. A division of property was made in the decree granting the divorce, but no order was made for the support of the minor children by the respondent.

The record shows that petitioner presented a petition for referral to the State of Nebraska to the circuit court for Marion County, Orgeon, as provided by section 110.101 of the Oregon Uniform Reciprocal Enforcement of Support Act. O. R. S. 1955, c. 110, p. 723. The circuit court for Marion County, Oregon, entered its order pursuant to section 110.131 of the Oregon act, finding that respondent owed a legal duty to support his three minor children, Florence, Sammy, and Dale, ages 16, 13, and 8 years respectively, and directed that the petition be transmitted to the district court for Antelope County, Nebraska, under the reciprocal provisions of the Nebraska Uniform Reciprocal Enforcement of Support Act. The petition was filed pursuant to section 42-712, R. R. S. 1943. Issues were formulated, a hearing had, and an order entered which is the basis of this appeal. § 42-713, R. R. S. 1943.

The evidence shows that respondent is 70 years of age and in such poor health that he is unable to work. He is the owner of a $12,000 mortgage on a farm in Antelope County on which the interest and $500 of principal is payable each year. He is the owner of 320 acres of pasture land in Wyoming which produced a rental of $325 in 1956. Respondent stated that the rental of the Wyoming land is uncertain in that some years there are no rentals therefrom. He contends that his income does not exceed $1,040 a year and that the allowance of $75 a month for the support of the three minor children leaves him nothing for his own maintenance.

We know of no rule that limits the liability of a

father to support his minor children to income over and above his own living expenses. He has property valued in excess of $12,000 from which the payments of child support can be derived. The allowance of $75 per month for the support of his three minor children is reasonable under the circumstances shown, and that portion of the order is affirmed.

The respondent complains of that part of the order requiring him to furnish a recognizance in the form of a cash deposit or bond in the amount of $1,500. This requirement was made pursuant to section 42-715, R. R. S. 1943, which provides in part: "In addition to the foregoing powers, the court of this state when acting as the responding state has the power to subject the defendant to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular: (1) To require the defendant to furnish recognizance in the form of a cash deposit or bond of such character and in such amount as the court may deem proper to assure payment of any amount required to be paid by the defendant; * * *." The evidence shows that the assets of the respondent within the jurisdiction of the court were personal property which could be disposed of for the purpose of defeating the court's order. The trial court did not abuse the discretion lodged with it by the statute in requiring the recognizance to be given in the amount of $1,500.

The respondent asserts that the trial court erred in allowing an attorney's fee in the amount of $100 or in any amount. The Oregon act provides that the district attorney shall represent the petitioner in proceedings under the act. The petitioner was represented in the district court for Antelope County by the acting county attorney. Attorney's fees may not be allowed to a prosecuting attorney for services rendered in his official capacity. § 23-1206, R. R. S. 1943. The order of the court provided that the attorney's fee allowed be divided equally between petitioner's attorneys in Ne-

braska and in Oregon. It is contended that, as no objection is made to the allowance of one-half the attorney's fee to petitioner's Oregon attorney, it should not be disturbed. The attorneys in both states were prosecuting attorneys acting in their official capacity. The rule as to each is the same. We necessarily conclude that the trial court erred in allowing an attorney's fee as a part of the costs.

The decree of the district court allowing petitioner $75 per month for the support of her three minor children and requiring respondent to give a recognizance in the amount of $1,500 is affirmed. The allowance of an attorney's fee for petitioner's attorneys is reversed. All costs are taxed to appellant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

LLOYD PUEPPKA ET AL., APPELLEES, V. THE IOWA MUTUAL INSURANCE COMPANY, A MUTUAL COMPANY, APPELLANT.
87 N. W. 2d 410

Filed January 17, 1958. No. 34111.

1. **Trial: Appeal and Error.** The credibility of witnesses and the weight of evidence are, in an action at law, for the jury and its verdict may not be disturbed by this court unless it is clearly wrong as a matter of law.
2. ———: ———. Disputed questions of fact in an action at law are by the verdict of the jury resolved in favor of the prevailing party and in deciding an appeal in the cause the evidence and reasonable inferences therefrom are required to be considered most favorably to him.
3. **Witnesses.** The value of the opinion of an expert witness is dependent on and is no stronger than the facts on which it is predicated. The opinion has no probative force unless the assumptions upon which it is based are shown to be true.
4. **Trial: Appeal and Error.** A verdict so clearly wrong as to induce a belief by the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, must be vacated.

5. ———: ———. If material evidence has been disregarded by the jury which if considered in a proper manner requires a different conclusion than the one made in the cause by the jury, its verdict and the judgment thereon will be vacated in an appeal to this court.
6. ———: ———. The trial court should direct or this court should set aside a verdict if the evidence in the cause is undisputed or if it, though conflicting, is so conclusive that it is insufficient to justify the verdict or to sustain a judgment thereon.

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

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, and *Frank E. Piccolo, Jr.,* for appellant.

Crosby, Crosby & Nielsen, Halligan & Mullikin, and *Maupin, Dent, Kay & Satterfield,* for appellees.

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

BOSLAUGH, J.

Appellant, for a consideration, issued and delivered to Lloyd Pueppka and Cleo Pueppka a standard fire insurance policy protecting them, within the limits thereof, from loss caused by fire or lightning to a building owned by them and described in the policy. The building was thereafter destroyed by fire and Lloyd Pueppka and Cleo Pueppka seek to recover from appellant the amount of the policy. There is no issue concerning the parties described in this court as appellees and intervener other than Lloyd Pueppka and Cleo Pueppka and they will not be again mentioned herein. Lloyd Pueppka and Cleo Pueppka will be referred to as Pueppka and Cleo Pueppka, respectively, and collectively as appellees.

The cause of action of appellees as stated by them is as follows: They owned 5 acres of the southwest quarter of Section 10, Township 14 North, Range 30 West of the 6th P. M., in Lincoln County, on which was lo-

cated a two-story, quonset-type building. The appellant was an insurance company authorized to conduct insurance business in the State of Nebraska. It, for a consideration paid by appellees, issued and delivered to them in Nebraska a standard policy of fire insurance and thereby indemnified them from loss or damage caused by fire to the building in the amount of $25,000. The building was destroyed by fire of unknown origin August 8, 1952. Appellant was notified of the loss as the policy provided but it failed to pay the loss as required by the policy.

The amended answer of appellant to the extent relevant to this appeal contains the following: An admission of the cause of action alleged by appellees and allegations that the consideration paid by them for the policy of insurance had been returned to them by appellant and the policy had been canceled; that the policy of insurance contained a provision "Unless otherwise provided in writing added hereto this Company shall not be liable for loss accruing (a) while the hazard is increased by any means within the control or knowledge of the insured"; that appellees caused the building described in the policy to be burned and destroyed by fire on August 8, 1952; and that the burning and destruction of the building by either or both appellees voided the contract of insurance.

Appellees replied by a denial of new matter in the amended answer of appellant.

Appellant, at the termination of the evidence, by motion asked the court to direct the jury to return a verdict for it on the ground that the evidence was not sufficient to sustain a recovery by appellees. The motion was denied. The cause was submitted to the jury and its verdict was for appellees in the amount of the insurance contract. Appellant made a motion for judgment notwithstanding the verdict or, in the alternative, motion for a new trial. They were each overruled and judgment was rendered for appellees in accordance

with the verdict. This appeal contests the legality of the judgment.

Appellant contends that the trial court erred in denying its motion for a directed verdict at the conclusion of the evidence and in denying its motion for judgment notwithstanding the verdict because the proof is not sufficient to sustain a verdict for appellees.

The disputed questions of fact were resolved by the jury in favor of them and in considering and deciding this appeal the evidence and reasonable inferences therefrom must be considered most favorably to them. Boettcher v. Goethe, *ante* p. 363, 85 N. W. 2d 884; Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. The credibility of the witnesses and the weight of the evidence were for the jury and its verdict may not be disturbed by this court unless it is clearly wrong as a matter of law. Sorter v. Citizens Fund Mutual Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276; Conley v. Hays, 153 Neb. 733, 45 N. W. 2d 900.

The circumstances of this litigation are:

Appellees engaged in the construction of a building on the 5 acres of land owned by them as described above commencing in February 1952 and continuing to July 13, 1952. It was a two-story, quonset-type building to be used and operated as a private club and a dwelling for the owners. It was 40 feet wide from north to south, 160 feet long from east to west, and had a concrete foundation. The shell or outside was corrugated 26-guage galvanized steel supported by 16-guage, 6-inch-thick steel beams 4 feet apart, except each end of the building consisted of concrete blocks. The insulation was Celotex and there was a 6-inch air space between it and the outside steel covering. The inside wall was knotty pine placed over the insulation. There were several air ducts along the base of the building and there were nine roof vents equipped with rotary or revolving ventilators. There was a free passage of air from the outside into the 6-inch air space in the walls

to and through the roof vents and the ventilators. This arrangement provided ventilation and prevented condensation. The opening into each ventilator was fitted with a trap door and equipped so that it could be opened or closed from the first floor.

The kitchen was the northwest room on the first floor of the building. It was about 14 feet north and south and 40 feet east and west. There was a door on the west near the northwest corner of the kitchen, an opening in the south wall for passage to and from the dining room, and an opening to the east near the northeast corner of the kitchen for passage to the east through a corridor to the bar. The dining room was south of the kitchen and was the southwest room of the first floor. It was about 25 feet from north to south and about 40 feet from east to west. There was an opening in the east wall in the southeast corner into a corridor leading to the east and northeast into a large room in which there were located a powder room, a gentlemen's room, the bar, the office, the stairway to the second floor, booths for serving customers, and an area for dancing. The principal entrance to the building, known as the Spur Club, was the south door situated a short distance east of the southeast passageway from the dining room. There was an emergency door in the east end of the building which was confined to that use.

There were three bedrooms, a large living room, a kitchen, a bathroom, and closets on the second floor of the building which were occupied by appellees and their two children as their home. The entrance to the second story was a stairway from the first floor commencing a short distance east of the south door spoken of above.

The building was completely furnished and equipped for the uses intended except the gas furnaces for heating the building were not connected with gas, the fuel intended for their operation. The pipes through which gas was conducted to the appliances in the building were

temporary and were to be replaced by permanent installation of pipelines but that had not been done at the time of the fire important to this case. A ceiling had not been placed in the kitchen. It was open above to the beams and to the floor of the second story. These and some additional minor items were to be completed after the club was open for general use on July 13, 1952.

There were installed in the kitchen on the first floor, commencing at the northwest corner and proceeding east along the north wall, a deep freezer, a laminated top table with iron pipe legs sometimes referred to as a cutting table, a multiple-burner, commercial-type range or cooking stove with a grill about 25 inches wide, 2 electric deep-well fryers, an electric ice cube maker, and a double urn coffee maker operated with gas. Immediately south of the range a few feet was a table similar to the one spoken of above for general use in preparing and serving food. In the southwest corner south of the west entrance to the kitchen was a walk-in refrigerator equipped with a compressor and electric motor to operate the freezing process. The compressor and motor were outside to the east of the refrigerator and the motor was not sealed but was exposed. East of the refrigerator and west of the opening from the kitchen into the dining room was an automatic gas water heater equipped with a pilot light. East of the entrance from the kitchen to the dining room and extending to the east wall of the kitchen were a sink and a work table.

The propane gas system as it was installed consisted of two 1,000-gallon propane tanks set, according to regulations, about 60 feet west of the northwest corner of the building and connected by a manifold system so if the gas in one of the tanks was exhausted the other would automatically feed gas into the system. There was attached to each of the tanks a 15-pound regulator. There was a copper tube or pipeline from the tanks to the northwest corner of the building to a regulator with which it was connected. This regulator reduced the

pressure of the gas in the line to 6 ounces. The copper line extended from the regulator to ground level and to the east along the building to a T to which it was connected. A copper tube attached to one part of the T went to and through a hole in the north wall of the building some distance above the ground level and to a T on the southwest part or corner of the stove or commercial range about 35 inches above the first floor of the building. There was a T at that location and the copper tube was attached to it by being inserted into a fitting spoken of in the record as a brass reducer bushing, a brass L adapter, a connector, or flare nut. It will be referred to hereafter as a connector. The end of the pipe was flared or enlarged and the connector was screwed onto a part of the T which projected from the center of it toward the north. One end of the T was fastened securely by being screwed onto the feed pipe of the stove and the other or west end was fitted with a nipple and a brass elbow was fastened to the west end of the nipple. A copper gas line was connected to the brass elbow at this location by a connector and the line went north to the wall, up the north wall to the top of the kitchen, south to the south wall, and down to the water heater where this line was attached to the heater and furnished the gas to operate the pilot light and the heater. There was a copper tube attached to the east end of the T outside the building north of the location of the stove and it extended east and south through the north wall and was attached to the coffee urn. It furnished gas to operate the coffee urn.

The installation as above was completed the first night the club was opened. The last connection of the line was made to the water heater then because it did not arrive until the day of the opening of the club. Tests of the installation were made and the result indicated the construction was proper and satisfactory for the use intended except it was discovered that there was a defective valve on the coffee urn. It was immediately

removed and the defect was corrected. The gas line outside the building was tested by a pressure meter or gauge installed on the 15-pound side of the regulator so it would make about 20 pounds of pressure. The tanks were shut off, a reading of the gas was taken, and it was left in that situation for a couple of hours. When it was read again it had not dropped an ounce of pressure. This established the gas line was tight and available for use. The fittings and connections of the lines in the building were tested by the use of a liquid leak detector, a chemical product made especially for testing leaks of propane gas. It would bubble and foam up if there was a leak of gas so minor that it could not be ignited. The gas line proved by these tests to be free of leaks and proper for service of gas to and in the building. The person who made the installation was at the club on several occasions afterwards. There was no complaint made to him concerning it. He did at one time make an adjustment as to the flame on the stove to secure a hotter fire on a couple of the burners.

The gas line described above was in use as a facility in the operation of the club from the time the line was completed the first night the club was opened. Many people visited it. There were as many as 300 people in attendance at what is referred to in the record as the grand opening the night of July 13, 1952. The total membership of the club was stated as 565. The club was operated and patronized nightly after the opening except on one night of each week it was closed. There were employees in the kitchen near, around, and using the appliances when the club was opened from 6 p. m until 2 a. m., as well as during the preparation for the nightly activities and the cleaning-up work after it was closed for the night.

Appellees and their children lived there. It was their home. Appellees cleaned the entire first floor of the building on the day of the fire. Cleo Pueppka was there until about 2:30 p. m. of that day and Lloyd Pueppka

was there until somewhat later that afternoon. He was in the building and went through it when he left it in company with his brother-in-law. The brother-in-law entered through the kitchen and was in other parts of the building. There were other persons in the building that day. The propane gas used in it was odorized by a product which caused it to give off an easily detected, offensive odor if it was released or escaped. The gas was odorized for the purpose of alerting persons if gas had escaped. There was no one who appeared and claimed that they knew or even suspected that gas was escaping or leaking from the gas system of the building. On the contrary, all who spoke on the subject, including appellees, denied that they had experienced anything which caused them to think that any gas was leaking in or about the building. Likewise, the witnesses who were in a situation to know said the equipment of the building on the day of the fire was in proper condition and operating normally. There was no one who was there August 8, 1952, who made any claim of seeing or smelling smoke or of having any experience to alert them to a belief or suspicion of a fire or any unusual condition in the building until shortly before 4 o'clock that afternoon when persons from various locations detected positive evidence of a fire in the building.

Appellees and their children were at the club the night of August 7, 1952, and the morning of Friday, August 8, 1952. Breakfast for the family on that morning was prepared in the first floor kitchen of the club. The stove there was then used for cooking by Cleo Pueppka. They ate in the dining room of the club. It was a late breakfast. A painter had arrived and was painting on the south side of the building before appellees were up. The workman was there to paint the dormer windows on the south and north sides of the building. A representative of a plumbing and heating firm came to the club while appellees were at their morning meal in reference to an indebtedness they owed to

the firm. He was at and in the building for a considerable time. A man who had done some work on the building came there in the forenoon but he did not enter the building. He came back in the afternoon and he was in it.

The children of appellees at about 10 or 10:30 o'clock that forenoon went to the home of Mr. and Mrs. Johnson about a half-mile distant to visit and play with their children. The children of the two families were frequently together either at the Johnson home or at the home of appellees. Appellees had thoroughly gone over, cleaned, and put in order the entire building including waxing the floor in the dance hall after they had finished breakfast and before Cleo Pueppka left there that afternoon. She left the club about 2:30 that afternoon and went to the Johnson home to get her children and take them with her to North Platte. She visited for a time with Mrs. Johnson. The children desired to remain there rather than accompany their mother to the city. She left them and proceeded into North Platte primarily to secure a waitress to assist at the club. She made calls on different persons whom she thought might be secured and finally she was successful in securing the help she desired. While she was returning to her home she learned the building was burning. When she left the club that day the persons who were there were the painter, who was working on the north side of the building, and her husband. The building and everything in it when she departed to go to North Platte were, so far as she could tell, in normal and usual condition. There was nothing unusual except the smell of fresh paint on the second floor and floor wax that had been applied to the dance floor that day.

Pueppka, after his wife Cleo Pueppka drove away from the club in the family automobile as recited above, had his pick-up truck parked on the south side of the building. He then went to the living quarters on the second floor to clean up and dress in preparation for going to North

Platte. While he was doing this Raymond Branting, hereafter called Branting, the husband of a sister of Cleo Pueppka, came to the club, entered it through the west door, and proceeded to the second floor where Pueppka was. It was then a little after 3 o'clock in the afternoon. As Branting came to the club he saw a man on a ladder painting a dormer window. He met or saw no one in the building at that time except Pueppka. He finished dressing and getting ready to go out. The two of them sat and visited a few minutes and they then heard an announcement on the radio that it was 3:30 p. m. Branting said he had to go back to work and Pueppka said he wanted to go to the sale barn and buy some stock to butcher. They passed down the stairs to the first floor. Pueppka went to the west door, closed and locked it, and then went to the south door where Branting had gone. They opened it and went out on a concrete approach to the door. They met a representative of a transfer firm who had come to collect a freight bill from Pueppka. The three of them stood there in a group and Pueppka and the collector had a conversation. Pueppka and the collector went into the building to the office, got a check, it was made out, and Pueppka signed it and gave it to the collector. He asked permission to look the club over. It was granted and he did that. He found nothing that was wrong with the building at the time he was in it. He then proceeded out the south door to his automobile and drove away. The Pueppka pick-up truck and the automobile of Branting were standing side by side south of the club. Branting got in his automobile and drove away. Pueppka went to his pick-up truck, got in it, and was ready to leave but he did not then do so. The last Branting saw of Pueppka he was in his truck in the yard in front or south of the Spur Club.

The painter said he finished painting at the club that afternoon at 2:30. He looked at his watch and ascertained this fact. He had to dispose of the ladder and

put other things away and he said he finished that and left the club about and not later than 3:20 p. m.

Branting noticed nothing unusual while he was in the building. He said it was something like 3 or 4 minutes between the time the radio announcement was made that it was 3:30 p. m. and when he was in his automobile ready to drive away from the club.

The area on which the building was located bordered on the west side of Highway No. 83. Pueppka said he drove out on the highway, then south to Twelfth Street, then to Poplar, out to Eighth Street, and to the Western Livestock Sales Barn in North Platte. He did not say when he did this. More specifically, he did not attempt to say how soon after Branting drove away from the club that he, Pueppka, started the trip to North Platte or what he did during that interval. He did say that he was the last person to leave the building before the fire; that everything was all right when he left the building; that there was nothing out of order as far as he could tell in or concerning the building, the gas system, or any of the equipment in the building when he departed from it; and that the fire was not started accidentally or from natural causes. It was 3.3 miles from a point directly in front of the Spur Club on Highway No. 83 to the north city limits sign on the highway north of North Platte. The distance from that sign to the station of the fire department of that city was .9 of a mile, a total distance from the club to the fire station of 4.2 miles.

Pueppka said that when he arrived at the premises of the Western Livestock Sales Barn he went to the Western Toggery, talked to a man there for a short time, walked to the sales barn, went up the stairs, and sat by the Hoban brothers. The sale was then in progress. He could not say how long he was there.

A resident of North Platte was traveling on Highway No. 83 toward that city and passed the Spur Club about 3:35 the afternoon of August 8, 1952. He had a clock on

the instrument panel of his automobile and as he came around the corner approaching the club he looked at the clock and was thereby able to fix the time as 3:35. He saw three persons standing on the cement stoop outside the south door of the club. He told Pueppka that evening that he saw the three men at that time and place and that he thought Pueppka was one of them. Pueppka said he was not and that he wished the person he was talking to had stopped to see who the three men were.

A representative of the United States Checkbook Company was on a trip from Stapleton to North Platte the afternoon of August 8, 1952. He was traveling on Highway No. 83 and when he was about a mile north and east of the Spur Club driving toward the southwest he saw smoke coming out of the soil pipe and a ventilator above the roof on the west end of the club. The smoke at first was about the color of steam but as he came closer to the building it turned to dark smoke and he concluded that the building was on fire. He increased the speed of his car to 60 or 65 miles per hour until he reached the north corporate limits of North Platte. He continued to the station of the fire department of that city and reported the fire. The time the report was made was 3:57 of the afternoon of August 8, 1952. The report of the fire at the Spur Club was made to the assistant chief of the fire department of the city of North Platte. He immediately advised the firemen then on duty. One of them set off the fire alarm and when it was set off it made a record of the time. It was 3:57 p. m.

A traveler on Highway No. 83 approached the Spur Club between 3:30 and 4 o'clock the afternoon of the day of the fire. As he came over the hill from the south about 150 yards from the club he saw smoke coming out of a west ventilator. He went to the building, looked in the window, and saw about halfway across the building a blanket of white or gray smoke. He was

sure the fire had just started. He returned to his automobile parked on the highway and he then saw smoke coming out of ventilators 1, 2, and 3 as it progressed toward the east. The smoke turned from a gray color to black in about a minute.

A Mr. Richman had an area of land and a garden 2 or 3 blocks northwest of the Spur Club. He went past it at 3 o'clock the afternoon on which the fire occurred on his way to his garden where he was engaged for some time when his attention was directed to smoke coming out of the windows upon the west end of the Spur Club. He did not know the exact time of this but it was near 3:30 p. m. He ran to the building. There was no one there. The first flame he saw was on the north side near an opening into the kitchen area. A few minutes later flames broke out from the upper floor. The heat was extreme. The west door of the building was closed but the main entrance door on the south of the building was open and smoke was coming through the opening of the door. The smoke was dark gray at first but it got black as the fire progressed. The first persons who came after Richman got there were workmen from a house being constructed about three-quarters of a mile to the southeast of the club, and shortly thereafter the firemen arrived. They made no effort to put out the fire. It was so hot and intense that there was nothing that could be done about it.

A carpenter working on the construction of the house being built, as referred to above, said smoke was detected there about 3:45 p. m. and he noticed smoke coming over a hill that was between that location and the Spur Club. He went to the fire. A lot of smoke was coming from the ventilator on the west end of the building. Fire was mostly in the west end. The wind was in the northwest and he could not get close to the south side because of smoke and heat. The firemen came soon after the witness arrived and when they came the flames had reached a window on the north side so

that they were easily visible. The fire had then developed until there was nothing the firemen could do to extinguish it.

The assistant chief of the fire department and a member of it who was a truck driver for the department left immediately after receiving word of the fire with a fire truck and went to the scene of the conflagration. They arrived at the burning building about 4:10 p. m. and the roof of the building collapsed at 5 p. m. The conflagration terminated about 5:30 or 6 p. m. When they arrived at the fire it was principally in the northwest corner of the building. The heat was very intense and was rapidly extending to all other parts of the building. It had developed to the stage and was too hot for the firemen to do anything about it or to make an attempt to extinguish it. The north gas tank was singing and there was frost up to about a foot from the bottom all around the tank three-eighths to one-half inch thick. The gas was flowing at a rapid rate. The fireman shut off the flow of gas. The assistant chief and another man removed a Skelgas tank located near the north side of the building which served the upstairs apartment of the building.

While Pueppka was conversing with the Hoban brothers at the sale barn there was an announcement over the loud-speaker that there was a prairie fire in the north hills. Many of the persons present left immediately because of the information that it was a prairie fire and that their assistance might be required. On the way to his truck Mr. Huffman joined Pueppka and they drove out of North Platte and north on Highway No. 83 over the route Pueppka had used in coming to the sale barn. When they reached the summit of the hill south of the Spur Club dense smoke was crossing the road and Pueppka then thought it might be his building that was burning. He drove around to the west of the building and parked. It was then quite generally on fire. There were flames coming out of two or three of the

ventilators and there was nothing he or anyone could do to save the building. The premises where the building had been were by order of the chief of the fire department, at the request of a Deputy State Fire Marshal, placed under guard and they were guarded by Pueppka and Harry Schlientz until Tuesday, August 12, 1952.

The afternoon of August 9, 1952, two Deputy State Fire Marshals and the chief of the fire department of North Platte went to the site of the burned building. The debris and remains were very hot and it was impossible to make more than an external examination. They examined the two large propane gas tanks from which gas was furnished to service the first floor of the building. They followed and carefully inspected the fittings, connections, and copper pipe of the gas line from the tanks to where it entered the building to connect with the cook stove in the building; the gas line to the place on the north side of the building where it entered to connect with the coffee urn; and the regulators which constituted a part of the gas line and gas system of the building. These were all in good operating condition and had not been injured. There was no break, disconnection, or leak in any of them. They, also at the request of appellees, looked for and found a metal suitcase near but to the west of what had been the south door of the bulding in which appellees claimed they had placed $700 or $800 in money. The officials examined the contents which were badly burned but they found no evidence of the money except coins in the sum of $35. The value of the coins was destroyed by the heat to which they had been subjected.

The area where the building was located was not entered except by officials and nothing therein was disturbed until Monday, August 11, 1952, except as above stated. On that day an investigation was made by two Deputy Fire Marshals of the state, the chief of the fire department of the city of North Platte, and an investigator for the National Board of Fire Underwriters.

They were checking to find evidence of the cause of the fire. They found a T securely and firmly attached to the feed pipe of the stove in the building which had been used for cooking. The stove was at the place hereinbefore described near the northwest corner of the kitchen. The feed pipe of the stove was near the top of it and the opening in which the T was fitted was at the southwest corner of the stove as it was located in the kitchen. The west end of the T or the end of it which was opposite to the one attached to the stove was fitted with a nipple. Each end of the nipple was threaded. The west end of the nipple was entirely open. Whatever fitting had been attached to the nipple at that place had been removed. The diameter of the nipple was about five-eighths of an inch. In the hexagonal fitting in the center of the T, the opening which was to the north as the T was attached to the stove, was a brass connector which attached the copper pipe to the T when and as the gas line was installed and used in the building. When the gas system was installed and while it was used it conveyed gas from the tank to the T on the stove and through the opening in the end of it attached to the stove to the feed pipe of the stove and thence to its burners. The system also conveyed gas to and through the other or west end of the T and the nipple thereon into and through a brass elbow fitted to that end of the nipple and through the copper gas line to the pilot and burner of the water heater. The fitting on the west end of the nipple attached to the T when the gas system was installed and used in the building was a brass elbow to which was attached the copper gas line to the water heater. The brass elbow had been removed from the west end of the nipple and it was entirely opened when the investigators found it on Monday after the fire on the previous Friday. The investigators found a considerable portion of a copper pipe which extended from the north wall of the building to and was attached by the brass con-

nector to the T attached to the stove. This pipe was on the floor under where the connection had been, parallel with the west end of the stove, with its ferruled or flared end to the south. The balance of the copper tube which extended from the north wall to the T on the stove was found in several small burned and disintegrated pieces. The investigators found about one-half of the copper tube which was in the building and supplied gas to the water heater. It was the part nearest the heater and its connection with the heater was undestroyed by the fire. The nipple on the T which was attached to the stove, as described above, when it was found after the fire had in about the second or third thread from its end to the west a minute piece of brass about half the size of a pinhead loosely adhering or clinging to the threads of the nipple. It was not brazed with the nipple. The fragments of burned material that had been melted and were found on the floor of the Spur Club near the west end of the range were copper and not brass. They were probably portions of the pipe from the north wall of the building to the stove that brought gas into the building and a part of the pipe that conducted gas to the water heater. A careful search was made around the west end of the stove for anything in the debris that might have been brass but there was no brass of the proportion, size, or quantity that could have been an elbow the size of the one which was fitted into the nipple when the gas system was installed and that was there while the gas system was in use in the building. There was after the fire no brass elbow found or any fragments or molten brass that accounted for the absence of the brass elbow from the nipple.

W. H. Campen was presented by appellant as an expert. He qualified as a graduate chemist from the University of Nebraska in the year 1919 and as a testing engineer. He established the Omaha Testing Laboratories, has operated that business for 35 years, and is

a part owner of it. The activities of the organization include the testing of nearly all kinds of materials. The witness has specialized in the chemistry and physics of fires since 1933. He is the author of a treatise on physics and chemistry of fires resulting from a course he conducted during the 3 years of 1930 to 1933 for the firemen of the city of Omaha. The publication is now used by many fire departments of Nebraska. He has been consulted by many officers and others in regard to the origin of fires. Immediately before he appeared in this case he was engaged by the Great Western Railroad in reference to the cause of a large fire in an Omaha alfalfa storage building. He is a member of the American Chemical Society; the Society for Testing Materials; the American Society of Civil Engineers; and a member of the National Academy of Science, a national organization before a meeting of which he was to deliver a paper in Washington on Monday following his appearance in this case.

The T which was found after the fire attached to the stove was submitted to the witness and while it was in his possession he examined it and made laboratory tests to assist him in arriving at an opinion with reference to it and the cause of the fire. He had thereby found and expressed the opinion that the T and the threaded end of the nipple had been exposed to a fire and that there was no yellow brass elbow or anything of that nature attached to it at that time. He said he established by laboratory tests conducted, which he described in detail, that if a yellow brass elbow attached to a galvanized nipple is subjected to a temperature of 1,700 degrees Fahrenheit, the brass elbow will melt and most of it will run off the nipple but some of the brass will be brazed to the iron of which the nipple is made. Brazing is a process of attaching brass to iron. It is often used to repair small breaks in iron pipes. There was no brass brazed to the threaded exposed end of the nipple fitted to the T found attached to the stove

after the fire. He said if brass is brazed to iron the brass becomes a part of the total of the iron. They are fused together, they become one, and it would be as difficult to remove the brass as it would be to remove any other part of the iron to which the brass was fused. He then expressed the conclusion that during the fire important to this case the nipple fitted to the T had no yellow brass elbow attached to it.

The witness was present in court and heard the evidence produced until the time he was examined and this included substantially the case-in-chief of appellant. He had seen the exhibits and had examined the stove. He was asked if he had an opinion based thereon as to how the fire in the Spur Club on August 8, 1952, originated. He said he had and stated in his opinion the fire started by gas burning at the outlet of the nipple attached to the T which was fitted to the stove when the investigation was made after the fire. The conclusion was based principally on these considerations: The construction of the building, the rapidity of the fire, the amount of gas delivered by the low-pressure regulator on the site, the effect of heat on brass and iron, the pertinent testimony of the witnesses, and the general knowledge of the witness of the progress of fires after they get started. The witness had made a set-up in a laboratory identical to the gas system which supplied gas to the building which was burned and he made tests which he explained in detail. The conclusion he reached and expressed was that after the gas became ignited at the outlet of the nipple it would require only about 3 minutes to produce smoke and only 10 minutes for the flame to start things burning at a good rate in the kitchen; that it would take only 20 minutes thereafter until the fire would progress through the rest of the building and finally come out through the windows on the second story or a total of about 30 minutes to accomplish this; and that he agreed with the testimony he heard in the case that it was about

30 minutes from the time the fire started until flames were seen in the upstairs windows.

The witness stated that the frost on the outside of the gas tank when the fireman examined it at 4:10 p. m. was the natural result of gas escaping from the tank at a rapid velocity. He said that when propane gas is changed from liquid to gas it produces coldness as a result of such transformation. The presence and accumulation of frost invariably appears if there is a rapid flow of liquid gas. He said it would require 20 minutes from the time the gas was ignited at the nipple until frost would appear on the tank. The presence and amount of frost depend on the amount of propane used. That is the controlling factor. He concluded that if the tank was frosted at 4:10 p. m. it was inescapable that the propane started flowing from the tank not later than 20 minutes earlier or 3:50 p. m. If the elbow was on the nipple fitted to the T on the stove when the fire in the building started by any accidental cause, it could not possibly have melted the brass elbow and let the gas start escaping from the outlet of the nipple before the firemen got there at 4:10 p. m.

The witness said all standard liquid petroleum gas is mandatorily odorized so that leaks and escaping gas can be detected by the sense of smell. A compound is used in odorizing the gas which has a very strong smell like decayed eggs or garlic so that the presence of gas is easily and quickly detectible.

The witness determined the amount of gas that was delivered into the kitchen of the club through the outlet of the nipple and he considered that in arriving at his opinion above expressed. The regulator delivered 191 cubic feet of gas per hour. Propane gas has a BTU content of 2,500 per cubic foot. The total amount of BTU's delivered was 480,000 per hour.

Appellees produced Herbert R. Pearson as an expert witness. He said he was 49 years of age and a resident of North Platte for 18 years during which time his busi-

ness had been the handling and sale of propane gas and appliances. In connection therewith he had installed propane systems for heating and cooking in houses and for heat and other purposes in commercial buildings. He had read bulletins, periodicals, and things put out relative to the use of propane gas, its propensities, and what it will do. He had attended schools conducted by producers and suppliers of propane gas relative to the handling thereof, its propensity, and safety features. He said "about two such schools per year" are conducted by his suppliers and he pretty generally attended them. He had kept in constant touch with the installation and maintenance of propane gas systems. He said propane gas was a common name for liquified petroleum sometimes identified by the letters LP.

The witness was advised and became familiar with the location, size, and arrangement of the kitchen in the building concerned in this case. This was true in general as to its first floor. He knew the appliances, equipment, and facilities as they were located in the kitchen and he knew the kind and extent of the system which served the kitchen and its facilities with gas. He had examined and was advised of the contents of the exhibits in the case that were in any manner relevant to the inquiry as to the cause of the fire which destroyed the building. He had not heard any of the testimony in the case as it was produced at the trial. The witness was asked an extensive hypothetical question purporting to state the substance of the evidence as interpreted by appellees and he was asked if he had an opinion based thereon as to how the fire in the Spur Club on the afternoon of August 8, 1952, "could have occurred." He answered he had such an opinion and he was permitted to state his reasons therefor which he did in substance in this manner: He referred to the T which was fitted to the stove and the brass connector screwed into the center of the T and then said that there had been a terrific heat at that location because the brass con-

nector had molten brass in the lower part of its opening. He referred to the part of the copper pipe that extended from the north wall of the building to and was attached to the T by the brass connector when the pipe was installed, which after the fire was found near the west end of the stove on the floor wholly detached from the connector, and he said that he understood that the fragment or piece of pipe was connected to the T with the end of the pipe being placed into a connection and that "I also have noticed and assumed" that there is a flaw in this flare. The flare or flange to which reference was made was on the end of the copper pipe last referred to and described above which during the installation of the gas line was inserted in the opening of the connector and the end of the pipe was enlarged or flared outward so that the connector where it was screwed into the opening of the T held the pipe firmly and securely against the collar of the connector. The alleged flaw in the flare, after it had been through the fire and was in some manner undisclosed detached from the connector, is almost a V shape. The outer part of it is about three-eighths of an inch across and the depth to the point of the V is about one-eighth of an inch. The witness continued that the little V which is out of the flare would permit the gas to come back through the flare nut and "we would have a slow leak." The gas water heater had a flame when the burner on it was operating and there was a flame on the pilot of the water heater at all times. Propane gas is heavier than air. It does not rise but when in the open it falls to a lower level than the point of release. He said in his opinion gas seeped from this fitting "which could have been going on for hours—it could have accumulated in the vicinity of the gas heater, which would have ignited the gas, at which point you would have a flash of fire, which would have come back to the source of supply, which was at this point" (the place of the alleged defect in the flare). He said this would have

burned a hole in the copper tubing and if it burned a hole in the tubing there was a free flow of gas which would have caused the terrific fire. The amount of the gas that would have leaked through the V would have been increased if the connector was not screwed on so that the flare was tight against the collar of the connector. The flow of gas would be increased if it was loose. He said he had no knowledge that the fitting was not firm and tight and he did not claim to have any information that it was not. He stated that it required a temperature of around 1,700 degrees Fahrenheit to melt brass and about 2,000 degrees Fahrenheit to melt copper. He thought that if the gas leaked back through the brass connector it settled to the floor, spread out in the kitchen, and when it reached a flame it ignited all the gas that had spread out; that the fire then went back to the source of escaping gas and continued to burn; that the heat was enough to melt the brass connector; and that if the fire got started at that point and if the connector melted away, the intake pipe would naturally drop and there would be a free flow of gas.

A demonstration by the witness was made in the courtroom in the presence of the jury concerning which there is discussion and emphasis in the argument. However, it concerned only the hypothesis that propane gas when released will seek a plane lower than the point of escape; and that it will spread out and travel and if it comes in contact with a flame or fire it will ignite if there is a proper mixture of oxygen and gas, burn the accumulated gas, and the fire will return to the source of supply. This is a matter concerning which there is no dispute in the record.

The witness said there were two motors in the kitchen, one on the deep freeze and one on the walk-in refrigerator. They were exposed or unsealed motors. When either of them commenced to operate there was an arc or spark which would be sufficient to ignite propane gas.

The witness estimated it would require a minute or a minute and a half with a large crescent or open-end wrench to remove the connector and the elbow fitted to the outer end of the nipple if they were tight enough to require the use of a wrench, and that to have caused a fire because of the slow leak without an explosion would have required several hours.

The witness on cross-examination said that there was an opening in the north wall into the kitchen above the stove in which an exhaust fan was to be but had not been installed, which opening was 18 x 24 or 18 x 26 inches; that the ventilators on the building would create a certain amount of air movement from the west to the east in the building; and that any slow leak of gas would have a tendency to go towards the southeast. The possible slow leak that he spoke of would require considerable time, possibly at least 3 or 4 hours, in order to accumulate sufficient gas to be ignited by the water heater. His opinion was that the V-shaped place in the flare of the pipe was there from the inception of the gas system but he could not form an opinion as to whether it resulted from defective material or faulty workmanship. The gas installation that served the building was put in by a competitor of the witness in the same city. He knew no direct evidence as to the cause of the V-shaped place on the pipe. In order for that place to develop a slow leak, which the witness assumed, it would have been required that there had been some movement of or a blow to the pipe leading to the brass connector. There was no evidence of such occurrence. He spoke only of the possibilities of such an occurrence but not of evidence that it happened. Before the gas would be ignited it would have to build up over the entire floor to the height of the flame of the burner on the heater which was at least 8 inches above the floor and the witness could not tell how many cubic feet of gas from a slow leak of the size that he had assumed would be required to escape and spread over the floor

of the kitchen before it would reach the flame of the water heater. He specifically stated that his theory was that the gas leaked back through the threads of the brass connector, burned a hole in the copper pipe some distance from the connector, and after the pipe was burned in two then the flame from that place melted the brass connector. He contradicted or abandoned that theory later when he stated the burning gas from the slow leak caused by the V-shaped place on the flare of the pipe melted the brass which is now visible in the lower part of the opening in the connector or flare nut, as the witness referred to it in his testimony. It was melted, he said, by the flame caused by the leaking gas right at the flare nut so that in effect it burned itself off. He said he did not know how long it would take the slow leak to sever a copper pipe by burning it; that he did not know how much gas was escaping but he did know it would require 2,000 degrees of temperature to melt copper; and that he did not know how long it would require to melt brass under the circumstances he had assumed. When he was asked to specify what was meant by a slow leak he said that it was very hard to tell: A slow leak in a large area would be a fast leak in a small area, depending on the size of the room. He was asked how large a flame caused by the slow leak which melted the brass was at the connector according to his estimate and he answered: "It is awful hard to tell * * *; I don't know." Likewise, when inquiry was made as to how long it would take the flame to disintegrate the copper pipe, he gave a like answer and added: "The only thing I can say is that it is burned—the evidence is there." He agreed that the portion of the copper pipe and the brass connector he was talking about went through the general fire which destroyed the building and that the fragment of copper pipe which was then being discussed was part of a longer pipe which was severed by the fire and much of it was wholly disintegrated. The witness said that the

V-shaped place on the flare showed evidence of fusion or melting and that other parts of the same copper pipe which went through the fire and were badly burned showed a similar result and condition. He also said he knew of no evidence that the V-shaped place on the flare was there before the building was burned except his personal explanation of it, that all the information he had on that subject was his opinion, and that that was all he wanted to be understood as expressing.

W. H. Campen testified on rebuttal that the V-shaped piece of copper intake pipe referred to by the witness who appeared for appellees as an expert was not removed during its preparation and installation as a part of the gas system of the building because it showed definite evidence that it was burned off in the fire precisely the same as other holes and melted parts of the pipe of which the exhibit was a part before the fire. There is a hole burned in the pipe that was being discussed, close to the flare. The flame described by the expert for appellees at the connector caused by a slow leak of gas starting at the flared end of the pipe and going back toward the pipe through the threads of the nut would not melt the copper pipe or the brass connector because the flame assumed was small and the hot part of whatever flame the leak of gas created would have been above the copper pipe as that is the way a flame works, whether the escaping gas is around, on top of, or below the pipe. The molten copper pipe found in the Spur Club fire ruins in about the same location as the fragment of the copper pipe concerned in the above discussion shows similar V-shaped places resulting from fusion or melting caused by the burning building. The damage done to the pipe which was attached to the T on the stove resulted from the general fire which destroyed the Spur Club. The flared part of the pipe fits snugly against the collar of the brass connector. They are brought firmly together and they make a tight connection. With the end of the copper

pipe firmly against the collar of the connector there could have been only a very minute opening even though the V-shaped piece was missing before the fire. The opening in any event would not have been the size of the V-shape as it appears in the flare detached from the connector because the flange or flare on the pipe lays flat on the beveled edge of the brass fitting. Any opening which existed was the zero portion of the V. Any gas escaping in that situation would not create a flame more than 2 inches long above the copper pipe and would not have melted it. Likewise, a leak of that kind would never cause an explosion in the kitchen no matter how long it was there because the amount of gas would be so small compared with the size of the room and the amount of available air that there could not have been a condition that would have resulted in either a flame or an explosion. There could not have been escaping gas as has been assumed or it would have been detected by any person in the building and especially anyone near the place of escape.

A statement made by Pueppka exhibited by the record represents that he invested in the Spur Club property $32,000 in cash and he incurred indebtedness in acquiring the property of an additional $30,000 to $35,000 which has not been paid, or a total investment in the property of $62,000 to $67,000. Another statement placed in evidence by appellees sets forth that they had invested in the property $45,775.61 and that they had incurred in addition thereto unpaid indebtedness of $26,-464.82, or a total investment of $72,240.43. It should be mentioned that the last total stated includes an item of "Household goods & Mdse. 7,495.00" and an item "Estimated labor—Mr. & Mrs. Pueppka $10,000.00." The last item was the value of labor appellees say that they performed in the preparation of the site for and in the construction of the building.

Appellees had procured four policies of fire insurance on the Spur Club property. Two of them were dated

July 19, 1952, one is dated July 27, 1952, and the remaining one is dated July 28, 1952. The amount of the insurance represented by these policies is $65,000, consisting of $40,000 on the building and $25,000 on its contents.

The ledger statements of the bank exhibiting the deposit account of appellees show that the balance on deposit to their credit August 8, 1952, was nominal. There is no claim in the record that appellees owned any property except the Spur Club. They admittedly owed in excess of $25,000 of past due indebtedness which they could not satisfy. The success of the venture in which they were engaged before the fire was, to say the least, very doubtful.

It was testified by Pueppka that he did not at any time disconnect the brass elbow attached to the west end of the nipple which was fitted to the T attached to the stove or the copper pipe connected to the elbow on the north part of it; that he did not disconnect, sever, interfere with, or injure any part of the gas system which supplied gas to the building August 8, 1952, or at any time; that he had no knowledge or information of anyone who caused an incendiary fire in the building in which the Spur Club was operated August 8, 1952; that he did not ignite or cause a fire in the building or any part of the Spur Club which destroyed the property on that date; and that he had no knowledge or information of anyone else who tampered with, injured, disconnected, or interfered in any manner with any part of the gas system which supplied gas to the building.

A person passing the building at 3:35 the afternoon of the fire saw three men on the concrete approach to the south door of it, one of whom was Pueppka. The traveler on the highway near the building who saw a steam-like substance being emitted from the soil pipe and a ventilator which quickly changed to a dark smoke, traveled 4.2 miles by automobile at considerable speed from the Spur Club to the fire station and gave infor-

mation of a fire there at 3:57 p. m. It may be concluded that he passed the building about 3:45 p. m. because the firemen left a minute after they got the alarm and traveled the same distance to the building in 12 minutes, arriving there at 4:10 p. m. Pueppka and Branting left the apartment on the second floor of the building and the former went by way of the large east room to and through the kitchen where he passed the stove. He closed and locked the west door, returned to the south door, and there joined Branting. They met the collector of a freight bill at the south door and the three of them were together just outside the south door a short time. Pueppka and the collector entered the building, the bill was paid, and the collector took a view of the inside of the club. The evidence is that 3 or 4 minutes after Pueppka and Branting were informed by a radio announcement that it was 3:30 p. m., Branting drove away from the building in his automobile and he last saw Pueppka in his pick-up truck which was parked near to and south of the building. This was right at 3:35 p. m.

Mr. Richman saw dark gray smoke coming out of the west windows of the club some minutes before the firemen arrived at 4:10 p. m. He ran to the building. There was no one there. He saw flames from the kitchen through the opening in the north wall above the stove. The smoke became black. He then observed flames come out of the upper windows on the north. The heat was intense and the fire was so hot that the firemen when they arrived could do nothing to extinguish it. It spread through the entire building. The roof fell in 50 minutes after the firemen got there and the conflagration was complete by 5:30 or 6 p. m. A building in normal condition without incident at 3:35 p. m. was the victim of an internal fire by 3:45 p. m. and was condemned to complete destruction by a raging, terrific fire some few minutes before 4 p. m.

It was an incendiary fire. The last person in or near

the building, so far as the record shows, was Pueppka. He was there when Branting drove away in his automobile. The doors in the building were locked. Pueppka had just locked them. He had the keys and he had tools and the knowledge to accomplish the quick disconnection of the brass elbow from the nipple at the stove. The evidence of the time required to do this was a minute to a minute and a half. It was only about 10 minutes after Branting left the building that it was discovered on fire and it was only a short time after that Pueppka was at the sales barn when he heard the announcement of a fire which was in his building. If Pueppka had nothing to hide, it is difficult to understand why he admittedly and untruthfully denied the evening of that day that he was one of the three men near the south door of the building at 3:35 p. m. and why he said to the person who saw him there that he, Pueppka, wished that this person had stopped and secured the identity of the three persons who were standing near the south door of the building. The conceded misrepresentation to the chief of the fire department by Pueppka while the fire was in progress that he left the Spur Club at 3 p. m. that day must have been prompted by an attempt at concealment of the facts. These were not minor, remote, or incidental things. Only a brief time elapsed since their occurrence. A large loss had resulted and Pueppka had a large stake in the true facts. He must have known that a relentless and critical investigation and analysis of the facts would be made in an attempt to ascertain the cause of the fire because of the unusual attendant facts and circumstances and that carefulness and veracity of statement and true representation of the facts were the best probability of his recoupment.

The investigation made after the site of the fire could be entered disclosed the absence of a brass elbow from the outer end of the nipple fitted to the west end of the T attached to the stove. The outlet end of the nipple

was open and permitted an unobstructed flow of propane gas under pressure into the kitchen where there was a flame not more than 10 feet from the point of escape. Careful examination and search disclosed no fusion of the brass attached to the nipple. There was no brazing of brass with the iron of the nipple and no molten brass was found in the ruins to account for the disconnection of the gas system and the absence of the brass elbow. It was established by a competent, experienced engineer, chemist, and specialist in the chemistry and physics of fires that the elbow was not on the nipple during the fire and that the outlet of the nipple during that time was open. He deduced from his knowledge of science and by tests that if the elbow was on the nipple at the inception of the fire caused by any accidental means it could not possibly have melted the brass elbow and permitted the gas to escape from the outlet of the nipple before the firemen arrived at 4:10 p. m. The gas tank was at that time frosted. This could only have been accomplished by gas flowing from it at a rapid rate and it would have required 20 minutes under the conditions existing to have caused the frost on the tank. With the elbow off the nipple there were BTU's delivered into the kitchen at the rate of 480,000 per hour or 8,000 per minute. This explains the rapidity, the intensity, and the immensity of the fire. The conclusion of the expert was that the sole cause of the fire was the fact that the outlet of the nipple was open. The reasons he gave for his opinion have been stated before and will not be repeated.

The witness called by appellees as an expert, Herbert R. Pearson, did not attack or contradict the validity or soundness of the reasons given for the conclusions of W. H. Campen, the expert produced by appellant. The expert for appellees, hereafter referred to as Pearson, followed the expediency of disregarding them. Pearson did not say that in his opinion the brass elbow was attached to the nipple at the time of the fire. He was

simply and totally silent on that subject. It was assumed in the hypothetical question propounded to him that the elbow was in place as it was installed at the commencement of and during the fire notwithstanding the positive, scientific evidence that it was not there during that time. Pearson did not, however, even hint that the elbow was in place during the fire. He or any other witness made no attempt to disprove or discredit the testimony of the expert produced by appellant in reference to fusion. Neither was there any effort made by appellees to establish that fusion of the elbow had actually taken place.

Pearson did not express an opinion as to what actually caused the fire but he did have and expressed a speculative opinion as to what could have caused it. The foundation for this was a hypothesis submitted which required him to assume that Pueppka left the Spur Club in his pick-up truck and proceeded to North Platte when Branting left the building in his automobile and that the brass elbow was at that time and during the fire attached to the nipple and performing its function. He was not asked to assume at any time that the evidence did not show that Pueppka left when Branting did or that the nipple showed no evidence of fusion or brazing of brass with it. Pearson thought that there might have been a slow leak of some gas back through the threads of the connector and into the kitchen because of a small V-shaped place on the edge of the flare of the copper pipe which had been attached to the center of the T by a brass connector and that the escaped gas might have become ignited, burned the connector or the pipe, and caused the pipe to become detached. He did not say that he found a defect in the flare. Specifically he said: "I also have noticed and assumed, that is, that there is a definite flaw in this flare." He did not disclose any factual evidence to that effect nor did he give his reasons for the assumption stated. He saw the exhibit which was the fragment of

the pipe on which there was a flare only after it had been in and had gone through the fire which destroyed the building, a fire which created a temperature of as much as 2,000 degrees Fahrenheit. There were other burned parts of copper pipe that were in the fire which have places on them similar to the V-shaped place on the flare referred to by the witness Pearson. W. H. Campen examined this place and found positive evidence of fusion. It was his conclusion that the small V-shaped place on the flare was caused by the fire which destroyed the building. The evidence supported his judgment and conclusion. The gas system was tested when it was put in and thereby it was demonstrated that it had no leak. It was completed July 13, 1952, and was used thereafter until the fire without indication or demonstration in any way or to anyone that there was a defect in or that there was escaping gas therefrom. The gas was odorized. There were many people in the building during that period, as many as 300 persons on a single night. Appellees testified that they knew of no defect in the building, its equipment, facilities, or gas system. No complaint had been made to the person who installed the gas system of any failure therein. Pearson assumed that there was a defect in the flare of the copper feed pipe of the gas system and on that basis he evolved and stated an opinion as to how the fire could have been caused in the building. His opinion was a speculation not supported but contradicted by substantially all of the facts and circumstances shown by the evidence in this case.

The essence of the challenge by appellees of the facts and circumstances of the fire as shown by the evidence is the specific and unqualified denial of Pueppka that he had any knowledge of the cause of the fire or that he in any manner contributed thereto and the opinion of Pearson as to how the fire could have originated. A statement from Davis v. Security Ins. Co., 139 Neb. 730, 298 N. W. 687, may appropriately be adopted in refer-

ence to his denial: "The circumstances are strong and convincing, when weighed against the mere denial of the plaintiff that he did not set the fire." The testimony of Pearson is not sufficient to create an issue of fact. The doctrine is that the value of the opinion of an expert witness is dependent on and is no stronger than the facts on which it is predicated. The opinion has no probative force unless the assumptions upon which it is based are shown to be true. Williams v. Watson Bros. Transp. Co., 145 Neb. 466, 16 N. W. 2d 199; Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728; Anderson v Cowger, 158 Neb. 772, 65 N. W. 2d 51.

The record is convincing that the insured violated the specification of the policy of insurance that the company shall not be liable for loss accruing while the hazard is increased by or with the knowledge of the insured; that the defense of appellant in this respect is established as a matter of law; and that the verdict in this case is clearly wrong. A verdict so clearly wrong as to induce a belief by the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, must be vacated. Trute v. Holden, 118 Neb. 449, 225 N. W. 238; Ellis v. Omaha Cold Storage Co., 122 Neb. 567, 240 N. W. 760; Cuva v. Glens Falls Ins. Co., 136 Neb. 359, 285 N. W. 917; Davis v. Security Ins. Co., *supra.*

If material evidence has been disregarded by the jury which if considered in a proper manner requires a different conclusion than the one made in the cause by the jury, its verdict and the judgment of the court thereon will be vacated in an appeal to this court. Cuva v. Glens Falls Ins. Co., *supra;* Davis v. Security Ins. Co., *supra;* Ward v. Aetna Life Ins. Co., 91 Neb. 52, 135 N. W. 220; Heink v. Lewis, 89 Neb. 705, 131 N. W. 1051. The trial court should direct and this court should set aside a verdict if the evidence is undisputed or if the evidence, though conflicting, is so conclusive that it is insufficient to justify a verdict or sustain a judgment.

Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551.

The record shows that there have been three trials in the district court for Lincoln County, each of which involved the problem of the origin of the fire which destroyed the building concerned in this case. It may be assumed that no different or additional evidence can be produced now or in the future bearing on that issue.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Lincoln County to sustain the motion of appellant for judgment notwithstanding the verdict and to render a judgment of dismissal in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE BACKER ET AL., APPELLANTS, V. CITY OF SIDNEY, NEBRASKA, APPELLEE.
87 N. W. 2d 610

Filed January 17, 1958. No. 34268.

1. **Appeal and Error.** The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.
2. ———. In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.
3. **Eminent Domain.** In cases where the law of eminent domain is applicable, benefits are generally divided into two classes, general and special benefits. General benefits are benefits shared equally by those in the neighborhood whose land is neither injured nor taken. Special benefits are a kind of benefit that has been brought to and affect a particular piece of land that is not shared in by all other land within the range of the public improvement.
4. **Eminent Domain: Appeal and Error.** Where a landowner's property is injured by virtue of the construction of a public

improvement and the evidence fails to show any special benefits accruing to the landowner's property, the submission of the issue of special benefits to the jury constitutes prejudicial error.

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

Holtorf & Hansen and *Thorpe & Babcock,* for appellants.

Clinton & McNish, for appellee.

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

MESSMORE, J.

This is an action at law brought by George Backer and Mollie Backer, as plaintiffs, in the district court for Cheyenne County, against the City of Sidney, defendant, to recover consequential damages to real estate owned by the plaintiffs abutting on an underpass constructed by the defendant. Trial was had to a jury resulting in a verdict for the defendant. The plaintiffs filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the plaintiffs appeal.

The plaintiffs' petition, insofar as it need be considered here, alleged that the City of Sidney is a city of the first class located in Cheyenne County; that the city constructed an underpass under the Union Pacific railroad tracks on Thirteenth Avenue where the same intersects the Union Pacific railroad tracks, which construction was commenced on March 26, 1956; that the plaintiffs own real estate, Lots 5 and 6, Block 10, original town of Sidney, which abuts on the east side of Thirteenth Avenue and the underpass; that the construction of the underpass and approach thereto will damage and destroy the value of the plaintiffs' property which, but for such construction, would be desirable for commercial and other purposes; and that the defendant city is invested with the right of eminent domain but

has neither compensated nor agreed to compensate the plaintiffs for the damages which they will suffer by virtue of the construction of the underpass. The plaintiffs prayed for damages and interest from March 26, 1956.

The defendant's answer admitted certain paragraphs of the plaintiffs' petition relating to procedure for the construction of the underpass, and denied generally all other allegations therein contained with reference to damages that might be suffered by the plaintiffs. The answer further alleged, as a defense, that the property of the plaintiffs had been specially benefited by the construction of the underpass and the value of their property enhanced, and prayed that the plaintiffs' petition be dismissed.

The plaintiffs' reply to the defendant's answer denied that the construction of the underpass benefited the plaintiffs' property, and alleged that any benefits accruing to the plaintiffs were benefits accruing to the public as a whole. They further alleged that the building of the underpass and the appurtenances thereto, including a one-way access road immediately to the west of their property, reduced the market value of the property by injuring it for public use; that because of the construction of the underpass the plaintiffs' property was damaged; and that these damages are not common to the public generally. The plaintiffs renewed the prayer of their petition.

The defendant complains that the plaintiffs' assignments of error are wholly insufficient and present no question for review by this court, except at its option. The defendant argues that the plaintiffs' assignments of error are set forth only in the language of the statute pertaining to motions for new trial. The plaintiffs' assignments of error Nos. 1, 3, 4, 5, and 6 are substantially in the language contained in section 25-1142, R. R. S. 1943, relating to motions for new trial. Assignment of error No. 2, not complained of by the defendant, falls within

the same category as assignment of error No. 3, that the evidence is not sufficient to sustain the verdict.

Section 25-1919, R. R. S. 1943, provides in part: "The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; * * *. The Supreme Court may, however, at its option, consider a plain error not specified in appellant's brief." See, also, Rule 8a2 (4), Revised Rules of the Supreme Court, 1957.

As stated in Smallcomb v. Smallcomb, *ante* p. 191, 84 N. W. 2d 217: "The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision."

In Wieck v. Blessin, *ante* p. 282, 85 N. W. 2d 628, quoting from Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, it is said: " 'In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.' See, also, Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100; Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913."

In the instant case the plaintiffs predicated error on certain instructions wherein the issue of special benefits was submitted to the jury. The above authorities do not preclude this court from examining the evidence to determine whether or not the trial court committed prejudicial error in submitting the issue of special benefits to the jury.

It is apparent from the verdict of the jury that the jury must have considered that there were special benefits due to the construction of the public improvement which enhanced the value of the plaintiffs' property and

as a consequence the plaintiffs suffered no injury or damage to their property.

"In cases arising under the exercise of the right of eminent domain, benefits are usually divided into but two classes, general and special, the general benefits as a rule being those derived by the community from the use of the improvement, and special benefits being those derived by particular pieces of property because of their advantageous relation to the improvement, and differing in kind rather than merely in degree from the general benefits." 18 Am. Jur., Eminent Domain, § 298, p. 943.

In Prudential Ins. Co. v. Central Nebraska Public Power & Irr. Dist., 139 Neb. 114, 296 N. W. 752, 145 A. L. R. 1, we said: "The difficulty in applying many of the rules comes from the use of the words 'general public,' 'community at large,' and other similar expressions in the texts and cases defining general benefits. * * * 'Few general rules can be laid down for ascertaining whether or not a given benefit is general or special; the question must be determined largely by the circumstances of the particular case.' " The court further said: "In discussing why general benefits are not deducted from consequential damages (3 Sedgwick, Damages (9th ed.) 2299) the author points out that the landowner is given damages for the taking or injury of his property. 'But the taking or injury does not of itself produce these advantages, because they are in general *shared equally by those in the neighborhood whose land is neither injured nor taken.*' * * * Why are special benefits deducted? The authorities clearly establish that one of the reasons is that those benefits are a *kind* of benefit that has been brought to and affect the particular piece of land that is not shared in by all other land within the range of the public improvement and that the landowner should pay, by a reduction in his damages, for that special benefit. 18 Am. Jur. 942, sec. 298; 2 Nichols, Eminent Domain (2d ed.) 767; * * *. 'In order that

benefits may be set off against the * * * damage to that injured in making an improvement * * * they must be special or local or such as result directly and peculiarly to the particular tract of which a part is taken.' 20 C. J. 822."

We summarize only the evidence deemed necessary to determine whether or not any special benefits accrued to the plaintiffs' property by virtue of the construction of the public improvement.

The record discloses that the plaintiff, George Backer, purchased Lots 5 and 6, Block 10, original town of Sidney, on November 4, 1950, for $2,000, taking title in his name and in his wife's name as joint tenants. These lots are 48 feet wide facing south on Grant Street, with the west side of 132 feet abutting on Thirteenth Avenue. The city of Sidney commenced construction of an underpass under the Union Pacific railroad tracks on Thirteenth Avenue on March 26, 1956, which was completed at the time of trial. The north end of the approach to the underpass ends at an alley which is along the north side of the plaintiffs' lots, with the entrance of an access road north of the alley. The south end of this construction terminates on the other side of the railroad tracks from the plaintiffs' lots. The paving on the one-way access road is immediately to the east of the underpass.

The plaintiff George Backer testified that at the time he purchased the lots he made observation and study to the effect that there was considerable traffic that passed this property, and he concluded that it would be a good location for a filling station. He further testified that due to the construction of the underpass this property was valueless for such purpose; that no business places were located in the immediate vicinity; that he could not rent the property and it was of no value to him; and that immediately before the construction of the underpass the market value of this property was $7,000 and

immediately after the completion of the underpass the value of this property was $100.

A real estate broker, also experienced in the oil business, testified that he was familiar with the plaintiffs' property; that just prior to the time of the commencement of the construction of the underpass plaintiffs' lots constituted a suitable location for a filling station and were of the value of between $5,500 and $6,000; that immediately after the construction of the underpass this property had no value for such purpose; that after the construction of the underpass plaintiffs' property had no value for either commercial or residential purposes; and that property values in Sidney had increased in the past few years. He further testified that an access road and 15 feet of paving on the west edge of the plaintiffs' property was a detriment to the property due to the manner of ingress and egress to it; that north of the plaintiffs' property is a sign which reads "Do Not Enter," the effect of which prohibits traffic from coming onto the plaintiffs' property; that the only way that entrance can be gained thereto would be from the east; and that the property is so situated that the construction of the underpass prohibits the flow of traffic passing the property to have adequate means to enter thereon.

A real estate dealer in Sidney testified that she had been in the business of selling real estate since 1950; that she sold both commercial and residential property; that she was familiar with the plaintiffs' property prior to the building of the underpass and with the zoning plans and ordinances of the city with reference to real estate; that the plaintiffs' property, by ordinance, is in a restricted building area and zoned so as to permit the construction and use of the property for a filling station; that prior to the construction of the underpass there was considerable traffic on the street passing the plaintiffs' property and it was ideal for any type of business such as a drive-in, flower shop, or filling station, it being convenient and not too far from the business

section of the city; and that the property could not be used for such business purposes after the construction of the underpass because it was completely shut off from traffic and the only means of access to it was to completely circle the block. She further testified that immediately before the construction of the underpass the market value of the property was $5,000, and after the construction of the underpass the property had very little value. This witness further testified that the plaintiffs' lots would be undesirable for a residence because of the inconvenience of the location.

A witness engaged in the mortgage and loan business and the construction of residences, and who was also a real estate broker, testified for the defendant that he was employed by the city to make an appraisal of the property abutting on Thirteenth Avenue in connection with the construction of the underpass under the Union Pacific railroad tracks; that he made an appraisal of Lots 5 and 6, Block 10, of the original town, for the purpose of determining the value of the property immediately prior to the construction of the underpass and immediately after the construction of the underpass; and that he inspected the plaintiffs' property before and immediately after the construction of the underpass and was familiar with the neighborhood in which the plaintiffs' property is located. He further testified that before the construction of the underpass the market value of the plaintiffs' property was $1,000 to $2,000, and immediately after the construction of the underpass it had the same value. He further testified that there were certain special benefits, such as a new sidewalk constructed along the west edge of the property, the paving immediately adjacent to the property, and the drainage which eliminated flood conditions that existed on the property prior to the construction of the underpass; and that several times during his residence in Sidney, since 1933, when they had heavy rain the floodwaters came down Thirteenth Avenue and blocked the

crossing temporarily, and Thirteenth Avenue remained in a bad condition for as much as 2 or 3 days. He estimated that the property had been specially benefited by the improvement, as distinguished from benefits to property generally, in the amount of $600 to $700. He further testified that there had been very little change in the real estate market values of property similar to the plaintiffs' property north of the Union Pacific railroad tracks in Sidney from November 1950, to the completion of the underpass.

On cross-examination this witness testified that prior to the construction of the underpass there were two north-south crossings across the Union Pacific right-of-way, one on Thirteenth Avenue and one on Tenth Avenue near the depot. Since the completion of the underpass, the access road on the west side of the plaintiffs' property had been paved. This is a one-way street and cannot be entered from the north side. Traffic would have to go around three sides of the block to get to the plaintiffs' property. If the traffic went out on the west side of the plaintiffs' property, it would be required to go north and not make a turn at the underpass, but would have to circle some other block. For commercial purposes such as a filling station, drive-in, or flower shop, traffic is of considerable value. Prior to the building of the underpass, considerable traffic passed the plaintiffs' property. By the construction of the underpass, as far as commercial enterprises that depend upon traffic are concerned, the plaintiffs' property is almost useless. With reference to special benefits to which he testified, it is true that the property owner would have to be able to use the paving and other such benefits to have them benefit the property.

The street commissioner of the city of Sidney, whose duty it is to look after the streets, alleys, and storm sewers, testified that he was familiar with the location of Thirteenth Avenue and Grant Street and the property in that vicinity; and that when there is a heavy

rain from the northwest there is a flood on Thirteenth, Twelfth, and Eleventh Avenues. The waters from the northwest come down from Nineteenth and Twentieth Streets into a pocket. Prior to the construction of the underpass, in a hard rain the water would pile up on Thirteenth Avenue and back up to the north three-fourths of a block. This would occur on an average of twice a year. Prior to the construction of the underpass, Thirteenth Avenue between Forrest and Grant Streets was unpaved and there was no paving at the intersection of Grant Street and Thirteenth Avenue until the underpass was constructed. He testified that he did not believe there had been a flood at Thirteenth Avenue and Grant Street since the construction of the underpass. In connection with the construction of the underpass, provision was made for drainage at this corner. A catch basin was installed on the east side of the street which connects to the sewer which runs north to Forrest Street and through a big sewer that goes east from Forrest Street.

On cross-examination, the effect of the testimony of this witness was that the drainage of the water in this vicinity not only affected the property of the plaintiffs, but other properties in the immediate vicinity by its natural flow from north to south. He further testified that prior to the building of the underpass Thirteenth Avenue and Tenth Avenue were open to the public from the south side of the right-of-way to the north side, were heavily traveled, and there was considerable traffic across the railroad tracks on Thirteenth Avenue.

The deposition of a civil engineer was read into evidence. He testified that he inspected the paving on Thirteenth Avenue abutting on the plaintiffs' property, Lot 5, Block 10, in connection with the construction of the underpass on Thirteenth Avenue between Illinois and Forrest Streets. The paving, as it relates to the plaintiffs' property, is along the west side of such prop-

erty with an 8-inch curb, 15 feet of paving, and a concrete sidewalk. He further testified that the plaintiffs' property is benefited in the sum of $755 due to the fact that it has been improved by the sidewalk and the paving. He also testified that he inspected the plaintiffs' property before the underpass was constructed. Prior to the paving, the road was dusty and subject to flooding at the corner upon which the plaintiffs' property was located. At the present time it is an all-weather road and plaintiffs' property derived a special benefit by the construction of the underpass.

An appraiser of real estate employed by the city of Sidney to make an appraisal of properties abutting Thirteenth Avenue in connection with the construction of the underpass under the Union Pacific railroad tracks made an appraisal of the plaintiffs' property to obtain an opinion of the fair market value of this property as it was prior to the construction of the underpass and the fair market value after the completion of the underpass. He testified that the best use of this particular property would be primarily for warehouse purposes or something of that nature, and secondarily for residential purposes. In his opinion the fair market value of the property immediately before the construction of the underpass would be $2,000, and its value immediately after the construction of the underpass was $2,000.

The evidence shows that after the construction of the underpass those desiring to obtain access to the plaintiffs' property are required to circle the block. This inconvenience and annoyance, as it relates to the use to which the plaintiffs' property may be put under the restricted zoning which affects it, constitutes a detriment to the property. The concrete sidewalk, 8-inch curb, and the 15-foot paving along the west side of the plaintiffs' property on a one-way access road are of no special benefit to the plaintiffs. It appears to be practically impossbile for the plaintiffs to have any access by vehicle to the west side of their lot.

The testimony relating to drainage discloses that prior to the construction of the underpass during a heavy rain, especially from the northwest, flood conditions did exist at Thirteenth, Eleventh, and Twelfth Avenues, and at Thirteenth Avenue and Grant Street where the plaintiffs' property is located water would accumulate and back up three-fourths of a block to the north. This water would remain at this crossing for a period of 2 or 3 hours. The construction of the underpass had the effect of eliminating this flooding condition. Provision was made for drainage of this corner on the east side of the street by building a catch basin which connects with a sewer which runs north to Forrest Street and to a large sewer which runs east from that street. This is not a special benefit to the plaintiffs' property but a general benefit shared equally by those in the neighborhood whose property is neither injured nor taken.

We conclude that the evidence fails to show any special benefits accruing to the plaintiffs' property by virtue of the construction of the underpass, and the trial court committed prejudicial error in submitting the issue of special benefits to the jury. Having arrived at this conclusion, there is no occasion to discuss the defendant's cross-appeal.

For the reasons given herein, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WALTER W. WEBER ET AL., APPELLANTS, V. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION, ET AL., APPELLEES.
87 N. W. 2d 575

Filed January 17, 1958. No. 34269.

1. **Municipal Corporations: Appeal and Error.** In review on appeal of the action of a board of adjustment granting a variation from the provisions of a zoning ordinance, the decision of the board

will not be disturbed unless it is found to be illegal, or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong.

2. **Municipal Corporations: Zoning.** The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity.
3. **Municipal Corporations.** A city is a political subdivision of the state, created as a convenient agency for the exercise of the governmental powers of the state that are entrusted to it by constitutional provision or legislative enactment.
4. **Municipal Corporations: Zoning.** A municipality has no inherent power to enact a zoning ordinance. Its authority to do so results from statutory or constitutional authorization.
5. ———: ———. Whether or not zoning action or a zoning ordinance enacted to enforce same is arbitrary and unreasonable, or illegal, must be determined by the evidence of the special surrounding conditions and circumstances.
6. ———: ———. The courts will, in an appropriate action instituted for that purpose, declare invalid such zoning action or zoning ordinance where it clearly and satisfactorily appears that the action or ordinance is arbitrary and unreasonable or illegal.
7. **Zoning.** Spot zoning has generally been defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and other owners therein.
8. ———. The validity of spot zoning depends upon more than the size of the spot, and spot zoning as such is not necessarily invalid, but its validity depends upon the facts and circumstances appearing in each particular case.
9. **Municipal Corporations: Zoning.** Generally, the test of validity of zoning action or a zoning ordinance is whether or not such action or ordinance is in accord with a comprehensive plan of zoning as required by enabling statutes, and whether or not it is lawfully designed to promote the general welfare or other objectives specified in the enabling statutes, rather than merely to benefit individual property owners or to relieve them from the harshness of the general regulation as applied to their property.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

Cunningham & Cunningham, for appellants.

Carl E. Willard, for appellees.

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

CHAPPELL, J.

Plaintiffs, who are appellants here, filed a petition in the district court for Hall County upon appeal from affirmative rezoning action taken by the Grand Island board of adjustment. Plaintiffs sought to have such action and Grand Island rezoning ordinance No. 3263, which established such rezoning, declared illegal and void for failure to give notice as required by law, and upon the ground that such rezoning action and ordinance were arbitrary, unreasonable, discriminatory, and illegal spot zoning. Defendants, who are appellees here, answered, denying generally. At conclusion of plaintiffs' evidence and again at conclusion of all the evidence, defendants' motions to dismiss were overruled. However, after submission of briefs and argument by counsel, a judgment was rendered finding and adjudging that the action of the city in rezoning the property involved was not arbitrary, unreasonable, or discriminatory, and that the ordinance establishing the rezoning was valid. It denied plaintiffs' petition and taxed costs to plaintiffs. Subsequently, plaintiffs' motion for new trial was overruled and they appealed, assigning in substance that the judgment was not supported by the evidence but was contrary thereto and contrary to law. We sustain the assignment.

As held in Frank v. Russell, 160 Neb. 354, 70 N. W. 2d 306: "In a review on appeal of the action of a board of adjustment granting a variation from the provisions of a zoning ordinance, the decision of the board will not be disturbed unless it is found to be illegal or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong."

In Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490, we held that: "The power conferred upon municipal corporations by their charters to enact ordinances

on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.

"The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity."

Also, in Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420, we held: "A city is a political subdivision of the state, created as a convenient agency for the exercise of the governmental powers of the state that are entrusted to it by constitutional provision or legislative enactment.

"A municipality has no inherent power to enact a zoning ordinance. Its authority to do so results from statutory or constitutional authorization.

"The governmental authority known as the police power is inherently an attribute of state sovereignty and belongs to subordinate governmental subdivisions when and as conferred by the state by its Constitution or legislation."

Also, in Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634, we held: "What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown it is not the province of the court to interfere.

"In determining the validity of a city ordinance, regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.

"In passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities and local courts especially familiar with local conditions.

"In appeals from the district court to the supreme court in suits in equity, on trial de novo this court will

retry the issue or issues of fact involved and reach an independent conclusion as to what findings are required under the pleadings and the evidence, without reference to the conclusion reached in the district court." Also, as said in that opinion: "The question of the validity or invalidity of a zoning ordinance presents a question to be determined on examination of the facts in each particular case presented. On this proposition the law is well settled."

See, also, Cassel Realty Co. v. City of Omaha, 144 Neb. 753, 14 N. W. 2d 600, wherein we said: "We come to a determination of the question of whether or not the zoning ordinance in question is unreasonable, arbitrary and confiscatory in its application to the plaintiff and its property hereinbefore described. Whether or not it is unreasonable, arbitrary and confiscatory must be determined by the evidence of the special surrounding conditions and circumstances. In City of Lincoln v. Foss, supra, a case dealing with a zoning ordinance, it was said: 'It is difficult, if not impossible, to lay down any general rules describing the exact field of operation of such power that will fit cases arising in the future. Each must be controlled by the special conditions and circumstances surrounding it.' "

As held in Davis v. City of Omaha, 153 Neb. 460, 45 N. W. 2d 172: "The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.

"In zoning what relates to the public good is a question primarily for determination by the zoning authority and in the absence of violation of law or unreasonable or arbitrary action its determination will be allowed to control.

"The courts will in an appropriate action instituted for that purpose declare invalid a zoning ordinance where it is made to appear that such ordinance is unreasonable and arbitrary."

Also, as held in Graham v. Graybar Electric Co., 158

Neb. 527, 63 N. W. 2d 774: "The validity or invalidity of spot zoning depends upon more than the size of the spot."

It is generally agreed that spot zoning as such is not necessarily invalid, but its validity depends upon the facts and circumstances appearing in each particular case. Spot zoning has generally been defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and other owners therein.

As stated in Annotation, 51 A. L. R. 2d § 2, p. 266, citing and discussing many authorities: "The most widely accepted tests of validity, sometimes stated or applied in combination, sometimes separately, are whether or not the ordinance is in accordance with a comprehensive plan of zoning, a requirement generally imposed by the enabling statutes, and whether or not it is reasonably designed to promote the general welfare, or other objectives specified in the enabling statutes, rather than merely to benefit individual property owners, or to relieve them from the harshness of the general regulation as applied to their property." As stated in § 4 (b), p. 274: "It has been frequently stated, and is generally recognized, that a 'spot zoning' ordinance (using the term in its descriptive sense) can be justified only when it is in accordance with a comprehensive plan of zoning which is designed to promote the general welfare, or other statutory objectives." And as stated in § 11 (a), p. 289: "Largely on the ground that they were not enacted in pursuance of any general or comprehensive zoning plan, zoning enactments giving a less restricted classification to small areas located within more restricted districts have been held illegal and void in a number of cases."

As stated in 62 C. J. S., Municipal Corporations, § 226 (12), p. 467, citing many authorities: "A change or amendment of regulations involving only a single or

very few properties, and removing therefrom restrictions imposed on surrounding property, may be invalid as improper spot zoning except where the change is reasonably related to the public welfare."

In the light of such rules we have examined the record. The facts were established in large part by records of the city, about which there is no dispute, and other evidence offered by plaintiffs, including numerous photographs of the surrounding area.

The city of Grand Island is a city of the first class. With regard to rezoning, it is governed by sections 19-901 to 19-914, R. R. S. 1943. In that respect, section 19-904, R. R. S. 1943, as applicable here, was amended by Laws 1955, chapter 57, section 1, page 185, and now appears as section 19-904, R. S. Supp., 1955. On December 17, 1947, general zoning ordinance No. 2162 was passed by the city. Section II thereof provided regulations and restrictions as authorized by the foregoing statutes for the location of trades and industries; regulated and limited the height and bulk of buildings; regulated and determined the area of yards, courts, parking areas, and other open spaces about buildings, and the density of population; and divided the city into " 'Use and Height Districts' " of which there were five, to wit: "A - Residence District, B - Residence District, A - Business District, B - Business District, Industrial District." An official map or plat attached to and made a part of the ordinance shows the particular classifications of all areas in the city, including the "B - Residence District" area here involved.

On November 20, 1956, Herbert V. Roeser filed an application with the city, requesting it to rezone the north half of Block 16 of Kernohan and Decker's Addition, consisting of Lots 1, 2, 3, and 4 therein, from "Residence B" to "Business B." He requested such rezoning so that he could construct a building thereon and operate a Nash-Finch Company chain store. In that connection, Nash-Finch Company had closed its branch

offices at Hastings and Columbus and moved to Grand Island, where, on the half block involved, known as the 1700 block in Grand Island, Roeser, as shown by his proposed plat and other evidence adduced by plaintiffs, planned to construct a store building about 80 by 120 feet, with adjoining cement parking space on the east and west thereof, large enough to accommodate about 100 cars. His total investment would be about $250,000, and he would employ some 20 to 40 persons.

The building would be located in about the center of the half block facing north on West Second Street, which was a busy, no-parking, arterial street about 48 feet wide, over which passed U. S. Highway No. 30. There would be no driveway into the building or lots on West Second Street, but there would be such a driveway on both Harrison Street from the west and Jackson Street from the east. Those streets are about 36 or 37 feet wide. The rear of the building would abut within about 2 feet of a 16-foot alley on the south, which adjoined "A Residence District" properties. There is a traffic light on the corner of Jackson and West Second streets, a very busy and congested point.

A plat of the area involved, prepared by the city engineer, and one of the entire city as zoned, which was attached to and made a part of ordinance No. 2162, disclosed the following: The south half of Block 16 abutting on West First Street, and the south half of all blocks abutting on West First Street from Clark Street, a block west of Eddy Street on the east, thence west to Clay Street, some 12 blocks, were zoned "Residence A" or "A Residence," as are all other blocks south of West First Street except the east half of a block adjoining Greenwich Avenue on the west. The adjoining north half of the same blocks abutting on West Second Street are zoned "Residence B" or "B Residence." The residence properties owned by plaintiffs are surrounded by residential properties.

Plaintiffs Weber lived at 1710 West First Street, on

Lot 7, Block 16, in "A Residence District," immediately south, across the alley from the half block proposed to be rezoned. In August 1955, they paid $12,500 for their property and have since improved it at an expense of about $2,000.

Plaintiffs Jelinek lived at 1609 West Second Street, across the street from Jackson Street, in the next block east, which is "B Residence District." Their home is an 8-room, tiled-roofed, brick-veneered house, located on an extra-10-foot-wide lot, with a brick wall around the entire lot.

Plaintiffs Meyer lived at 1704 West First Street, on Lot 8, Block 16, in a 9-room house located in "A Residence District" immediately south across the alley from the half block proposed to be rezoned. They paid $18,000 for their home in 1954.

Numerous photographs in the record portray the many residences near and surrounding the half block involved. Some of them are ordinary bungalows or residences, some are more substantial, and many are beautiful and more valuable homes. They illustrate the residential character of the entire neighborhood, as does the fact that there were 23 small children in the one and one-half block adjoining area who generally crossed Jackson Street on their way to and from schools in the neighborhood.

There is a doctor's office located across the street in the 1700 block on West Second Street. It was constructed under ordinance No. 2162 in "B Residence District," which permitted such building. In the 1600 block on West Second Street there is a residence where people live, which is being used by them as an office for a furnace supply company. It was there when the original zoning ordinance No. 2162 was passed in 1947. Two blocks west there is a small motel, rented during the winter months as apartments. Beginning four blocks further west on West Second Street there are several large motels. West from Clay Street in the 2100 block

of West Second Street there are other motels, filling stations, restaurants, and garages. However, there are 26 residential properties on West Second Street in the three blocks immediately west of the property involved. The evidence shows without dispute that there is no parking on West Second Street. The traffic on West Second Street, and congestion thereof on Jackson Street and Harrison Street where parking is permitted, is tremendous and increasing. On West Second Street traffic has increased from 9,000 to 14,000 vehicles daily at the intersection of Jackson and West Second Streets, where it is almost impossible to turn left into Jackson or Harrison Streets.

There is no competent evidence whatever of necessity for the location of such a chain store as planned. The fact is that the neighborhood is well supplied with stores within a reasonable distance from the area involved. Further, its location at the place involved would without dispute greatly increase traffic congestion and reduce the value of plaintiffs' properties and other residential properties located in the area for some distance each way therefrom by from 20 to 30 percent.

In that connection, on November 21, 1956, at a regular meeting of the city council, the request to rezone was presented and referred to the planning commission, as required by section 3 of ordinance No. 3139, and the council agreed to sit as a board of adjustment for hearing the application on December 19, 1956, as it had a right to do. § 19-911, R. R. S. 1943. Notice of the filing of the application and the time and place of hearing thereon was published as shown by the printer's affidavit, but whether or not section 1 of ordinance No. 3139 and section 19-904, R. S. Supp., 1955, were fully complied with by personally serving a written notice upon all owners of real estate located within 300 feet of the property to be rezoned is in dispute. However, in view of our decision, that issue requires no discussion or determination.

Prior to the meeting on December 19, 1956, a large number of interested parties filed five written, signed protests or objections to the proposed rezoning with the city clerk. The exact number of objectors who had a right to do so is not clear, but plaintiffs claim there were as many as 54, as shown by the written protests so filed and received in evidence. Such protests were substantially upon the grounds that: The granting of such application would constitute illegal spot zoning; cause irreparable damage to and depreciate the value of residential properties in that locality; create an extra hazard for pedestrian and automobile traffic at West Second and Jackson Streets; that a chain store was not necessary in that locality; that it would destroy the peace and tranquility of its residents; and that no proper notice was given of the application and hearing thereon.

In that connection, as disclosed by section VI of ordinance No. 2162, "'B' Business District Regulations" would permit the location and use on the property involved of every type of business and industry except those offensive types specifically excluded. The allowance of the rezoning request and ordinance establishing such action would have valuable "A Residence District" properties joining "B Business District" properties, separated only by an alley to be used for business purposes.

Eight members of the city planning commission, to whom the request for rezoning had been referred, met December 4, 1956, and unanimously voted to disapprove Roeser's request to rezone. On December 10, 1956, a written report of such commission, signed by its chairman, was delivered to the mayor, setting forth the reasons why it had so voted to deny such request. That report said in part: "The City Planning Commission, since its inception five years ago, has consistently and without exception opposed what it terms spot re-zoning. We do not feel that the City Administration ever has the moral right to consider a fundamental change in zoning in an isolated lot or block that would result in that area

being zoned out of harmony with the surrounding area. This does not mean that we oppose the expansion of Business 'B' areas in general. Quite the contrary, we feel that such an expansion is due and called for. However, we feel that good city planning in the realm of zoning restrictions should move from existing Business 'B' areas in an outward manner along commercial type streets. We are unalterably opposed to a hop, skip and jump method of zoning.

"To apply our basic thoughts on re-zoning in general to the West Second Street situation, we feel that the City Administration would be justified in moving eastward from the existing Business 'B' classifications, a reasonable distance so as to permit some expansion of business activity in this area.

"In conclusion, the City Planning Commission feels that the Business 'B' areas of the city should be expanded. The Commission feels that this particular re-zoning request must be considered along with the other blocks on West Second Street immediately to the west of the block in question. After such unit consideration there might be some logic in re-zoning this particular block; however, the Commission feels that there are several blocks to the west of this property that should be re-zoned Business 'B' and actually utilized before the re-zoning of this property should be considered."

In that connection, it is interesting to note that the chairman then serving was not reappointed to the planning commission when his term expired in January 1957, and that a previous request to so rezone a lot lying east across Jackson Street from the property involved had been denied by the preceding city administration as spot rezoning, in conformity with the consistent and agreed policy of the planning commission and that administration for the previous 5 years.

This new city administration had appointed a seven-member "Zoning Commission" on August 15, 1956, as authorized by section 19-906, R. R. S. 1943. Evidently

after hearing of the unfavorable action of the planning commission, the city council referred the request of Roeser for rezoning to its zoning commission. That commission thereupon called a special meeting on December 10, 1956, and without any public hearing or notice, considered Roeser's request for rezoning, and on December 13, 1956, reported in writing to the mayor and city council. Insofar as important here, that report said: "Re: Rezoning of 1700 block West Second Street * * * 1. The zoning commission is basically opposed to any form of spot zoning made without regard to city-wide or future zoning plans for the city.

"2. The zoning commission has now been at work for over three months and has devoted considerable time and made an extensive study of the present zoning classifications existing on Second Street and has reached the conclusion that the area west of Jackson Street on Second Street should be re-classified from 'Residence A' to 'Business B.' In view of that conclusion, the requested change in classification of the 1700 block on West Second Street to 'Business B' appears to be within the scope of the over-all plan of the zoning commission for rezoning in the City of Grand Island, * * *." In that connection, it will be noted that the zoning commission did not know, or overlooked, the undisputed fact that the half block areas for several blocks west of Jackson Street abutting on both the north and south sides of West Second Street were classified by ordinance No. 2162 as "B Residence District" and not "A Residence District."

Thereafter, the city council met again on December 19, 1956, as a board of adjustment and, as authorized in section 19-910, R. R. S. 1943, Roeser's request for rezoning was presented, whereat the hearing thereon was continued until January 9, 1957. At that time, a report, dated January 7, 1957, and signed by four members of the city council serving as a "Zoning Committee," appointed by the mayor, was read to and considered by the

city council as a board of adjustment. Such report was also made without any public hearing or notice thereof. It recited that such committee had "deliberated and considered the request" for rezoning. It found "that the Zoning Commission has under consideration the entire area along West Second Street for rezoning and that there will be public hearings by the Zoning Commission on this area and other areas in the City," and "that the North Half of Block 16 should be rezoned to Business B in as much as it is in the contemplation of an overall area now being considered for rezoning to Business B on Second Street as the area is no longer suitable for residences, and in fact, a number of businesses are being operated in the area." The report should also have added that such businesses were either operated in conformity with "B Residence District" classification under ordinance No. 2162, or had been located there with vested rights before that ordinance was passed in 1947. Be that as it may, the report was unanimously approved by all eight members of the board of adjustment, including the four members of the city council who made the report, and they then unanimously granted Roeser's request for rezoning and ordered an ordinance drawn to make it effective.

Thereafter, on January 16, 1957, the city council passed ordinance No. 3263, which provided that the "north one-half (N½) of Block Sixteen (16) Kernohan and Decker's Addition to said City now zoned and classified as a Residence 'B' District be and the same is hereby rezoned and reclassified and changed to Business 'B' district." Such ordinance was published on January 22, 1957, and on January 23, 1957, plaintiffs filed their petition in the district court for Hall County in conformity with the provisions of section 19-912, R. R. S. 1943.

It should be noted that there is no competent evidence from which it could be concluded that the action of the board of adjustment permitted the rezoning, or

that ordinance No. 3263 was passed for the purpose of promoting the health, safety, morals, or general welfare of the community, in compliance with section 19-901, R. R. S. 1943. The evidence is conclusive that such action and ordinance did not do so.

Section 19-905, R. R. S. 1943, provides in part: "Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified or repealed."

Also, section 19-904, R. S. Supp., 1955, provides in part: "The legislative body of such municipality shall provide for the manner in which such regulations and restrictions, and the boundaries of such districts, shall be determined, established, and enforced, and from time to time amended, supplemented, or changed," after notice of and public hearing.

However, as provided by section 19-903, R. R. S. 1943: "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."

In that connection, the city council has never attempted to establish, and has not established a comprehensive plan for rezoning the area west of Jackson Street or any other area on West Second Street designed to meet the specified objectives of section 19-903, R. R. S. 1943. As a matter of fact, the planning commission, zoning commission, and zoning committee

all considered that such plan should be adopted, but they never did anything to properly and legally accomplish it. The city council did no more than learn that such a plan was being considered and might be proposed in the future, but it never took any official action seeking to rezone such area in accord with a comprehensive plan designed to conform to the specified objectives heretofore recited. The evidence clearly established that the city council as a board of adjustment, and the city council as such, both acted contrary to the advice of its planning commission and in violation of the enabling statutes and authorities heretofore cited, by spot zoning the property involved in an arbitrary, unreasonable, discriminatory, and illegal manner for the benefit of Roeser, to the detriment of plaintiffs, the area involved, and other owners of property therein. The action of the board of adjustment in permitting the rezoning, and ordinance No. 3263 enacted by the city council to enforce it, were both invalid.

We conclude that the judgment of the trial court was clearly wrong. It should be and hereby is reversed and the cause is remanded with directions to render a judgment in favor of plaintiffs and against defendants, thereby awarding plaintiffs the relief prayed for in their petition. All costs are taxed to defendants.

REVERSED AND REMANDED WITH DIRECTIONS.

DALE KONVALIN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
87 N. W. 2d 570

Filed January 24, 1958. No. 34279.

Criminal Law: Appeal and Error. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.

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

Joseph M. Lovely and *Edward T. Hayes,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

BOSLAUGH, J.

The charge against the plaintiff in error, identified herein as accused, was that on or about the 9th day of January 1956, he, in the County of Douglas, forcibly by putting in fear, took personal property of value belonging to Sutherland Lumber Company from the protection of Daniel Hunter, with the intent to rob or steal it. He pleaded not guilty and the trial of the charge resulted in a verdict of guilty. The accused was adjudged to be confined in the Nebraska State Penitentiary. His motion for new trial was denied and he prosecutes this proceeding in error.

The single issue in this court is the sufficiency of the evidence to sustain the verdict and sentence. The accused challenged the sufficiency of the evidence at the close of the case-in-chief of the State and at the termination of all the evidence by motion in each instance for a verdict of not guilty.

The place of business of the Sutherland Lumber Company, hereafter referred to as company, was on the north side of L Street on the west end of the L Street viaduct. The office of the company was about 60 feet north of L Street with its front door and show window facing the street. Adjacent to the office on the east side of the building was a parking area which was open to L Street. The yard area of the company was generally enclosed by a wire fence with openings for two large gates which were equipped so that they could

be locked when they were closed. A vehicle could only enter or leave the yard area by the use of one of the gates. There was a safe in the office which was built in and made a part of the counter therein. The safe was cased in with lumber which gave it and the counter a finished appearance. The outside of the counter was towards the area used by customers and the front of the safe was toward the part of the office in which the routine business and the clerical and record work was done. The safe contained at the time important to this case the records, books, papers, cash in excess of $1,850 of the company, and checks payable to the company in an undetermined amount.

The night watchman of the company, who will be spoken of as Hunter, at about 3:30 a. m., January 9, 1956, was cleaning the counter in the office when the glass in the door was broken. He looked in that direction and saw a man pointing a gun directly at him. The man at the door advised Hunter it was a stick-up and ordered him to lie down near the counter and be still or he would shoot him. Hunter complied. Three men came into the office wearing facial disguises. One of them covered the head of Hunter with his coat and stayed near him with a revolver in his hand. The one who guarded Hunter was probably between 30 and 35 years of age and the other two men were probably not more than 35 to 40 years of age. The last two mentioned attempted to open the safe. Some part of it was broken and Hunter thought he heard it fall to the floor but they did not succeed in opening the safe. They removed the casing from around it. Its weight was about 600 or 700 pounds and it was fitted with wheels or casters. It was taken from its place in the counter to the door of the office. In the meantime the man with the gun had tied the hands of Hunter with a cord taken from a Venetian blind. He was left on the floor of the office. A truck of the company was taken from its

yard. Hunter heard a vehicle start operating soon after the men removed the safe from the office.

The break-in and robbery were reported to the police department of the city. The truck of the company was located at about 5:45 a. m. by a cruiser officer on the ball diamond west of Forty-second and Q Streets. The safe was not in the truck or at that location. The manager of Meeks Rent A Car Company, hereafter referred to as the rental company, rented a Ford panel truck to a man during the forenoon of that day. He represented himself to be and he signed the rental agreement Dale Konvalin. He gave his address as 818½ North Sixteenth Street. That was the address of the fiancee of the accused. He exhibited as his identification a motor vehicle operator's license issued to Dale Konvalin and the number of it was placed upon the rental agreement by the manager of the rental company. The time the rental truck was taken by Dale Konvalin from the rental company's place of business was 10:49 a. m. and was returned at 1:55 p. m. of that day. The man who represented himself to be Dale Konvalin was described by the manager as about 5 feet 9 inches tall, in his early 30's, had a weight of about 185 pounds, was wearing a suede jacket, and had a mustache. There was a man with Dale Konvalin but he was not closely noticed because he took no part in the transaction. He was described as about 30 years old and not as tall as the accused. The two men came to the place of business of the rental company in an automobile which was left in the garage while they had the rented truck. The manager of the rental company endorsed the license number of the automobile on the rental agreement. It was 1-28148. The automobile was about a 1949 or 1950 Pontiac of medium shade. It was the automobile of the fiancee of the accused. The vehicle which the accused rented was a Ford panel truck. After they returned the truck to the place of business of the rental company these men drove away in the

automobile above described. The police were advised of this fact and they immediately commenced a search for the Pontiac car. Myrel C. Meeks, the operator of the rental company, saw Dale Konvalin and the man who was with him when they returned the truck. He observed them at that time for several minutes.

A farmer, who will be referred to as Belak, lived about 2½ miles south of the Omaha city limits and about 1 mile east of Bellevue Boulevard. He also operated what was known as the Gifford farm some distance beyond the farm he owned. There was a road from Bellevue Boulevard to the Gifford farm which ended there. It was a dead-end road. Belak made a trip over this road about 7:30 or 8 o'clock on the morning of January 9, 1956, and he saw or experienced nothing unusual. Later he was going to the Gifford farm from his home after lunchtime that day. He passed a panel truck about one-half block from his home. He was attentive to the truck because there had been break-ins in the Gifford farm and some things had been stolen from it. He noticed the license of the truck. It was 1-527, Nebraska, and he thought it had the figure ½ between the 1 and the 527. He continued down the road about 1 mile and came upon a safe on the edge of the bank with papers and other things near it. He went back and overtook the truck, after following it for some distance, at the intersection of Thirteenth Street coming off of Bellevue Boulevard. It was the identical truck which he had passed on the road from the Gifford farm. He met a policeman, gave him the license number, and pointed out the truck. Belak told the officer what he had seen. He later reported finding the safe to the sheriff of Sarpy County because its location was in that county. He and the deputy sheriff of Sarpy County saw checks at the place where the safe was deposited which were made payable to the Sutherland Lumber Company. The safe was recovered but it had been misused to the extent that it had no value.

The police soon after 2 p. m. that day apprehended the accused at a public telephone booth near a motor vehicle service station at Sixteenth and Clark Streets. The Pontiac automobile described above was parked nearby. They arrested and took the accused to the central police station and there searched him. He had $759 or $756 in currency and about $7 in change on his person. One of the bills they found on him had "24th Woolworth" written with heavy crayon across the front of the representation of the United States Treasury Building thereon.

An employee of the company whose hours were from 4 p. m. to 1 a. m. was performing his duties the night of January 8, 1956, and saw a bill on which there was written "24th" and the name of a street which he thought he remembered was "Woolworth." When he first saw it it was on the ledge of the cash register with the green side of it and the writing thereon in view. He had never seen any other bill written on in this manner and he spoke to the cashier about it. The bill in evidence is in the same condition and looks the same as the one he saw in the office the date stated above. The cashier of the company worked from 4 p. m. until 2 a. m. and he was on duty the night of January 8, 1956, and until 2 a. m. of the following day. He saw the bill above mentioned and it was identical with the one in evidence in this case which was taken from the person of the accused at the time he was searched. The cashier while he was on duty made all change for the company. When he first saw the bill it was on the ledge of the cash register where change was made. He was directed to the writing with what appeared to be black crayon on the back or green side of it. He never saw any other bill marked in that way. The practice of the company was to arrange all bills with the front of them upward. He put the marked bill in the cash register. The bill in evidence does not vary in any way from the one he saw and put in the cash register at that time. He took all the paper bills

out of the cash register at 2 a. m. that morning, tied them in a package, and put them in a metal box in the safe. The safe was locked before he left the office. The bill in evidence with the writing on it is, to the best of his knowledge, the one he put in the safe that night.

The manager of Meeks Rent A Car Company was asked to go to the police station which he did on January 10, 1956. He was there asked to view some men to ascertain if he could identify any of them. He picked out and identified the accused as the man he rented the Ford panel truck to on the forenoon of the 9th day of January 1956. He also identified the accused at the trial of this case. Myrel C. Meeks, the operator of the rental company, saw and observed the accused for several minutes when he returned the truck he had rented on January 9, 1956. Mr. Meeks 2 or 3 days thereafter was at the police station where the officers lined up four men on a platform. They were observed by him and he identified the accused as the man who returned the rented truck to his place of business on the afternoon of January 9, 1956. Mr. Meeks also identified the accused at the time of the trial as the man who returned the truck. A watchman for the stockyards adjacent to the company testified that he saw three men at about 3:42 a. m., January 9, 1956, in the yard area of the company. One was in a truck and the other two stood behind it. He approached them and exchanged remarks with the man who had been in the truck. He alighted from the truck as the watchman approached. They were within 3 feet of each other and had a brief conversation. The watchman identified the man who was in and alighted from the truck as the accused.

A member of the police department of Omaha examined the panel truck which was rented to the accused. The truck was identified for him by the manager of the company which owned it and and the policeman was shown the rental agreement signed by the accused to evidence the identity of the truck. It was

also established that the truck had not been used in the interval between when it was returned to the owner by the accused and the time when it was examined by the policeman. The inside of the body of the truck was not painted. The policeman found chips of paint. The part of them which apparently had been on the outside of the object from which they came was a greenish color. The chips consisted of several layers of paint of various colors. They were found loose on the inside of the body of the truck on its floor. There were metal strips on the floor which it was thought had chipped the paint off of some object which had been in the vehicle. The policeman at the office of the company, in the presence of the man in charge, removed paint from the safe that had been stolen and taken from that office. Parts of the paint had been broken off the safe. The paint the officer removed from it was taken from near the places from which paint had previously been taken and the paint the officer took was removed down to the metal of the safe. It had a rather thick consistency consisting of several coats and the paint was easily removed by the use of a metal instrument. The outside of the paint removed was of a greenish color with coats of paint of red, brown, and other colors underneath. The paint taken from the safe appeared to the officer to be identical with the paint chips he found and took from the panel truck. The two specimens of paint were kept separate and were sent by the police department to the Federal Bureau of Investigation for examination and analysis.

A special agent of the Federal Bureau of Investigation assigned to the laboratory in Washington, D. C., hereafter referred to as agent, qualified and testified as an expert witness. He was a graduate of a college in which he majored in chemistry. He was employed for some period of time as an analytical chemist by the Ideal Manufacturing Company in New Jersey. He was a student for 2 years in a graduate school pursuing the

subject of chemistry. He had been engaged by the Federal Bureau of Investigation laboratory for about 16 years and had made thousands of examinations of glass, paint, metals, and other materials. He had testified concerning the examinations and results of them in many courts, state and federal, throughout the United States.

The agent received two specimens of paint from the police department of Omaha on January 16, 1956. They were separately identified. He turned the paint from the safe on end as one might place a book upon end and examined it under a microscope. In this position he could see the various layers of paint and he found 16. The top or outer coat was a light green. Beneath that the 2nd and to and including the 6th layers were each a light gray-green color. The 7th to and including the 11th layers were each a bright red color. The 12th layer was a thick, coarse aluminum paint. The 13th was a very thin, clear varnish. The 14th to and including the 16th were, respectively, medium gray primer paint, coarse dark gray primer paint, and dark red-brown primer paint which was the last layer of paint and it was next to the metal of the safe. The paint chips from the truck were examined microscopically in the same manner. They were found to have the identical 16 layers of paint. They had the same colors, the same relative thickness, and the same color sequence.

The paint from each sample was then put under the miscroscope at the same time side by side and this comparison showed the same 16 layers of paint were present. They had the same colors, the same color sequence, the same layer structure, and the same texture of paint. Under the microscope with the aid of a solvent such as chloroform a test of the various layers was made and a microchemical test was made of each sample. A microchemical test will disclose what the color agent or pigment is in any paint. A piece of the top layer of light green paint was treated with a small drop of hydrochloric acid and it turned blue. Both samples were treated in the

same manner with the identical result in each instance.

The agent then subjected both samples of paint to a test on the spectrograph, an instrument which discloses the composition of any material such as paint. There are hundreds of known elements and any one of them under proper test will give off light which is characteristic of itself. If a grain of common salt comes in contact with an open flame it will give off a yellowish orange light. The light is characteristic of the substance and this is true in all known elements. A part of each sample of paint was put in a small vessel and burned. The light given off was characteristic of the elements present in the paint. The spectrograph analyses the light given off. The results are recorded on a photographic plate and by examining or studying it the composition of the burned material can be ascertained. The samples of paint submitted were subjected to this character of tests and the two samples of paint were found to have all of the same elements and in the same approximate percentages. The conclusion of the agent was that the paint from the Ford panel truck came from the same surface as the paint from the safe.

The accused became a witness in the case and denied that he in any manner participated in the robbery of the company, that he rented a truck from the Meeks Rent A Car Company, or that he signed the rental agreement. He denied the evidence of the State tending to connect him with the crime charged. He was in many respects corroborated by the testimony of other witnesses. The evidence is conflicting. The verdict of the jury resolved all matters of fact in favor of the State and the evidence and the permissible inferences therefrom must be by this court considered most favorably to the State. There is no claim of error of law in the conduct of the case in the trial court. The issue is only the sufficiency of the evidence to sustain the conviction and sentence. The claim of inadequate proof of the offense charged is not sustained by the record. The

evidence permitted a finding of guilt of the accused of the charge made. The credibility of witnesses and weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong. Burnell v. State, 159 Neb. 349, 66 N. W. 2d 838; State v. Warren, 162 Neb. 623, 76 N. W. 2d 728; Pew v. State, 164 Neb. 735, 83 N. W. 2d 377. It may not properly be said that the verdict in this case is clearly wrong. The judgment should be and it is affirmed.

AFFIRMED.

GEORGE PUPKES, APPELLANT, V. ORAL V. WILSON, DOING BUSINESS AS WILSON BEER DISTRIBUTOR, APPELLEE.
87 N. W. 2d 556

Filed January 24, 1958. No. 34293.

1. **Automobiles: Negligence.** When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question.
2. ———: ———. Where an automobile proceeding across a highway intersection had passed the center of the intersecting highway and was struck by a car approaching from its left, and it appears that no collision would have occurred if the approaching car had proceeded on its right-hand side, no justification being shown for the approaching car being to the left of the center of the highway, any negligence of the driver of the first car in failing to see the approach of the second is not a proximate cause of the accident.

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

Lester L. Dunn, Blake, Fabian & Fabian, and *J. H. Dickens,* for appellant.

Chambers, Holland, Dudgeon & Hastings, for appellee.

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

CARTER, J.

Plaintiff sued to recover damages for injuries sustained in an automobile accident. The trial court dismissed the action at the close of plaintiff's evidence, and the plaintiff has appealed.

On April 19, 1955, at about 6:15 p.m., the plaintiff was driving his automobile in a southerly direction on Preston Road, a county highway running north and south in Richardson County. The road was graveled and dry. As he approached the intersection of Preston Road with State Highway No. 4, he stopped at the stop sign about 18 or 20 feet from the pavement on State Highway No. 4, a through highway protected by stop signs. Plaintiff testified that he looked to his right where he could see for a quarter of a mile and saw no traffic approaching. He then looked to his left, where he had an unobstructed view of 550 feet to the top of a grade rising towards the east, and saw no traffic within his range of vision. His wife testified that she was riding in the front seat and likewise looked and saw no traffic approaching from either direction. She told plaintiff that the road was clear, and he proceeded to drive across the intersection at a speed not exceeding 10 miles an hour. They did not look again for approaching traffic. When plaintiff had driven across the center of the intersection and at a point where the front wheels of the car were off the south edge of the pavement and the rear wheels were on the pavement, his car was struck on the left rear wheel by defendant's truck which was approaching from the east. As a result of the collision plaintiff sustained severe personal injuries. The action was commenced to recover damages for the injuries sustained because of the negligence of the driver of defendant's truck.

The evidence shows also that defendant's truck was

traveling west on State Highway No. 4 at a speed of approximately 55 miles per hour when it was one-half mile east of the intersection. There were tire marks on the pavement extending 114 feet east from the point of impact. These marks were on the south side of the center line of the highway, they being in the lane for vehicles traveling east. The evidence shows that these tire marks followed a straight course slightly to the south until they reached the approximate point of impact, where they turned to the northwest. The truck overturned about 112 feet beyond the point of impact.

A witness testified that the driver of the truck told him he saw plaintiff's car enter the intersection as he was coming over the hill, that he thought plaintiff was going to turn to go into Falls City, that he started to pass him on his left, and that when he saw that plaintiff was not turning to the right he attempted to get back on his own side of the road to miss plaintiff's car but that he did not make it. The state patrolman who was called to the scene of the accident testified that defendant's driver said he saw plaintiff's car come across the pavement, that he did not see him stop for the stop sign, and that he hit the car broadside. The patrolman testified that the view line at the top of the grade to the east was 722 feet from the intersection.

On this evidence the trial court found that plaintiff was guilty of contributory negligence which was more than slight, as a matter of law, and dismissed the action. This is the equivalent of a directed verdict for the defendant. The only issue before the court is the correctness of the trial court's ruling that plaintiff was guilty of contributory negligence more than slight as a matter of law.

In considering the evidence plaintiff is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Egenberger v. National Al-

falfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523.

The defendant relies upon the rule of law announced in Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571, to the following effect: "When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see a car which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. If he fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question."

The evidence shows that plaintiff stopped at the stop sign, looked to his right and to his left, saw no traffic approaching from either direction, and entered the intersection. Plaintiff had crossed the center line of the intersection and had his automobile half off the pavement when it was struck by defendant's truck. The evidence affirmatively shows by the admissions of plaintiff and his wife that he did not look to the right or the left after entering the intersection.

The evidence shows also that defendant's truck was being driven west at a speed of approximately 55 miles an hour at a point one-half mile east of the intersection. The driver of the truck saw plaintiff's car entering the intersection when he reached the top of the grade to the east of the intersection. His rate of speed as he came down the grade, a distance of 550 to 720 feet, is not shown by the record. As the truck neared the intersection the driver assumed that plaintiff was going to turn right to go into Falls City. The driver of the truck turned to his left to pass plaintiff's car on this assumption. When the truck driver saw that plaintiff was not turning to his right, but was proceeding south across the intersection, he applied his brakes and attempted to

avoid a collision by turning back to his right-hand side of the highway. He failed in his efforts to avoid the accident.

It is plain from this evidence that plaintiff had cleared the lane of travel for west-bound traffic, the direction in which the truck was traveling. The driver of the truck saw plaintiff's car entering the intersection when the truck was more than 550 feet away. As he approached the intersection the truck driver assumed that plaintiff was going to turn to the right, an assumption not based on any conduct of the plaintiff. When the driver of the truck discovered his error he applied his brakes and attempted to avoid the accident by turning back into his right-hand lane.

In considering this evidence the jury might well have found that plaintiff had a right-of-way through the intersection superior to that of the driver of the truck. The evidence would sustain a jury finding that the proximate cause of the accident was the turning of the truck into its left lane on the erroneous assumption that plaintiff was going to turn right at the intersection. The jury could well have found that if the truck had stayed on its right-hand side of the road there would have been no accident.

Under such circumstances we cannot say that the failure of the plaintiff to maintain a proper lookout after entering the intersection is contributory negligence more than slight as a matter of law. The negligence of the driver of the truck in assuming that plaintiff, when there was no basis in fact for such an assumption, would turn to the right, could properly be found by the jury to have been the proximate cause of this accident. It would be for the jury to determine under proper instructions whether the negligence of the plaintiff was more than slight when compared with that of the driver of the truck.

Under the evidence adduced, the driver of the truck was not in a favored position as he approached the in-

tersection. The jury could find that plaintiff had the right-of-way in attempting to cross as he did. While plaintiff's right-of-way was not an absolute one, plaintiff could properly assume that the driver of the truck would comply with the rules of the road, and if the latter did not, a jury question was presented. This rule is stated in Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405, as follows: "When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question." See, also, Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235.

When the evidence establishes that one entering an intersection fails to see an approaching vehicle which is favored over him, he is guilty of contributory negligence sufficient to bar recovery as a matter of law. Whitaker v. Keogh, *supra;* Parsons v. Cooperman, *supra.* In the instant case the evidence does not establish that the driver of the truck was in a favored position. Under such circumstances it is for the jury to determine, under proper instructions, the question of negligence and contributory negligence.

In Whitaker v. Keogh, *supra,* we announced the following rule: "Where an automobile proceeding across a street intersection had passed the center of the intersecting street and was struck by a car approaching from its left, and it appears that no collision would have occurred if the approaching car had proceeded on its right-hand side, no justification being shown for the approaching car being to the left of the center of the street, any negligence of the driver of the first car in failing to see the approach of the second is not a proximate cause of the accident." The facts of the instant case place it squarely within this rule.

For the reasons stated, the trial court erred in dismissing plaintiff's action at the close of plaintiff's evidence. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HAROLD G. STRASSER, APPELLANT, V. L. N. RESS, FIRST AND REAL NAME UNKNOWN, DIRECTOR OF MOTOR VEHICLES, APPELLEE.

87 N. W. 2d 619

Filed January 24, 1958. No. 34301.

1. **Courts.** A certificate made by the judge or clerk of the county court as required by section 39-795, R. S. Supp., 1955, is not required to be attested by the seal of the county court.
2. **Names.** The use of a name is to designate the person intended and that object is accomplished when the name given him has substantially the same sound and appearance as his true name.
3. **Idem Sonans.** The doctrine of idem sonans has been modified or enlarged to conform to the rule that a variance in names to be material must be such as has misled the person to his prejudice.
4. **Alteration of Instruments.** An alteration of a written instrument which neither varies its meaning nor alters its legal effect is an immaterial change and does not affect or invalidate it.

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

Shotwell, Vance & Marchetti and *Peter E. Marchetti,* for appellant.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for appellee.

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

BOSLAUGH, J.

Appellee on August 31, 1956, revoked the license of appellant authorizing him to operate a motor vehicle in

this state for 1 year from July 3, 1956, because appellee believed that appellant had accumulated more than 12 points within the period commencing with November 18, 1954, and continuing through July 3, 1956. Appellant prosecuted an appeal from the action of appellee within the time and in the manner provided by law to the district court for Douglas County. Appellant filed an amended petition on which the case was heard and disposed of in that court. Appellee interposed a general demurrer thereto. It was sustained and a judgment of dismissal of the cause was rendered. This appeal is from the action of the trial court.

The substance of the parts of the amended petition relevant to this appeal is as follows: Appellant was holder of license No. J 8 17072 issued by the state authorizing him to operate a motor vehicle therein. Appellee made an order August 31, 1956, revoking the license of appellant for the period of 1 year from July 3, 1956, and appellant appealed therefrom to the district court for Douglas County, the county of his residence, within the time and in the manner permitted by law. The name of appellant has been and is Harold G. Strasser and he has not used or been known by the name of Strassen or Harald G. Strassen. The action of appellee in revoking the license of appellant is contrary to law, is in excess of his power, and is void because appellee (a) exceeded his authority in assessing 3 points against appellant for the offense of speeding on the basis of a purported certified judgment of conviction of the county court of Custer County because the alleged copy of the record of that court was not authenticated by the judge of the court or at all, as required by law; (b) exceeded his authority in assessing 3 points against appellant for the offense of speeding on the basis of an abstract of the record of a justice of the peace court of Central City showing a conviction of Harald G. Strassen for the offense of speeding but the abstract did not purport to show the operator's license number or

the motor vehicle license number of Harald G. Strassen but it did recite that neither of them was obtained; (c) materially changed and altered the said abstract of conviction of Harald G. Strassen by inserting therein the operator's license number and the motor vehicle number of Harold G. Strasser; and (d) exceeded his authority by assuming to exercise discretion in changing and altering the abstract of conviction of Harald G. Strassen above described and by assessing 3 points because thereof and thereunder against appellant. The relief sought was an order vacating the revocation order and restoring the driver's license.

The brief of appellant says that appellee assessed 3 points against appellant for the offense of speeding upon a judgment of the county court of Custer County which "bears no seal of the court purporting to have issued it * * *." There is no identical allegation of that in the amended petition. It alleged a conclusion that appellee exceeded his power in charging appellant 3 points for the offense of speeding on a purported certified copy of the judgment of the county court of Custer County "which purported certificate is not authentic as being in compliance with statutory requirements relating thereto." This part of the pleading was indefinite, ambiguous, and alleged no issuable fact. The effect of the asserted absence of the seal from the certification is not discussed in the brief of appellant. The county court is a court of record. The statute requires the clerk of a court of record to certify to appellee any record of conviction therein which is within the reach of the point system of the state. § 39-795, R. S. Supp., 1955. The statute is silent concerning the use of a seal in making the certification. There is no statute which requires all acts of the county court or the judge or clerk thereof to be attested by the seal of the court. It is generally provided by section 24-540, R. R. S. 1943, that: "Every record made in any county court, excepting original orders, judgments and decrees thereof,

shall have attached thereto a certificate signed by the judge of such court * * * and it shall not be necessary to call such judge or his successor in office to prove such record so certified. And in any cause, matter or proceeding in which the court or judge has jurisdiction, and is required to make a record not provided for in sections 24-501 to 24-553, such record shall be certified in the same way and with like effect as aforesaid." Here again the specified verification is a "certificate signed by the judge" and no mention is made of a seal. A dependable authority asserts that the seal of the officer is not essential to the certificate in the absence of a statute requiring the certificate to bear such a seal. 20 Am. Jur., Evidence, § 1039, p. 876. See, also, Belford v. Scribner, 144 U. S. 488, 12 S. Ct. 734, 36 L. Ed. 514; Annotation, Ann. Cas. 1912C 942. The absence of a seal from the certification made to appellee by the county court of Custer County was not fatal to the effectiveness of it.

The abstract of the record of a conviction for speeding in a justice court at Central City was made and delivered to appellee by the justice of the peace. It named the person who was convicted as Harald G. Strassen. Above a line therein following the printed words "Operator's License No." there were written in typewriting the words "Not Obtained." Above another line therein following the printed words "Vehicle License No." and immediately below the typewritten words "Not Obtained" were ditto marks. Appellant by his pleading says that his name is Harold G. Strasser and that he has never used or been known by any other name; that he has never used or been known by the name of Strassen and that this is also true as to the name Harald G. Strassen; that there is no identification in the certificate of conviction of Harald G. Strassen or otherwise that he was or is the same person as Harold G. Strasser; and that the act of appellee in assessing 3 points against appellant because of the conviction of

Harald G. Strassen was unauthorized and illegal and could not contribute to or be a basis for the revocation of the license of appellant to operate a motor vehicle. This involves some consideration of the doctrine of idem sonans. These words translated into English mean having the same sound. Because of the arbitrary orthography or pronunciation given to proper names and the variant spelling of names, courts have formulated the doctrine of idem sonans. The use of the name is merely to designate the person intended and that object is fully accomplished when the name given to him has the same sound as his true name. Hence the law treats a mistake in the spelling of the name of a party as immaterial if both modes of spelling have the same sound. Some jurisdictions recognize that the test for determining if names are idem sonans is whether although spelled differently, the attentive ear finds difficulty in distinguishing the two names when pronounced. Others disregard the sound of the names and predicate their conclusions solely on appearance if the names involved are written or printed. A still further class of adjudications takes a modified view that if the name as published both appears and sounds similar to the real name, then the doctrine is applicable. It is profitless to attempt to cite or analyze the cases which have considered this doctrine. They are very numerous, irreconcilable, and inconsistent. Some decisions conclude that certain names are within the doctrine while other courts, sometimes in the same jurisdiction, refuse to apply the rule to similar names which are indistinguishable. Bennett v. Winegar, 103 Neb. 843, 174 N. W. 512; Black's Law Dictionary (DeLuxe 3d Ed.), Idem Sonans, p. 914; Collingsworth v. Hutchinson, 185 Okl. 101, 90 P. 2d 416; Kelly v. Kuhnhausen, 51 Wash. 193, 98 P. 603, 130 Am. S. R. 1093; Jones v. State, 115 Tex. Cr. 418, 27 S. W. 2d 653; 65 C. J. S., Names, § 14, p. 24; 38 Am. Jur., Name, § 36, p. 612. It is now generally recognized that the doctrine of idem sonans has been modified or

enlarged, by what has been spoken of as modern decisions, to conform to the growing rule that a variance to be material must be such as has misled the person affected to his prejudice.

The court said in Raven v. State, 149 Tex. Cr. 294, 193 S. W. 2d 527: "The doctrine of 'idem sonans' has been enlarged to conform to the rule that a variance in names, to be material, must be such as has misled a party to his prejudice."

In Stevens v. Stebbins, 4 Ill. (3 Scam.) 25, the court said: "In relation to variances, courts at the present day are not confined to the rigid rule of idem sonans, but adopting a more liberal and reasonable one, enquire whether the variance be material or immaterial. If there be a material and substantial variance, it is fatal; otherwise it is not."

The Illinois court later said in People v. Callahan, 324 Ill. 101, 154 N. E. 463: "The rule of idem sonans applies to both civil and criminal proceedings, and a variance as to names alleged in an indictment and proved by the evidence is not to be regarded as material unless it shall be made to appear to the court that the jury was misled by it or that some substantial injury was done to the accused thereby * * *." See, also, Brady v. State, 122 Tex. Cr. 279, 55 S. W. 2d 104; Puckett v. Hetzer, 82 Kan. 726, 109 P. 285, 136 Am. S. R. 127; Kelly v. Kuhnhausen, *supra;* Ordean v. Grannis, 118 Minn. 117, 136 N. W. 575, L. R. A. 1915B 1149; 65 C. J. S., Names, § 14, p. 26.

The name Harald G. Strassen in the abstract of conviction in the court at Central City and the true name of appellant, Harold G. Strasser, are so similar in pronunciation and appearance and the variation is so slight that they must be determined to be idem sonans within the doctrine as above discussed. This is especially true since appellant has not alleged that he is not the identical person who was charged with, pleaded guilty to, and paid the penalty assessed in the case at Central City

referred to in the abstract or certificate under discussion of this phase of the case and the further circumstance that he has not claimed that he did not accumulate 13 points during the less-than-2-year period concerned in this litigation exactly as represented by the five abstracts appearing in the record which were before and on which the appellee acted in issuing the order of revocation of the license of appellant. In this situation it must be concluded that appellant was not and could not have been misled to his prejudice by the slight variation in the two names. He does not even assert that he was except he says his license was suspended for a period by appellee. This was exactly what appellee was compelled to do by clear mandate of the law. § 39-7,129, R. S. Supp., 1955.

Appellant complains that appellee materially altered the abstract made and certified by the justice of the peace as described above by writing thereon above the typewritten words "Not Obtained" the letter and figures "J 8-17072" and by writing thereon near and partly over the ditto marks "8-1846." Appellant states the former was the number of his license to operate a motor vehicle in Nebraska and the latter was his motor vehicle license number. It is not alleged that anything was stricken from the abstract. It is not every change of an instrument or document that affects its validity or effectiveness. If the change does not alter its legal effect it is without significance and will be disregarded. The only effect of the writing made on the abstract was that it had a tendency to identify the person who was charged with and convicted of a traffic violation at the time, in the court, and at the place designated by the abstract. This added no burden to nor deprived appellant of any right or advantage. The name of the party involved in the offense and the conviction therefor were identified by name as above decided herein. The writing alleged to have been done thereon by appellee added nothing to or detracted nothing from the ab-

stract. If the writing had been omitted the abstract would have had exactly the same effect as it had with the writing added. The writing, under the circumstances, had no efficacy or disadvantage. An alteration of a written instrument which neither varies its meaning nor changes its legal effect is immaterial and does not affect or invalidate the instrument. Fisherdick v. Hutton, 44 Neb. 122, 62 N. W. 488; Bank of Cedar Bluffs v. Beck, 128 Neb. 244, 258 N. W. 528, 96 A. L. R. 1099; First Trust Co. v. Airedale Ranch & Cattle Co., 136 Neb. 521, 286 N. W. 766; State ex rel. Nebraska State Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138.

The amended petition of appellant did not state a cause of action and the trial court was justified in sustaining the general demurrer thereto. The judgment should be affirmed.

AFFIRMED.

ALEX REIZENSTEIN, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
87 N. W. 2d 560

Filed January 24, 1958. No. 34302.

1. **Criminal Law: Appeal and Error.** This court, in a criminal action, will not interfere with a verdict of guilty, based on conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. ———: ———. In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other documentary evidence for the inspection of defendant's counsel before trial, and error may be predicated only for an abuse of such discretion.
3. **Criminal Law: Evidence.** The admissibility of statements of a deceased as dying declarations to which objections have been made is a question of law for determination by the court in the light of the facts and circumstances disclosed.
4. ———: ———. A witness who remained with a deceased a

considerable period of time before death, heard him talk, witnessed his demeanor, and had an opportunity for reaching a correct conclusion, may testify to his opinion or conclusion that the deceased was aware of impending dissolution.

5. ———: ———. A declaration is admissible in evidence as a part of the res gestae if it was made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which it was made.

6. ———: ———. Elements essential to render statements admissible as res gestae are that, in the instance, there was shock to the feelings sufficient to render the utterance spontaneous and unreflecting; the utterance must have been before there has been time to contrive or misrepresent, and while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and it must relate to the facts and circumstances causing the shock to the feelings.

7. ———: ———. Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon.

8. **Evidence.** When a fact in issue may be explained by the production of an article or object to which testimony relates it is proper to produce such object or article and exhibit it to the jury.

9. **Evidence: Appeal and Error.** The rule as to the admissibility in evidence of illustrative experiments is that in such cases a discretion is conferred upon the trial court and unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such evidence.

10. **Witnesses: Appeal and Error.** The determination of the competency of a child of tender years to testify rests largely in the sound discretion of the trial court whose decision will not be disturbed in the absence of clear abuse of discretion.

11. **Homicide: Evidence.** Evidence of a course of hostility before the commission of a homicide extending down to the homicide is admissible in evidence.

12. **Criminal Law: Trial.** It is not error for the court to refuse to give an instruction containing the following maxim, or one containing that substance: "He who speaks falsely on one point will speak falsely on all."

13. **Trial: Appeal and Error.** Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law appli-

cable to the evidence, error cannot be predicated on the giving of the same.

14. **Trial.** An instruction which has no foundation in the evidence is properly refused.

15. **Criminal Law.** One is conclusively presumed to intend the obvious and probable consequences of his voluntary act.

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

LaVerne H. Hansen, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

YEAGER, J.

This is a criminal action wherein in the district court for Scotts Bluff County, Nebraska, Alex Reizenstein, who will be referred to herein as the defendant, was charged and convicted of the crime of first degree murder. He was thereafter sentenced to confinement in the State Penitentiary during life. He duly filed a motion for new trial which was overruled. By petition in error to this court he seeks a reversal of the judgment of the district court.

The assignments of error are numerous but they fall into general groups or classifications. One group relates to the sufficiency of evidence to sustain a conviction, one to the foundation for and admissibility of dying declarations, one to the refusal to allow inspection of a statement made by the defendant, one to admissibility of exhibits, one to the admissibility of the testimony of witnesses, one to the refusal of the court to give instructions tendered by the defendant, and one to the giving of instructions by the court on its own motion.

For the purposes of this opinion it appears necessary, before considering the assignments of error, to state the

factual background as disclosed by the record. The following pertinent incidents are not in dispute. On and prior to November 30, 1956, the defendant and Lydia Reizenstein were husband and wife and lived in the city of Scottsbluff, Nebraska. A short time before 7:55 p.m., the exact time not being certain, Lydia Reizenstein, who will be hereinafter referred to as the deceased, was wounded in the abdomen by a charge from a 20-gauge shotgun. At the time she was shot she was in the bathroom of the home. She was removed to a hospital where she died about 10:40 p.m. Just before the shot was fired, the defendant searched for and found the shotgun, loaded it, and entered the bathroom after which the discharge was heard. No one saw the gun fired. After the shot the deceased was observed lying on the floor. The defendant was in the bathroom at that time. Police officers arrested the defendant and took him away. From the wound received the deceased died. A statement was taken from the defendant. That statement is not in evidence but a transcript of it appears as an exhibit.

The record does not disclose the exact time when the deceased was shot. Kathleen Reizenstein testified that she heard the shot and immediately went into the bathroom where she saw her mother on the floor. The shooting was immediately reported to the police. A police officer received the report while on patrol duty at about 7:55 p.m. and immediately went to the scene arriving at about 8 p.m. It is therefore reasonable to conclude that the shooting took place after 7 p.m.

Randy Reizenstein, a son, who was 7 years old at the time of the trial, testified that prior to the shooting he was in the bathroom with his mother when his father came in and continued an argument with his mother and stated that he was going to kill them all including himself. Randy left the bathroom, took the shotgun from the place where it was usually kept, and hid it under a bed. He returned to the bathroom where he saw his

father trying to get some shells out of a box and his mother was trying to prevent him from so doing. He helped his mother get the box away and he hid it. The defendant came out, found the gun, and returned to the bathroom, after which Randy heard a "pop" and he turned around and saw his mother lying on the floor and the defendant was standing up with the gun in his hand. He returned to the bathroom and his father laid the gun down and said: " 'Oh, I love you and I am sorry.' "

Mary Povoor testified that she called an ambulance and the police; that she then went into the Reizenstein home where she saw the deceased lying on the floor and the defendant sitting in a chair in the bathroom with the gun close beside him leaning against the wall; and that the police came and took the gun and the defendant away. She also testified that she heard a conversation between the deceased and police officer Lee Shipley wherein the deceased said in substance that she was ironing; that the defendant was drinking but wasn't drunk and he started arguing with her in there; and that she didn't pay any attention to him so he went and got the gun and shot her around the stomach. This witness also testified that the deceased told her that the defendant was fighting with her, that she didn't pay any attention to him, and that the defendant was at fault because she didn't pay any attention to him.

These conversations took place before the deceased was removed and taken to the hospital. After she was taken to the hospital an operation was performed and she died about 10:40 p.m. the same evening.

Lee Shipley testified in substance that after he arrived at the scene he talked with the deceased and she told him that the defendant had been drinking all evening and that she was trying to do her ironing; that the defendant came into the bathroom where she was doing her ironing and started giving her the dickens and quarreling with her; that she left the room once to get away from him and then she returned and began her

ironing again; and that the defendant appeared with a shotgun and pointed it at her stomach and shot her while she was standing ironing.

This witness further testified that under questioning the defendant admitted that there was an argument; that he got the shotgun and loaded it; that he did this just to scare his wife; that he intended to commit suicide; and that there was a scuffle and his wife grabbed the gun and pulled the trigger. He testified that later the defendant said he did not know how the gun went off.

Dorothea Johnston testified and stated that the last words of the deceased before her death were: " 'Oh, God, please take care of my children.' " The statement was made about 9:45 p.m.

The testimony of these witnesses as to what the deceased said was objected to on the ground of lack of foundation. The point of the objection was that the statements were made out of the presence of the defendant and they were hearsay unless a foundation was laid for them as res gestae or dying declarations, which foundation was absent.

Certain witnesses testified as to statements made by the defendant after he was apprehended and in custody. These statements apparently were taken in shorthand by a court reporter and by him transcribed. It does not appear necessary to summarize the testimony since it is not contended that the information was not admissible but only that the method of disclosing it to the jury was improper.

The defendant offered in evidence a copy of the statement made by the defendant. The statement was not received in evidence but it is in the bill of exceptions and was in the hands of the defendant. There will be reference to this statement later herein.

The testimony disclosed that at the point where the charge entered the body of the deceased the wound was ragged in appearance, of a diameter of approximately 2 inches, with a grayish-white halo around it, and below

the larger wound there were four or five separate perforations. The wound was about 2 inches below and 1 inch outside from the navel. There was no discoloration of the skin. The halo was made by a foreign substance.

It appears evident beyond peradventure, and that discussion is not necessary to sustain the view, that the evidence summarized is sufficient to sustain the verdict returned and the judgment rendered unless there were errors occurring at the trial sufficient to overturn that verdict and judgment or unless there was other evidence which has not been referred to sufficient to require a reversal. The defendant urges that there were such errors and such other evidence.

"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." Birdsley v. State, 161 Neb. 581, 74 N. W. 2d 377. See, also, Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349; Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761.

There are assignments and groups of assignments of error which the defendant contends require a reversal. The first of these relates to the statement made to and in the presence of witnesses by the defendant to which reference has already been made.

Before the commencement of the trial the defendant filed a motion for an order requiring the county attorney to produce for inspection written statements and statements taken in shorthand. The stated reason for the production was that this inspection was necessary in order that the mental condition of the defendant at the time the statements were made might be determined. The motion was not supported at the time or when a hearing was had upon it by affidavit or other evidence. On the hearing on the motion the defendant called the

county attorney as a witness to support his claim of right to have the statements produced. The county attorney objected to testifying. The right of the county attorney to refuse to testify and to refuse to submit the statement for inspection was sustained.

Certain witnesses were called at the trial on behalf of the State who had been present when the statement of the defendant was made. They had refreshed their recollection from the statement as to what the defendant had said. The defendant's counsel requested the production of the statement for the purpose of cross-examination at the time. The request was denied. He objected to the witnesses testifying to their recollection of what the defendant said. The objections were overruled. This is assigned as error.

In Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, this court said: "In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion." No reason is apparent why the same rule should not apply during the trial. The proper application of the rule is discussed in the opinion. In the light of the rule and the declared applicatory principles it cannot be said that the court erred in its rulings.

If any abuse of discretion was involved the defendant was afforded the opportunity to demonstrate it. He called the reporter who took the statement and attempted in that manner to get the entire statement from the notes into evidence. Objection was made and sustained, and his offer denied. The court did require the production of a transcript of the statement. The defendant offered the transcript in evidence. Objection to it was sustained.

In the light of the fact that the attorney for the de-

fendant had the statement and the opportunity, before the trial was over, to examine it and to ascertain whether or not his client had been prejudiced by the refusal to produce the statement when requested and to call attention to the particular prejudice, if any in fact existed, but in these respects failed to act, it does not appear that he is on this review entitled to assert successfully that the trial court abused its discretion in this area.

It must be said that the assignments of error related to the statement are without merit.

Two assignments of error relate to the admissibility of the testimony of witnesses as to what the deceased said within a short time after she was shot with reference to the shooting. The defendant insists that this was hearsay and therefore not admissible. The theory on which this evidence was admitted was either that the statements of the deceased were a part of the res gestae or that they were dying declarations, or both, and therefore admissible.

Three witnesses who were present recited the facts as to their observations of the deceased after she was shot. They were allowed to express their opinions as to whether or not she had a belief that she was going to die. They gave testimony as to what she said.

Whether or not the allowance of these witnesses to give their opinions that the deceased had a sense of impending death was strictly proper does not appear to be a matter of controlling importance. The true basis for the admission of dying declarations is evidence satisfactory to the court, not the jury, that statements were made with a present belief that death was imminent and certain. This of course is not the measure of weight to be given them. The weight and credibility are for the jury. In Johnson v. State, 112 Neb. 530, 199 N. W. 808, this court said, referring to dying declarations: "The admissibility of the statements to which objections were made was a question of law for the court, determinable under the circumstances disclosed." See, also, Edwards

v. State, 113 Neb. 698, 204 N. W. 780; Nanfito v. State, 136 Neb. 658, 287 N. W. 58.

In Edwards v. State, *supra,* it was also said: "Where dying declarations have been admitted in evidence, their weight and credibility are for the determination of the jury." See, also, Penn v. State, 119 Neb. 95, 227 N. W. 314.

As to whether or not it was proper for these witnesses to give opinions as to whether or not the deceased had an awareness of impending death it appears from the testimony of these witnesses that they had an opportunity to observe and did observe her condition, her attitude, and were able themselves to form their own opinions as to whether or not she thought she was going to die. The rule which we think should be regarded as applicable is expressed as follows in Pennington v. State, 136 Tenn. 533, 190 S. W. 546: "There is abundant authority to the effect that a witness who remains with the deceased a considerable time before his death, hears him talk, witnesses his demeanor, and has full opportunity for reaching a correct conclusion, may testify to the opinion, or conclusion formed from such circumstances, that the deceased was aware of impending dissolution."

In Clary v. Clary, 24 N. C. 78, in discussing the admissibility of opinions of witnesses, the court said: "It approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the Jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others." See, also, People v. Sanford, 43 Cal. 29. The conclusion reached is that the evidence of all of these witnesses as to the declarations of the deceased between the time she was shot and the time she died was admissible as dying declarations. The further conclusion

is reached that the opinions of these witnesses were not erroneously admitted.

There is another reason, one which has not been stressed in the briefs, why this evidence was admissible. It was clearly on the record and under law a part of the res gestae.

It is often difficult to determine whether or not statements are to be regarded as res gestae. The general rule, as stated in Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916, and supported by cases cited in the opinion, is the following: "There is no hard and fast rule for demarcation between that which is and that which is not res gestae, but a declaration to be competent evidence as part of the res gestae must have been made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which made."

In Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1, this court pointed out some standards which are pertinent in determining whether or not statements may be admitted in evidence as res gestae, as follows: "To render such assertions admissible it is required that (1) there be some shock to the feelings sufficient to render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) it must relate to the circumstance causing the shock to the feelings."

The evidence in this case brings the statements of the deceased clearly within the rule as delineated by these decisions. It would serve no useful purpose to repeat herein the evidence which makes this clear.

Certain exhibits were received in evidence over objection. The defendant, as to each of them, insists that this was error. While some of them might well have been rejected, no prejudicial error in their receipt be-

comes apparent. One of the exhibits was a photograph of the deceased after she died. It was offered as a part of the chain of identification. It contained nothing in appearance which amounted to a spectacle. It was clearly admissible for the purpose for which it was offered. It was admissible under the following pronouncement: "Photographs of the person or body of a deceased, proper foundation having been laid, may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon." Vaca v. State, *supra*. See, also, Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858; Vanderheiden v. State, *supra*.

A group of exhibits was received which included a plat not drawn to scale of the Reizenstein home, a container with shot taken from the body of the deceased, the gun with which the deceased was shot, an empty shotgun shell, a box taken from the Reizenstein home containing 20-gauge shotgun shells, a box containing shotgun shells similar to the shells taken from the Reizenstein home, and an opened shell taken from this box.

The assignments of error indicate that this entire group of exhibits was admitted in evidence and in the discussion we have treated them all as having been admitted. Factually, however, exhibits Nos. 16 and 18, being one box of shells and the opened shell, were never actually received in evidence. They were clearly admissible. In 20 Am. Jur., Evidence, § 717, p. 600, it is said: "It is always proper, when a fact in issue may be explained by the production of an article or object to which testimony relates, to bring such article or object into court and exhibit it to the jury; it may be said, in fact, that this should be done if the circumstances permit." See, also, Morris v. Miller, 83 Neb. 218, 119 N. W. 458, 20 L. R. A. N. S. 907, 131 Am. S. R. 636.

The last two of this group require consideration with

another group of exhibits to which objection was made. After the shooting occurred experiments were made by loading the shotgun with ammunition like or similar to that which caused the death of the deceased and firing it at different distances from a cardboard target. The purpose was to demonstrate the distance of the gun from the deceased when she was shot.

One of the exhibits to which reference has been made was a box containing loaded shells of the kind used in the experiment. The other was one of the opened shells. The other exhibits to which reference has been made were a group of cardboards showing the test patterns.

The evidence as to the pattern, it may well be said, was but an incident neither favorable nor unfavorable to the defendant since it is clearly evident that the deceased was killed by a charge from the gun which before and after the shooting was in the hands of the defendant. The only efficient purpose of the patterns was to show how far the gun was from the deceased when it was fired. The minimum distance testified to by any witness, including the witnesses for the defendant, was that it was 4 to 6 inches away. The pertinence of this is that the defendant contends that the discharge of the gun was caused by the deceased. This evidence was in negation of that contention and in support of the contention that the act of shooting was an act of the defendant. Even at the closest distance the firing mechanism was so far away that the shooting could not have resulted from an act of the deceased.

In Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627, it was said: "This court recognizing the difficulties attending an offer of evidence of illustrative experiments has adopted the rule that in such cases a discretion is conferred upon the trial court and that unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such evidence." See, also, Lillie v.

State, 72 Neb. 228, 100 N. W. 316; Falkinburg v. Prudential Ins. Co., 132 Neb. 831, 273 N. W. 478. It may not well be said that in this instance the court abused its discretion.

As pointed out Randy Reizenstein was a witness on behalf of the State. The defendant objected to him as a witness on the ground that on account of his age he was unable to know and understand the nature of an oath. He was examined as to his competency out of the presence of the jury after which he was allowed to testify. On the question of the competency of a child to testify this court said in Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236: "The question of the competency of such a witness rests largely in the sound discretion of the trial court, whose decisions will not be disturbed in the absence of clear abuse." See, also, Wells v. State, 152 Neb. 668, 42 N. W. 2d 363; Linder v. State, 156 Neb. 504, 56 N. W. 2d 734. From a review of the responses made by this witness to the questions propounded to him on the examination before he was allowed to testify and his testimony before the jury, it does not appear that the trial court abused its discretion in allowing the witness to testify.

On the trial this witness and two others were allowed to testify to quarrels and past threats taking place between the defendant and the deceased. The defendant contends that the court erred in this respect. The general rule is that where a course of hostility has existed and especially if it has continued down to the time of a homicide the evidence thereof is admissible, and the weight of it is for the jury. See, Sharp v. State, 115 Neb. 737, 214 N. W. 643; Wever v. State, 121 Neb. 816, 238 N. W. 736. The conclusion reached is that this evidence was properly admitted.

A doctor, an expert in the field of psychiatry, examined the defendant and was called as a witness for the State. Based on his examination and a history obtained from the defendant he gave testimony which em-

bodied an opinion as to the mental condition of the defendant at the time of the examination. No objection to this is made on this review. Thereafter a hypothetical question was propounded and the witness was asked for his opinion as to the mental condition of the defendant. Objection was made and sustained. Also the witness stated in effect that he could not fairly express an opinion dissociated from his examination. He was then requested to consider both the hypothetical question and his examination and was asked if he had an opinion as to whether the defendant knew the difference between right and wrong at the time the deceased was killed. He answered and gave his opinion. The error assigned is that the hypothetical question did not properly and sufficiently reflect the facts. From an examination of the question and the record it is concluded that the question did reflect properly and sufficiently all of the pertinent facts.

The defendant by assignments of error asserts that the cross-examination of this and two other witnesses was unduly restricted. The record does not so disclose. In no area covered by the record or the testimony of the witnesses on direct examination was the cross-examination unduly restricted.

By another assignment it is contended that the court erred in admitting evidence of witnesses who testified as to business transactions of the defendant on November 30, 1956. This evidence was admitted for the purpose of showing the condition and ability of the defendant to know and understand what he was doing a short time before the deceased was shot. The assignment is not supported by any authority. It is without merit.

The defendant assigns as error the refusal of the court to give a large number of requested instructions. Only a few of the requests require special consideration. One requiring special mention involves a request for an instruction in case the jury found that the shooting resulted from a scuffle. There was no competent evidence

of a scuffle, hence there was no basis for such an instruction.

Another related to a requested instruction relative to accidental discharge of the gun. The instructions given sufficiently and clearly described the benefits which should flow to the defendant from accidental discharge of the gun.

A request was made that the jury be instructed that greater care should be exercised in weighing the testimony of witnesses employed to find evidence against the accused than in weighing the testimony of others. No witnesses were so employed, hence there was no basis for such an instruction.

A request was made that the jury be instructed that if it believed from the evidence that any witness had willfully testified falsely to any material fact that then it was at liberty to entirely disregard all of the testimony of such witness. At one time it was the rule that on such a request a jury should be so instructed. Lee v. State, 147 Neb. 333, 23 N. W. 2d 316. That is no longer true. In Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, 9 A. L. R. 2d 891, the rule was rejected. In that case it was said: "It is not prejudicial error for the trial court to fail or refuse to give an instruction to a jury based on the maxim, 'He who speaks falsely on one point will speak falsely upon all.'" No prejudicial error was committed in the refusal to give the requested instruction.

As to the remaining requests for instructions which were refused it appears sufficient to say, after careful examination of them, of those given, and of the bill of exceptions, that the matters involved were fully and fairly presented by the instructions given or instructions on them were not warranted by the evidence adduced on the trial and the law pertaining to the issues.

"Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applic-

able to the evidence, error cannot be predicated on the giving of the same." Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677. See, also, Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151; Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

"An instruction which has no foundation in the evidence upon which to base it, is properly refused." Rhea v. State, 63 Neb. 461, 88 N. W. 789.

By assignments of error it is contended that the court erred in giving certain instructions. The first of these is No. 14. The complaint in this connection does not appear in the assignment but only in the argument. It is urged that by this instruction the jury was told that it could presume malice or intent, and if the defendant was sane it could presume that the defendant intended to kill the deceased.

The instruction is not capable of any such interpretation. Malice is not mentioned. As to intent the following appears: "It is to be arrived at by such just and reasonable deductions and inferences from the facts and circumstances shown by the evidence as the guarded judgment of a cautious person would ordinarily draw therefrom." With this language no fault can be found. The concluding paragraph of the instruction is as follows: "Every sane person is presumed to intend the natural and probable consequences of his voluntary acts." This is the only place in the instruction where presumption is referred to. There was no impropriety in giving it. It had no relation to the intent with which the crime itself was committed. It is a correct statement of legal principle. This court has said: "One is conclusively presumed to intend the obvious and probable consequences of his voluntary act." Peterson v. Wahlquist, 125 Neb. 247, 249 N. W. 678, 89 A. L. R. 747. See, also, State ex rel. Davis v. Banking House of A. Castetter, 110 Neb. 564, 194 N. W. 784.

The next instruction attacked is No. 16. It is stated in argument that the jury was told by this instruction

that "if the defendant knew what he was doing he was criminally responsible for his acts." The instruction does not contain this statement either in tenor or effect. This is the statement of an element taken out of context from the following which is a correct statement of legal principle: "* * * yet if he has the mental capacity to understand what he is doing and to know it is wrong and deserves punishment, he is criminally responsible for his act."

The next and last assignment to which attention will be directed herein contains an assertion that the court erred in submitting the charge of murder in the first degree to the jury.

Earlier in the opinion this question was decided adversely to the defendant, subject to the question of whether or not there were errors of law occurring at the trial, or evidence not at that time referred to, which justified a reversal. No such errors of law or other evidence was found. Accordingly this assignment must be resolved adversely to the defendant.

In the light of the principles announced herein it must be said that no reversible error has been found. The judgment of the district court is affirmed.

AFFIRMED.

HAROLD L. GURSKE, APPELLEE, V. FLOYD W. STRATE ET AL., APPELLEES, IMPLEADED WITH THE FIRESTONE TIRE AND RUBBER COMPANY, A CORPORATION, APPELLANT.
87 N. W. 2d 703

Filed January 24, 1958. No. 34303.

1. **Reformation of Instruments.** It is unnecessary to secure a formal reformation of a written instrument where it differs from the true agreement of the parties as it should have been expressed in the writing in order to enforce it or have the advantage of it as a defense.
2. **Limitations of Actions.** The defense of the statute of limita-

tions is a personal privilege of the debtor, and can be raised only by such debtor and those in privity with him.

3. **Reformation of Instruments.** The reformation of an instrument has the effect of making it express the real intent of the parties. The rights of the parties are measured by the instrument as originally intended, and the effect of the reformation is to give all the parties all the rights to which they are equitably entitled under the instrument which they intended to execute.
4. ———. Upon the reformation of an instrument the general rule is that it relates back to, and takes effect from, the time of its original execution.
5. ———. The equity of reformation is superior to and operative against the demands of general creditors, and is not affected by the securing of a judgment and the levy of an execution by a general creditor.

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

Paul P. Chaney and *Archibald J. Weaver,* for appellant.

Ginsburg, Rosenberg & Ginsburg, for appellees.

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

CARTER, J.

This is a suit to reform a real estate mortgage and to foreclose the mortgage as reformed. The answering defendant is a judgment creditor claiming a prior lien by virtue of the levy of an execution on the property. The trial court found that the plaintiff held a first lien on the property and ordered a sale to satisfy the mortgage. The judgment creditor has appealed.

The evidence shows that the plaintiff, who will hereafter be referred to as Gurske, obtained a note and mortgage from his brother-in-law, Floyd W. Strate, on an undivided one-half interest in Lots 10, 11, and 12, Block 8, Hillcrest Addition to the city of Falls City, Richardson County, Nebraska, on May 17, 1949, in the amount of $4,700. The property described belonged to Gurske's mother, Margaret Gurske, in which Strate had no in-

terest. The evidence shows that Strate was the owner of a one-half interest in Lots 13, 14, and 15, Block 7, Hillcrest Addition to the city of Falls City, Richardson County, Nebraska. The record further shows that it was the intent and purpose of Strate to mortgage to Gurske his one-half interest in the last-described property, but through inadvertence and mistake Gurske described the property of his mother instead of that belonging to Strate.

It is the contention of the judgment creditor, the Firestone Tire and Rubber Company, that Gurske is precluded from reforming the mortgage by sections 25-207 and 25-212, R. R. S. 1943, statutes of limitation alleged to be applicable.

The general rule is: "The defense of the statute of limitations is generally regarded as a personal privilege of the debtor, which cannot be interposed by a stranger, and which can only be made by him or by persons standing in his place, such as his grantees, mortgagees, executors, administrators, trustees, heirs or devisees." Neill v. Burke, 81 Neb. 125, 115 N. W. 321. The effect of this holding is that generally a party to suit may not assert the statute of limitations as a defense where the debtor has not done so, unless he stands in privity with the debtor, and in this respect he must plead and prove facts showing that he is in privity with him. In the present case the Firestone Tire and Rubber Company shows that it is a judgment creditor claiming a lien under its judgment and the levy of an execution. As a judgment creditor it is not in privity with the debtor and is not entitled to raise the statute of limitations even if it is a defense to the foreclosure of the mortgage lien if raised by the judgment debtor. While it is true that there are cases to the contrary from other jurisdictions, the rule is firmly established in the law of this state. Neill v. Burke, *supra;* Plummer, Perry & Co. v. Rohman, 61 Neb. 61, 84 N. W. 600; Dayton Spice-Mills Co. v. Sloan, 49 Neb. 622, 68 N. W. 1040.

The equity of reformation is superior to the rights of general creditors. In support of this holding this court in Beckius v. Hahn, 114 Neb. 371, 207 N. W. 515, 44 A. L. R. 73, said: "In equity the reformation of an instrument has the effect of making it express the real intent of the parties. The rights of the parties are measured by the instrument, as originally intended, and the effect of the reformation, as a whole, should be to give all the parties all the rights to which they are equitably entitled under the instrument they intended to execute. Except as to bona fide purchasers without notice and those standing in similar relations, upon the reformation of an instrument, the general rule is that it relates back to, and takes effect from, the time of its original execution, especially as between the parties thereto and as to creditors at large and purchasers with notice."

A separate suit in equity to reform the mortgage to correct the mutual mistake of the parties is not necessary. Equity and justice can be administered in a single suit. The reformation of the mortgage to correct the mutual mistake is incidental to the foreclosure of the mortgage and any and all equitable rights the mortgagee can show that he has in it. The rights of a judgment creditor who has levied an execution are not those of an innocent purchaser for value. Such creditor's rights are inferior to all the rights of the holder of the mortgage, both legal and equitable. Central Granaries Co. v. Nebraska Lumbermen's Mutual Ins. Assn., 106 Neb. 80, 182 N. W. 582; Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315. The rights of Gurske in the mortgage as reformed are therefore superior to the rights of the Firestone Tire and Rubber Company.

The decree of the trial court is consistent with the foregoing conclusions and the decree of the district court is therefore affirmed.

AFFIRMED.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LINCOLN, A CORPORATION, APPELLEE, V. EARL L. CORYELL ET AL., APPELLANTS, IMPLEADED WITH LEVI L. CORYELL ET AL., APPELLEES, KENNETH L. MITZNER ET AL., INTERVENERS-APPELLEES.

87 N. W. 2d 554

Filed January 24, 1958. No. 34320.

1. **Judicial Sales: Mortgages.** The statute does not require that mortgage foreclosure sales shall be held open for any length of time.
2. **Judicial Sales: Appeal and Error.** An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.

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

Doyle, Morrison & Doyle, for appellants.

Lester L. Dunn and *Marti, O'Gara, Dalton & Sheldon,* for appellees.

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

MESSMORE, J.

This is an appeal from an order confirming a sale held pursuant to a mortgage foreclosure decree. The issue raised by the appellants is whether or not the sheriff's sale, considered in the light of all of the circumstances, is one which the court in justice to all the parties should approve.

The record shows that the decree was entered on May 21, 1954, wherein the court decreed that there was due the plaintiff, the First Federal Savings and Loan Association of Lincoln, Nebraska, the sum of $14,966.88 with interest at 9 percent per annum as a first lien, and the sum of $1,209.85 with interest at 9 percent per

annum as a second lien; that there was due cross-petitioners Levi L. Coryell and Daisy Coryell, the sum of $5,534.83 with interest at 5 percent per annum as a third lien; and that there was due intervener Kenneth L. Mitzner the sum of $244.45 with interest at 6 percent per annum as a fourth lien.

The decree in favor of the plaintiff and the cross-petitioners was assigned to L. J. Shotwell.

On March 7, 1955, the appellants executed a note and mortgage on the real estate here involved to C. C. Carlsen to secure the sum of $6,000. The sum of $400 was paid on this obligation. This note and mortgage have not been foreclosed because the loan was made after the entry of the decree of foreclosure.

On March 7, 1955, the appellants, as further security for the said note and mortgage, transferred to C. C. Carlsen the sum of $6,000 with interest at 9 percent from the proceeds that might become due the appellants by reason of a sheriff's sale under the foreclosure decree entered on May 21, 1954. This assignment authorized the clerk of the district court for Lancaster County to pay C. C. Carlsen the sum of $6,000, with interest, from any amount that came into the hands of the clerk of the district court to which the appellants would be entitled from a sale of the real estate.

The sheriff's sale was held on June 18, 1957. The property was sold to L. J. Shotwell for the sum of $34,500, as shown by the sheriff's return made June 24, 1957.

On July 18, 1957, the cause came on for hearing with reference to confirmation of the sale. The court overruled the appellants' objections to the sale and entered an order confirming the sale, granting the appellants, until August 15, 1957, the right to redeem the property by paying the full amount of the decree of foreclosure, and by paying C. C. Carlsen the amount due on his note and real estate mortgage on the real estate here involved.

Earl Coryell, one of the appellants, testified that he

purchased the property involved in this action, known as 2801 Van Dorn Street in Lincoln, in 1937, for $28,600, and has resided there since that time. This property is a two-story house constructed of brick and tile, with a slate roof, and containing 3,800 to 4,000 square feet of floor space, on ground 120 feet in width and 313 feet in length. It was built about 11 years prior to the time this witness purchased it. He placed the present value of this property at $57,000 to $58,000. He further testified that he had rejected a cash offer of $50,000 for this property within the past year, and rejected a $41,000 offer made in 1956, but has had no recent offers.

The appellants introduced a letter dated December 1, 1955, wherein a real estate dealer sought exclusive listing of this property for a price of $57,500. This dealer explained that actual value and market value were not always the same in this price class property due to the scarcity of buyers willing and able to purchase such a house at any certain time.

The affidavit of a real estate dealer placed the market value of this property at $42,750, and another such dealer fixed the market value at $42,500. There are also in evidence affidavits of other real estate dealers fixing the market value of the property at $37,500, at $39,500, and two at $40,000. One of the real estate dealers who placed the market value of the property at $40,000 subsequently, by letter, changed the amount to $50,000.

In addition to the amounts set forth in the decree and the interest thereon, there were unpaid real estate taxes for the years 1954, 1955, and 1956 in the amount of approximately $3,264.17, and court costs in the amount of $252.07.

The appellants have made no effort to either sell the property or to redeem it to pay this indebtedness.

The appellants complained that the sale was commenced at 2:06 p.m., June 18, 1957, and held open for a period of 13 minutes. The appellant Earl Coryell stated

that he had no notice of the sale until the morning of the day it was to be held.

The record shows that there were several people present at the time of the sale. The sheriff was selling other tracts of land. There was one bidder for this particular property.

In Cross v. Leidich, 63 Neb. 420, 88 N. W. 667, this court said: "The statute does not require that mortgage foreclosure sales shall be held open for any length of time."

As we view the record, on a trial de novo, the real estate sold for its fair and reasonable value under the circumstances and conditions of the sale. We find no competent evidence that at a subsequent sale a greater amount would be realized.

The rule applicable to the instant case, as stated in Cole v. Madison, 140 Neb. 812, 2 N. W. 2d 115, is as follows: " 'An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.' Equitable Life Assurance Society v. Buck, 138 Neb. 203, 292 N. W. 605." See, also, Weir v. Smith, 135 Neb. 447, 282 N. W. 260.

The decree of the district court is affirmed, with leave granted appellants to redeem within 60 days from the issuance of the mandate.

AFFIRMED.

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Actions.

1. The nature of an action, whether legal or equitable, is determinable from its main object as disclosed by the averments of the pleading and the relief sought. *Roy v. Bladen School Dist. No. R-31* 170
2. Where land outside the district has been and is being damaged by a drainage district, an action for equitable relief and one for damages may be joined. *Armbruster v. Stanton-Pilger Drainage Dist.* 459

Adverse Possession.

1. The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years. *Ziemba v. Zeller* 419
   Worm v. Crowell 713
2. The payment of taxes is an element and circumstance which may be considered together with all of the other circumstances of the case with respect to the subject of adverse possession. *Ziemba v. Zeller* 419
3. Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party. *McDermott v. Boman* 429
4. The rules of recognition and acquiescence may be the means of determining the corner or boundary, but it is separate and distinct from establishment by adverse possession. *McDermott v. Boman* 429
5. Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of 10 consecutive years. *McDermott v. Boman* 429
6. The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. *McDermott v. Boman* 429
   Worm v. Crowell 713

7. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto. *McDermott v. Boman* 429
8. Adverse possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted. *Worm v. Crowell* 713
9. When a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will by adverse possession gain title to such land as may have been improperly enclosed with their own. *Worm v. Crowell* 713
10. If the adverse possession of the occupant is a continuation of the possession of a prior adverse possessor claiming title and such occupant claims title from such prior possessor, the possession of the occupant may be tacked to that of such prior possessor. *Worm v. Crowell* 713

Affidavits.

1. An affidavit of a litigant consisting of denials, general allegations, conclusions, arguments, and statements that would not be admissible in evidence is of no avail in opposition to a motion for a summary judgment. *Eden v. Klaas* 323
2. An affidavit opposing the rendition of a summary judgment to be effective must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein. *Eden v. Klaas* 323

Agency.

An undisclosed principal is bound by a simple contract made by an agent if it is within the scope of the agent's authority and in the course of his employment. *Boettcher v. Goethe* 363

Alteration of Instruments.

An alteration of a written instrument which neither varies its meaning nor alters its legal effect is an immaterial change and does not affect or invalidate it. *Strasser v. Ress* 858

Appeal and Error.

1. Instructions not complained of in such a way as to be reviewable in the Supreme Court will be taken as the law of the case. If, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments of error will not be sustained. *Wolfe v. Mendel* 16
2. Before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made. *Wolfe v. Mendel* 16
3. The question of the amount of damage is one solely for the jury. Its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Wolfe v. Mendel* 16
4. In a workmen's compensation case an appeal to the Supreme Court is considered and determined de novo upon the record. *Eschenbrenner v. Employers Mutual Casualty Co.* 32
5. When the court adequately 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. *Svoboda v. DeWald* 50
6. Where the evidence given on a former trial is not contained in the record under review, the Supreme Court cannot determine whether or not the judgment rendered was sustained by proper and sufficient evidence. *Vasa v. Vasa* 69
7. Rule for trial of equity case de novo stated. *Pike v. Triska* 104
   Sorensen Constr. Co. v. Broyhill 397
8. The action of the board in changing boundaries of school districts is the exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom the cause is triable de novo. *Roy v. Bladen School Dist. No. R-31* 170
9. If it does not appear from the record that an incorrect instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it, the giving of the instruction must be considered prejudicial error. *Raile v. Toews* 184
10. The function of assignments of error is to set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise the

Supreme Court of the issues which are submitted for decision. *Smallcomb v. Smallcomb* 191
Wieck v. Blessin 282
11. The rules of the Supreme Court do not contemplate nor authorize assignments of error to be made in appellant's reply brief. *Smallcomb v. Smallcomb* 191
12. Under statute and court rules, consideration of the cause on appeal is limited to errors assigned and discussed, except that the Supreme Court may, at its option, note a plain error not assigned. *Smallcomb v. Smallcomb* 191
Zych v. Zych 586
13. In error proceedings the findings and conclusions of a board of equalization, which acts judicially, have the weight and conclusiveness of the verdict of a jury. *Bitter v. City of Lincoln* 201
14. A failure or refusal of the district court to comply with statutory requirement, that before testifying the witness shall be sworn, may not be properly assigned as error if timely objection was not made thereto. *Danze v. Stange* 227
15. A timely objection at the trial to alleged improper conduct by a trial judge is a prerequisite to review thereof on appeal. *Danze v. Stange* 227
16. The alleged errors which may be considered on appeal are those that appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by timely objection. *Danze v. Stange* 227
17. In a criminal case, the Supreme Court may reverse a judgment of the district court in part and affirm in part where the legal part is severable from that which is illegal. *Beyl v. State* 260
18. In order that assignments of error as to the admission or rejection of evidence may be considered, appropriate reference must be made to the specific evidence against which objection is urged. *Wieck v. Blessin* 282
19. The Supreme Court may, at its option, note a plain error not assigned. *Redding v. State* 307
20. The Supreme Court will not, in an appeal, consider or determine the constitutionality of a statute unless it has been made an issue in the case in the trial court. *Lucas v. Board of Equalization* 315
21. Jurisdiction of an appeal in a workmen's compensation case is obtained by the Supreme Court by the

filing of a notice of appeal in the office of the clerk of the district court and depositing therein the docket fee required by law within the time prescribed. *Miller v. Peterson* 344

22. Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant nor operate to defeat the appeal. *Miller v. Peterson* 344

23. In a criminal action, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Small v. State* 381
Pribyl v. State 691
Reizenstein v. State 865

24. In a criminal case, the credibility of witnesses and the weight of the evidence are for the jury to determine. The verdict of the jury will not be disturbed by the Supreme Court unless it is clearly wrong. *Small v. State* 381
Konvalin v. State 842

25. Where it appears that the dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial. *Armbruster v. Stanton-Pilger Drainage Dist.* 459

26. Where, on the hearing of an error proceeding, it is disclosed that the record presents nothing but a moot question for the determination of the Supreme Court, ordinarily the proceeding will be dismissed or the judgment of the district court will be affirmed. *McFarland v. State* 487

27. The real parties in interest in a proceeding in error to reverse the action of a county superintendent in creating a new district or changing the boundaries of districts, other than in city, village, or Class III districts, are the petitioners who signed the petitions for change of boundaries or the creation of the new district. *Keedy v. Reid* 519

28. In a proceeding in error all real parties in interest must be made parties to the proceeding, either as plaintiffs in error or defendants in error. *Keedy v. Reid* 519

29. In order to sue or defend for the benefit of a class, appropriate allegations, supported by the record, must be set forth in the petition in error suffi-

cient to bring the representatives within the purview of statute authorizing class actions. *Keedy v. Reid* 519

30. In an error proceeding where all the real parties in interest are not made parties to the proceeding before the time for filing a petition in error expires, and objection is timely made, the right to a review is lost and the petition in error should be dismissed. *Keedy v. Reid* 519

31. The review by the district court of assessments made by the county assessor is limited to questions presented to the county board of equalization. *K-K Appliance Co. v. Board of Equalization* 547

32. Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. *Universal C. I. T. Credit Corp. v. Vogt* 611

33. The trial court should submit to the jury only such issues as find some support in the evidence. Where an issue is submitted without support in the evidence which is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed. *Strnad v. Mahr* 628

34. When an instruction correctly states the law and a litigant does not consider it sufficiently specific as it relates to the evidence adduced, it is the duty of counsel to request an instruction that will supply the omission. *Kroeger v. Safranek* 636

35. The Supreme Court can properly set aside a verdict for excessiveness where there is no evidence to sustain it, or where reasonable minds can come to no conclusion other than that the verdict is the result of passion and prejudice. *Kroeger v. Safranek* 636

36. On appeal, error will not be presumed, but must affirmatively appear from the record. *County of Dodge v. Christensen* 643

37. In the absence of a bill of exceptions it will be presumed that issues of fact raised by the pleadings were supported by the evidence and that such issues were correctly determined. *County of Dodge v. Christensen* 643

38. A question requiring an examination of the evidence will be disregarded in the absence of a bill of exceptions preserving the evidence. *County of Dodge v. Christensen* 643

39. In the absence of a valid bill of exceptions, the only issue that can be considered on appeal is the sufficiency of the pleadings to sustain the judgment. *County of Dodge v. Christensen* 643

40. In an equity case the presumption obtains that the trial court, in arriving at decision, considered only such evidence as was competent and relevant. The Supreme Court will not reverse the judgment in a case so tried because other evidence was admitted, if, upon a trial de novo, the court finds that a preponderance of competent and relevant evidence appearing in the record sustains the judgment. *Heider v. Kautz* 649

41. An affidavit used as evidence in the district court cannot be considered on an appeal of the cause to the Supreme Court unless it is offered in evidence in the trial court, and preserved in and made a part of the bill of exceptions. *Spidel Farm Supply, Inc. v. Line* 664

42. An affidavit used as evidence in the district court, filed in the office of the clerk of the court, and exhibited in the transcript is unimportant to a consideration and decision of an appeal in the cause to the Supreme Court. *Spidel Farm Supply, Inc. v. Line* 664

43. Where the method pointed out for securing jurors is disregarded and due and timely objection is made by a defendant in a criminal case, error will be presumed. *Pribyl v. State* 691

44. Where the method pointed out for securing jurors is disregarded and due and timely objection has not been made by a defendant in a criminal case, a reversal may not be had on account thereof in the absence of the appearance of prejudice. *Pribyl v. State* 691

45. When the refusal of the trial court to give a requested instruction is not alleged as error in the motion for a new trial, it may not be asserted as error in the Supreme Court on appeal. *Robinson v. Meyer* 706

46. For an error at law occurring at the trial to be considered by the Supreme Court, the alleged error must be properly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal. *Robinson v. Meyer* 706

47. The aggregate time allowed for the performance of any of the statutory steps in securing an allowance of a bill of exceptions will not be shortened, or advanced, by completing any of the steps enumerated in advance of the time limited by the statute. *Worm v. Crowell* 713
48. When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal 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. *Gustason v. Vernon* 745
49. Immaterial evidence which is admitted and which should have been stricken will not be regarded as prejudicial unless it fairly appears from the record that it could be calculated to mislead. *Peery v. State* 752
50. A statement made by a county attorney in the closing argument to which exception is taken must appear in the bill of exceptions, otherwise it does not become the subject of review. *Peery v. State* 752
51. An error proceeding in the district court and in the Supreme Court on appeal therefrom is ordinarily tried on the appropriate and relevant questions of law set out in the petition in error and appearing in the transcript. *School Dist. No. 49 v. Kreidler* 761
52. A final order made by a joint board of county superintendents may be reversed, vacated, or modified on petition in error filed in the district court for the county in which such board held the hearing and performed its judicial functions. *School Dist. No. 49 v. Kreidler* 761
53. A complete transcript of proceedings, containing the final orders rendered by a joint board of county superintendents in the county of its jurisdictional forum is sufficient when properly authenticated by the county superintendent who presided at the hearing. *School Dist. No. 49 v. Kreidler* 761
54. Error may be predicated on sufficiency or insufficiency of the evidence as a matter of law to affirm or reverse the finding and judgment of the court or tribunal from which error was prosecuted if all of the material, relevant evidence is properly presented in a bill of exceptions. *School Dist. No. 49 v. Kreidler* 761
55. When the record of proceedings before county superintendents discloses that the legal voters of the

districts involved have signed and filed proper petitions requesting creation of a new district from other districts or a change of boundaries thereof, such superintendents, acting multilaterally and not unilaterally, have jurisdiction and the mandatory duty to order the changes requested. *School Dist. No. 49 v. Kreidler* 761

56. An order of the district court directing a father to furnish a recognizance under the provisions of the Uniform Reciprocal Enforcement of Support Act will not be disturbed on appeal in the absence of a showing of an abuse of discretion by the trial court. *Rice v. Rice* 778

57. In an action at law, the credibility of witnesses and the weight of evidence are for the jury. Its verdict will not be disturbed by the Supreme Court unless it is clearly wrong as a matter of law. *Pueppka v. Iowa Mutual Ins. Co.* 781

58. In an action at law, disputed questions of fact are by the verdict of the jury resolved in favor of the prevailing party. In deciding an appeal the evidence and reasonable inferences therefrom are required to be considered most favorably to him. *Pueppka v. Iowa Mutual Ins. Co.* 781

59. A verdict so clearly wrong as to induce a belief by the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, must be vacated. *Pueppka v. Iowa Mutual Ins. Co.* 781

60. If material evidence has been disregarded by the jury which if considered in a proper manner requires a different conclusion than the one made by the jury, its verdict and the judgment thereon will be vacated on appeal. *Pueppka v. Iowa Mutual Ins. Co.* 781

61. Where the evidence is insufficient to justify a verdict or to sustain a judgment, the trial court or the Supreme Court on appeal should set the verdict and judgment aside, even though the evidence may be conflicting. *Pueppka v. Iowa Mutual Ins. Co.* 781

62. The function of assignments of error is to set out the issues presented on appeal and advise the appellee and the Supreme Court of the questions submitted for determination. *Backer v. City of Sidney* 816

63. In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of the Supreme Court require that appropriate reference be made to the specific evidence

against which objection is urged. *Backer v. City of Sidney* 816

64. Where the landowner's property is injured by virtue of the construction of a public improvement and the evidence fails to show any special benefits accruing to the landowner's property, the submission of the issue of special benefits to the jury constitutes prejudicial error. *Backer v. City of Sidney* 816

65. In granting a variation from the provisions of a zoning ordinance, the decision of a board of adjustment will not be disturbed on appeal unless it is found to be illegal, or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong. *Weber v. City of Grand Island* 827

66. In a criminal case, the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other documentary evidence for the inspection of defendant's counsel before trial. Error may be predicated only for an abuse of such discretion. *Reizenstein v. State* 865

67. The admissibility in evidence of illustrative experiments rests within the discretion of the trial court, and unless there is a clear abuse of discretion a judgment will not be reversed on account of the admission or rejection of such evidence. *Reizenstein v. State* 865

68. The determination of the competency of a child of tender years to testify rests largely in the sound discretion of the trial court. *Reizenstein v. State* 865

69. Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Reizenstein v. State* 865

70. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there was no satisfactory evidence that a higher bid could be obtained in the event of another sale. *First Federal Savings & Loan Assn. v. Coryell* 886

Attorney and Client.

1. A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the the administration of justice. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
2. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
3. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
4. An attorney, as an officer of the court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the courts. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
5. An attorney does not hold his office as a matter of grace and favor. The right which it confers upon him to appear for suitors is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
6. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
7. The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
8. The ethical standards relating to the practice of the law in this state are the canons of Professional Ethics of the American Bar Association and those

which may, from time to time, be approved by the Supreme Court. *State ex rel. Nebraska State Bar Assn. v. Richards* 80

9. Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
10. In granting a license to practice law it is on the implied understanding that a party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Fitzgerald* 212
11. The purpose of a disciplinary proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice. *State ex rel. Nebraska State Bar Assn. v. Fitzgerald* 212
12. Misconduct of an attorney, indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment. *State ex rel. Nebraska State Bar Assn. v. Fitzgerald* 212
13. The oath required by statute obligates lawyers taking the same to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe established standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar. *State ex rel. Nebraska State Bar Assn. v. Fitzgerald* 212
14. In general it may be stated that a conviction of a felony or misdemeanor involving moral turpitude, as such term is defined by the statutes, is conclusive evidence warranting disbarment. *State ex rel. Nebraska State Bar Assn. v. Fitzgerald* 212
15. The fee allowed for the service of an attorney for a wife in a divorce suit should be sufficient to adequately compensate for the service necessary to be performed. *Dwinnell v. Dwinnell* 566
16. On appeal in a divorce suit from the amount of the fee allowed to the wife for services rendered by her attorney, the Supreme Court will interfere

only to correct a patent injustice resulting from an allowance which is clearly excessive or insufficient. *Dwinnell v. Dwinnell* 566

17. A trial court, in the absence of statute, is not authorized to allow an attorney's fee to a county attorney for services rendered while acting in his official capacity. *Rice v. Rice* 778

Automobiles.

1. When a person enters an intersection of two streets or highways he is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. *Wolfe v. Mendel* 16

2. When a person fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way. The question of his contributory negligence in proceeding to cross the intersection is a jury question. *Wolfe v. Mendel* 16

3. Before a verdict can be properly directed, the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury. *Wolfe v. Mendel* 16

4. Where a person looks and does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury. *Wolfe v. Mendel* 16

5. Duty of two motorists approaching an intersection at or about the same time stated. *Wolfe v. Mendel* 16

6. To recover damages from a host for injuries received while riding in an automobile operated by the host, a guest must prove by a preponderance of the evidence the gross negligence relied upon, and that it was the proximate cause of the accident. *Werner v. Grabenstein* 231
Gustason v. Vernon 745

7. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty. *Werner v. Grabenstein* 231
Gustason v. Vernon 745

8. A finding of gross negligence is justified where host persists in negligent operation of motor vehicle

despite timely warning by guest. *Werner v. Grabenstein* 231
9. By statute, whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle is guilty of a crime to be known as motor vehicle homicide. *Pribyl v. Frank* 239
10. Where the evidence on a preliminary hearing on a charge of motor vehicle homicide shows the motor vehicle was being driven at a rate of speed greater than was reasonable and proper, or at a rate of speed in excess of the limit fixed by law where the accident occurred, and that the motor vehicle was being driven by the person charged, it is sufficient to hold such person for trial in the district court. *Pribyl v. Frank* 239
11. Duty of driver of motor vehicle stated. *Wieck v. Blessin* 282
12. Liability of owner of automobile kept for use and pleasure of his family stated. *Wieck v. Blessin* 282
13. The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery. *Wieck v. Blessin* 282
Eden v. Klaas 323
Barajas v. Parker 444
Fairchild v. Sorenson 667
14. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored automobile to exercise ordinary care to avoid an accident. *Barajas v. Parker* 444
15. It is the duty of the driver of an automobile on approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger. *Barajas v. Parker* 444
Fairchild v. Sorenson 667
16. The Legislature has the right to prescribe how the railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for the operation of motor vehicles for hire in intrastate commerce. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

17. Rule respecting liability under the doctrine of the last clear chance stated. *Larsen v. Omaha Transit Co.* 530
18. 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 was greater than was reasonable and prudent under the conditions then existing. *Coyle v. Stopak* 594
19. Although the evidence may be entirely circumstantial as to the rate of speed at which a motor vehicle was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence. Circumstances connected with an accident may be sufficient to overcome direct evidence. *Coyle v. Stopak* 594
20. A motor vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a motor vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. *Coyle v. Stopak* 594
21. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption. *Coyle v. Stopak* 594
22. An "emergency" is a sudden or unexpected happening or occasion calling for immediate action. *Coyle Stopak* 594
23. In order to justify a resort to the defense of sudden emergency there must be an absence of opportunity for mature deliberation. *Coyle v. Stopak* 594
24. The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it. *Coyle v. Stopak* 594
25. Compliance with the certificate of title and registration laws of the state where the contract was made and the motor vehicle was then located, by notation of the lien of a conditional sales contract on the certificate of title, generally gives such lien

priority over the rights of third persons acquired in another state after removal of the property thereto. *Universal C. I. T. Credit Corp. v. Vogt* 611
26. Rules announced in a prior case respecting gross negligence adhered to and followed. *Rahe v. Lewien* 625
27. A driver of an automobile about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Fairchild v. Sorenson* 667
28. It is the duty of a guest in an automobile driven by another to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances, and for failure so to do he is guilty of contributory negligence. *Fairchild v. Sorenson* 667
29. Duty of guest passenger in automobile stated. *Fairchild v. Sorenson* 667
30. In an action charging motor vehicle homicide the burden is on the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles. *Pribyl v. State* 691
31. In an action charging motor vehicle homicide the burden is on the State to prove that the unlawful acts were the proximate cause of the death. *Pribyl v. State* 691
32. Anyone with a knowledge of time and distance is a competent witness to give an estimate of the speed of a motor vehicle. *Pribyl v. State* 691
33. Motor vehicle homicide is a separate and distinct crime and so defined by statute. *Pribyl v. State* 691
34. In an action under the motor vehicle guest statute, a verdict should be directed for defendant only where the court can clearly say that the proof fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury. *Gustason v. Vernon* 745
35. Momentary inattention to the operation of a motor vehicle may not ordinarily amount to gross negligence. However, the continued or protracted voluntary failure of the operator to maintain a proper lookout may constitute gross negligence. *Gustason v. Vernon* 745

36. When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way. The question of his contributory negligence in proceeding to cross the intersection is a jury question. *Pupkes v. Wilson* 852

37. Where an automobile proceeding across a highway intersection had passed the center of the intersecting highway and was struck by an automobile approaching from its left, and it appears that no collision would have occurred if the approaching automobile had proceeded on its right-hand side, no justification being shown for the approaching automobile being to the left of the center of the highway, any negligence of the driver of the first automobile in failing to see the approach of the second is not a proximate cause of the accident. *Pupkes v. Wilson* 852

Bail.

1. The object of bail is to relieve the accused of imprisonment before his trial; to save the county the expense incident to his confinement before trial; to insure his attendance to answer the charge against him; and to guarantee that he will abide the judgment of the court. *State v. Honey* 494

2. If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law, or to procure his attendance in court, as the bond requires, the liability of the surety for the penalty of the bond becomes absolute and the bond should be forfeited. *State v. Honey* 494

3. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody the surety will undertake that the principal will appear personally to answer the charge made against him. The surety, upon failure of the principal to so appear, becomes the absolute debtor of the State for the amount of the bond. *State v. Honey* 494

4. The fact that the county attorney and sheriff of the county in which the principal in the bail bond was charged with the crime, when they were solicited by the surety, refrained from assisting it in its effort to secure the return of the principal from

another state to the one in which the charge was pending did not exonerate the surety on the bond. *State v. Honey* 494

5. The discretion to remit the penalty of a bail bond is committed to the district court and its exercise by that court will not be interfered with by the Supreme Court unless the action of the district court is arbitrary or capricious. *State v. Konvalin* 499

6. The authority given to the district court to remit a part or all of the penalty of a bail bond is a sound discretion to be exercised not arbitrarily or capriciously but with regard as to what is right and equitable under the circumstances. *State v. Konvalin* 499

7. The surety on a bail bond may at any time he elects before its breach relieve himself of all obligation by surrendering the principal on the bond to the court or the proper officer. *State v. Liakas* 503

8. The giving and acceptance of a bail bond and the release of the accused are effective to transfer his custody from the State to the surety who becomes the keeper or jailer of the accused by his selection and the dominance of the surety over the accused is a continuance of the original imprisonment. *State v. Liakas* 503

9. There is an implied covenant in the contract between the surety and the State that it will not interfere with the right of the surety to retain the principal in his custody or to discharge himself as bail by surrendering the principal in a legal manner in satisfaction and discharge of the bond. *State v. Liakas* 503

10. Generally, a surety on a bail bond is excused from liability and responsibility if performance of the obligation of the bond is made impossible in a legal sense by an act of God, of the public enemy, of the law, or of the obligee. *State v. Liakas* 503

11. A surety on a bail bond is discharged from further liability if the sovereignty whose jurisdiction first attaches surrenders the accused, who is the principal on the bond, to another sovereignty. *State v. Liakas* 503

12. The doctrine of strict construction prevails concerning the liability of a surety on a bail bond. He cannot be subjected to liability beyond the strict scope of his engagement. *State v. Liakas* 503

13. Once a surety is discharged, liability cannot be revived without his consent. *State v. Liakas* 503

Boundaries.

1. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Ziemba v. Zeller* 419
2. Where a stream which is a boundary from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary, and the boundary remains as it was in the center of the old channel, although no water may be flowing therein. *Ziemba v. Zeller* 419
3. If the change in the stream is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel has been formed, the original thread of the stream continues to mark the limits of the two estates. *Ziemba v. Zeller* 419
4. The rule of recognition and acquiescence may be the means of determining the corner or boundary, but it is separate and distinct from establishment by adverse possession. *McDermott v. Boman* 429
5. Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of 10 consecutive years. *McDermott v. Boman* 429
6. Where an island in a nonnavigable stream has been separately surveyed, platted, and deeded by government patent and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center of the thread of each surrounding channel. *Heider v. Kautz* 649
7. The thread or center of a channel is the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow. *Heider v. Kautz* 649
8. The title and possession of land formed by accretion follows the ownership of the riparian lands to which it is attached. *Heider v. Kautz* 649
9. Generally, where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the shores opposite to the island is in other owners, the same riparian rights

appertain to the island as to the mainland. *Heider v. Kautz* 649

10. When, by gradual erosion, a river becomes the boundary of land the owner thereof then becomes a riparian owner and is entitled to all accretions thereto. *Worm v. Crowell* 713

11. When a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will by adverse possession gain title to such land as may have been improperly enclosed with their own. *Worm v. Crowell* 713

Cancellation of Instruments.

A deed to valuable land, if procured for no consideration by fraudulent misstatements of facts, may be canceled in equity where the circumstances are such that the grantor was justified in relying on the statements and did so in good faith. *Chambers v. Martin* 482

Carriers.

1. The powers and duties of the railway commission under the Constitution, in the absence of specific legislation, include the regulation of rates, service, and general control of common carriers. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

2. The Legislature by specific legislation may prescribe the powers which the railway commission may exercise over the regulation of rates, service, and general control of common carriers. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

3. An action for injunctive relief by an interested party may properly be maintained against a party who is engaged in intrastate commerce as a common carrier under a void certificate of public convenience and necessity. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

4. The operation by a party as a common carrier under a void certificate of public convenience and necessity in the area of one holding a valid certificate is the invasion of a property right of the holder of the valid certificate. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

Conspiracy.

1. In a charge of conspiracy, the State is required to prove an unlawful conspiracy to commit a felony or to defraud the State, and the doing by one or more of the conspirators of an overt act to effect the objects of the conspiracy. *Beyl v. State* 260
2. Where the overt act tends to establish a scheme or plan to commit a felony or to defraud the State, they may be properly shown as evidence of a pre-existing unlawful conspiracy. *Beyl v. State* 260

Constitutional Law.

1. The Supreme Court will not, in an appeal, consider or determine the constitutionality of a statute unless it has been made an issue in the case in the trial court. *Lucas v. Board of Equalization* 315
2. The right to maintain an action for recovery of damages based upon Article I, section 21, of the Constitution, is not dependent upon whether or not a claim for damages has been filed by the person whose property is taken or damaged. *Armbruster v. Stanton-Pilger Drainage Dist.* 459
3. For the taking or damaging of property outside the boundaries of a drainage district, liability attaches under Article I, section 21, of the Constitution, and notice to the drainage district pursuant to statute is not a condition precedent to the maintenance of an action for damages. *Armbruster v. Stanton-Pilger Drainage Dist.* 459

Contempt.

1. A contempt proceeding in a civil case is really but an incident to the principal cause, and all the papers relating to it should be filed with the other papers in the case. *McFarland v. State* 487
2. A criminal contempt is one that has for its purpose the preservation of the power and the vindication of the dignity of courts, and to punish for the disobedience of their orders. Such a contempt is criminal and punitive in its nature, and is affected with the public interest. *McFarland v. State* 487
3. A civil contempt has for its purpose the preservation and enforcement of the rights of private parties, and to compel obedience to orders and decrees made to enforce private rights to which the court has found them to be entitled. Such a contempt is remedial and coercive in its nature, and affects the

parties whose private rights and remedies are involved. *McFarland v. State* 487

4. Where a party to an action fails to obey an order of the court, made for the benefit of the opposing party, the rule is well recognized that such act is, ordinarily, a civil contempt. *McFarland v. State* 487

Continuances.

The denial of an application for a continuance may not be regarded as error unless it appears that the rights of the party making the application have been prejudiced thereby. *Vasa v. Vasa* 69

Contracts.

1. The consideration for a contract may be a benefit to the promisor or a detriment to the promisee. In order for a detriment to the promisee to constitute a valid consideration for a contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. *Pike v. Triska* 104
2. Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement thereof. *Pike v. Triska* 104
3. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Pike v. Triska* 104
4. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are in the eyes of the law one instrument, and will be read and construed together as if they were as much one in form as they are in substance. *Pike v. Triska* 104
5. The practical interpretation given a 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. *Pike v. Triska* 104
6. A promise which the promisor should reasonably expect to induce action or forebearance of a definite

and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. *Kucera v. Kavan* 131

7. Oral negotiations between the parties preceding the execution of a written instrument are regarded as merged in it and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it. *Boettcher v. Goethe* 363

8. Contracts must receive a reasonable construction, so as to give effect to the intention of the parties thereto and to carry out, rather than defeat, the purpose for which they were executed. *Southwestern Truck Sales & Rental Co. v. Johnson* 407

9. When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law. *Southwestern Truck Sales & Rental Co. v. Johnson* 407

10. A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done. *Exstrum v. Union Cas. & Life Ins. Co.* 554

Corporations.

1. Before any state can subject a foreign corporation to the jurisdiction of that state such corporation must have either expressly consented to such jurisdiction or must have done sufficient business therein to constitute a submission to such jurisdiction. *Brown v. Globe Laboratories, Inc.* 138

2. No all-embracing rule can be laid down as to just what constitutes the doing of sufficient business in a state by a foreign corporation in order to subject it to process of that jurisdiction. Each case must necessarily be determined by its own facts. *Brown v. Globe Laboratories, Inc.* 138

3. A sales manager of a foreign corporation is a managing agent upon whom service of process on the corporation can be made. *Brown v. Globe Laboratories, Inc.* 138

Courts.

1. Judicial records or papers should not be removed from the place where they belong except for good and sufficient reasons, and no person has a right

to remove them without permission of the court. *State ex rel. Nebraska State Bar Assn. v. Richards* 80

2. The court may, however, grant permission to remove papers from the records, this being a matter within the discretion of the court both as to the removal and as to the terms and conditions on which the permission shall be granted. *State ex rel. Nebraska State Bar Assn. v. Richards* 80

3. There may be circumstances in which it is not only proper but the duty of the court to deny an application to remove papers from the files. *State ex rel. Nebraska State Bar Assn. v. Richards* 80

4. Comity is the doctrine under which contracts made, rights acquired, and obligations incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition thereof. *Universal C. I. T. Credit Corp. v. Vogt* 611

5. A certificate made by the judge or clerk of the county court as to a conviction for violation of any law relating to the operation of motor vehicles is not required to be attested by the seal of the county court. *Strasser v. Ress* 858

Criminal Law.

1. A conviction may rest on the uncorroborated evidence of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Leistritz v. State* 220

2. An instruction which does not purport to set out all the essential elements of an offense will not be held to be prejudicially erroneous when by another instruction the whole case is properly covered and the essential elements necessary to be established are set out, and when there is no inconsistency in the two instructions. *Leistritz v. State* 220

3. Subnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question. *Washington v. State* 275

4. Evidence of the condition of the mind of the accused at the time of a crime is admissible to show absence of any deliberate or premeditated design. *Washington v. State* 275

5. A criminal statute without a penalty clause is of no force and effect. *Redding v. State* 307
6. Where a penal statute fails to provide a penalty, it is beyond the power of a court to prescribe a penalty. *Redding v. State* 307
7. A criminal statute which fails to provide a penalty cannot constitute the basis for an unlawful act in a charge of manslaughter. *Redding v. State* 307
8. The unlawful act required by the manslaughter statute does not necessarily require proof of a violation of a criminal statute. *Redding v. State* 307
9. Evidence of the identity of an accused is admissible where a witness has had a reasonable opportunity to observe him. The probative value of such evidence is a question for the jury. *Small v. State* 381
10. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt. *Small v. State* 381
11. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, an alleged crime. If the facts which the evidence tends to establish cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Small v. State* 381
12. The unsupported testimony of the accused in a criminal case, which the jury does not believe, can not be said to furnish a hypothesis consistent with the innocence of the accused. *Small v. State* 381
13. In a criminal prosecution any testimony otherwise competent which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Small v. State* 381
14. In a criminal action, the Supreme Court will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Small v. State* 381
Pribyl v. State 691
Reizenstein v. State 865

15. In a criminal case, the credibility of witnesses and the weight of the evidence are for the jury to determine. The verdict of the jury will not be disturbed by the Supreme Court unless it is clearly wrong. *Small v. State* 381
Konvalin v. State 842
16. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything of which a verbal description by a witness is competent and relevant. *Pribyl v. State* 691
17. Where a photograph illustrates or makes clear some controverted issue in the case, it may properly be received in evidence even though it may present a gruesome spectacle. *Pribyl v. State* 691
18. The segregation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court. *Pribyl v. State* 691
19. A county attorney is not prohibited from becoming a witness in a criminal action. *Pribyl v. State* 691
20. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony. *Pribyl v. State* 691
21. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Pribyl v. State* 691
22. Where the punishment of an offense created by statute is left to the discretion of a court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion. *Pribyl v. State* 691
23. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. *Peery v. State* 752
24. In a criminal case, the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written confessions, statements, and other documentary evidence for the inspection of defendant's counsel before trial. Error may be predicated only for an abuse of such discretion. *Reizenstein v. State* 865
25. The admissibility of statements of a deceased as dying declarations to which objections have been made is a question of law for determination by

the court in the light of the facts and circumstances disclosed. *Reizenstein v. State* 865

26. A witness who remained with a deceased a considerable period of time before death, heard him talk, witnessed his demeanor, and had an opportunity for reaching a correct conclusion, may testify to his opinion or conclusion that the deceased was aware of impending death. *Reizenstein v. State* 865

27. A declaration is admissible in evidence as a part of the res gestae if it was made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which it was made. *Reizenstein v. State* 865

28. Elements essential to render statements admissible as res gestae detailed. *Reizenstein v. State* 865

29. Where a proper foundation has been laid, photographs of the person or body of a deceased may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon. *Reizenstein v. State* 865

30. It is not error for the court to refuse to give an instruction containing the following maxim, or one containing in substance: "He who speaks falsely on one point will speak falsely on all." *Reizenstein v. State* 865

31. One is conclusively presumed to intend the obvious and probable consequences of his voluntary act. *Reizenstein v. State* 865

Damages.

1. Where the defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, the judgment will not be reversed because no such instruction was given. *Wolfe v. Mendel* 16

2. Where an instruction does not prohibit or negative the computation of damages upon the basis of their present worth, it will not be assumed that the jury did not understand that it was to estimate the present value of future earnings lost. *Wolfe v. Mendel* 16

3. 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. *Wolfe v. Mendel* 16

4. The question of the amount of damage is one solely for the jury. Its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved. *Wolfe v. Mendel* 16

5. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. *Brown v. Globe Laboratories, Inc.* 138

6. In an action by the legal representative of a deceased brought in behalf of the widow or widower and next of kin, the trial court should submit to the jury the question of the amount of the pecuniary loss, if any, which the evidence, with reasonable certainty, shows they have suffered. *Wieck v. Blessin* 282

7. A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law. *Husak v. Omaha National Bank* 537

8. In an action for damages, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the sound discretion of the jury, and the courts are reluctant to interfere with a verdict so rendered. *Husak v. Omaha National Bank* 537

9. The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person. *Husak v. Omaha National Bank* 537

10. In an action for personal injury plaintiff may recover all the damages proximately caused by the tort under a general allegation of the gross amount of the damages caused, including damages for future pain and suffering. *Husak v. Omaha National Bank* 537

11. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the pecuniary loss suffered in the death of the head of a family. Ordinarily the value of ordinary services to the wife is left to the good judgment and common sense of the jury under the circumstances of each case. *Kroeger v. Safranek* 636

Death.

In an action by the legal representative of a deceased brought in behalf of the widow or widower and next of kin, the trial court should submit to the jury the question of the amount of the pecuniary loss, if any, which the evidence, with reasonable certainty, shows they have suffered. *Wieck v. Blessin* 282

Declaratory Judgments.

The use of a demurrer under the Uniform Declaratory Judgments Act is authorized. *Gottula v. Standard Reliance Ins. Co.* 1

Deeds.

1. Evidence that a deed was executed by the grantor understandingly and voluntarily cannot ordinarily be overcome by evidence relating to different occasions. *Pike v. Triska* 104
2. A deed to valuable land, if procured for no consideration by fraudulent misstatements of facts, may be canceled in equity where the circumstances are such that the grantor was justified in relying on the statements and did so in good faith. *Chambers v. Martin* 482
3. In the transfer of property by deed, the intention of the parties as determined from the whole instrument should govern. However, when the intention is obscure, uncertain, or ambiguous, resort may be had to subordinate rules of construction and permissible surrounding circumstances. *Gettel v. Hester* 573
4. In construing a reservation which is obscure, uncertain, or ambiguous, the intention of the parties is to be ascertained, if possible, and emphasis is given to a determination of what the grantor meant by the language of the reservation. *Gettel v. Hester* 573

Divorce.

1. A decree of divorce should only be granted when the evidence brings the case within the definition of the statute providing for such relief. *Birth v. Birth* 11
2. Corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts or conduct asserted as grounds for a divorce. *Birth v. Birth* 11
3. The district court may, after the term at which an order has been entered, for causes set forth in appli-

cable statute, set aside an order vacating a decree of divorce. *Vasa v. Vasa* 69
4. In an action for divorce it is ordinarily within the discretion of the court to allow or refuse to allow suit money and attorney's fees. *Vasa v. Vasa* 69
5. In a divorce action where a decree as to care, custody, and maintenance of minor children has been made, the court is without power and jurisdiction on its own motion to change the decree as to care, custody, and maintenance of such children unless the parties have entered an appearance or have been duly notified. *Vasa v. Vasa* 69
6. In awarding the custody of minor children in a divorce suit the primary concern of the court is the best interest and welfare of the children, having due regard for the rights of fit, proper, and suitable parents. *Smallcomb v. Smallcomb* 191
Dwinnell v. Dwinnell 566
7. Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody. *Smallcomb v. Smallcomb* 191
Dwinnell v. Dwinnell 566
8. Where the evidence in a divorce suit sustains a finding of cruelty, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by Supreme Court on appeal. *Dwinnell v. Dwinnell* 566
9. Where the evidence sustains a finding that a mother is not a suitable and fit person to have the care and custody of her minor children, a decree of the district court awarding the custody of such children to the father will not be disturbed on appeal where it is shown that he is a suitable and fit person to have their custody. *Dwinnell v. Dwinnell* 566
10. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court on review. *Dwinnell v. Dwinnell* 566
11. On appeal in a divorce suit from the amount of the fee allowed to the wife for services rendered by her attorney, the Supreme Court will interfere only to correct a patent injustice resulting from an allow-

ance which is clearly excessive or insufficient. *Dwinnell v. Dwinnell* 566

12. By statute, judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered. *Spencer v. Spencer* 675
13. An unqualified allowance of alimony in gross survives the death of the husband. *Spencer v. Spencer* 675
14. A father's obligation under a divorce decree to pay a stated sum per month for the support of his minor children until the youngest child becomes of age or the children become self-supporting, or until the further order of the court, survives the father's death. *Spencer v. Spencer* 675

Drains.

For the taking or damaging of property outside the boundaries of a drainage district, liability attaches under Article I, section 21, of the Constitution, and notice to the drainage district pursuant to statute is not a condition precedent to the maintenance of an action for damages. *Armbruster v. Stanton-Pilger Drainage Dist.* 459

Eminent Domain.

1. The right to maintain an action for recovery of damages based upon Article I, section 21, of the Constitution, is not dependent upon whether or not a claim for damages has been filed by the person whose property is taken or damaged. *Armbruster v. Stanton-Pilger Drainage Dist.* 459
2. General and special benefits in an eminent domain proceeding are defined. *Backer v. City of Sidney* 816
3. Where a landowner's property is injured by virtue of the construction of a public improvement and the evidence fails to show any special benefits accruing to the landowner's property, the submission of the issue of special benefits to the jury constitutes prejudicial error. *Backer v. City of Sidney* 816

Equity.

1. Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid

unnecessary litigation. *Armbruster v. Stanton-Pilger Drainage Dist.* 459

2. A court of equity will leave parties in pari delicto where it finds them. However where one party is imposed upon, although participating in an illegal or fraudulent transaction, relief may be granted. *Chambers v. Martin* 482

3. It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties. *Gettel v. Hester* 573

Escrows.

1. Definition of an escrow made. *Pike v. Triska* 104

2. The grantor or obligor of an instrument held in escrow loses control over it although he retains legal title and its concomitants until performance of the conditions of the escrow contract by the grantee or obligee. *Pike v. Triska* 104

3. The grantor or obligor is not entitled to a return of the instrument or a revocation thereof unless the grantee or obligee fails to fully perform the conditions of the escrow contract and upon performance of such conditions the grantee or obligee is entitled to delivery of the instrument, which will be enforced by a decree of the court. *Pike v. Triska* 104

Estoppel.

A person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration. *Kucera v. Kavan* 131
Boettcher v. Goethe 363
Exstrum v. Union Cas. & Life Ins. Co. 554

Evidence.

1. Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true but are generally regarded as purely advisory in character. A jury may place whatever weight it may choose upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise unreasonable. *Brown v. Globe Laboratories, Inc.* 138

2. A conviction may rest on the uncorroborated evidence of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Leistritz v. State* 220
3. In order that assignments of error as to the admission or rejection of evidence may be considered, appropriate reference must be made to the specific evidence against which objection is urged. *Wieck v. Blessin* 282
4. The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement, the effect of which would be to vary, alter, or contradict the terms of a written agreement. *A-1 Finance Co., Inc. v. Nelson* 296
5. Statements by an injured person as to the cause of an injury and the circumstances attending its occurrence, made to a physician so long thereafter as not to be a part of the res gestae, are not ordinarily admissible since they are a narration of a past event and hearsay. *Redding v. State* 307
6. In a proper case a physician may testify to the injured person's narrative of the history of the injury, which was necessary for the purpose of diagnosis and treatment, where the statements are a part of the description of the injury and separable from the patient's complaint with respect thereto. *Redding v. State* 307
7. Oral negotiations between the parties preceding the execution of a written instrument are regarded as merged in it and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it. *Boettcher v. Goethe* 363
8. A person of ordinary intelligence who first qualifies himself to speak upon the subject by showing that he has had opportunity for personal observation may give opinion testimony as to a person's identity from any fact that leads him to believe that he knows the identity of the person in question. *Small v. State* 381
9. A witness may base his conclusion of the identity of a person upon the form, size, manner, walk, tone of voice, or any mark or peculiarity of the person, rather than upon a view of his features. *Small v. State* 381
10. Evidence of the identity of an accused is admissible where a witness has had a reasonable opportunity to

observe him. The probative value of such evidence is a question for the jury. *Small v. State* 381
11. The positive testimony of one credible witness, identifying the defendant as the perpetrator of the crime of robbery, may be sufficient to support a conviction. *Small v. State* 381
12. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt. *Small v. State* 381
13. In a criminal prosecution any testimony otherwise competent which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Small v. State* 381
14. Where there is no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. *Sorensen Constr. Co. v. Broyhill* 397
15. A record of an act, condition, or event is, insofar as relevant, competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it is made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. *Sorensen Constr. Co. v. Broyhill* 397
16. In an action on quantum meruit for services rendered, evidence of stated rates is competent evidence tending to show value. *Sorensen Constr. Co. v. Broyhill* 397
17. A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. *Southwestern Truck Sales & Rental Co. v. Johnson* 407
18. Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such

testimony may be considered as a judicial admission. That rule has particular application where the party so testifying made no effort to retract, qualify, or otherwise explain the positive force of his own evidence. *Southwestern Truck Sales & Rental Co. v. Johnson* 407

19. To justify the overturning of a verdict supported by direct testimony on the ground that it is in conflict with natural laws or some established principle of mathematics, mechanics, physics, or the like, the indisputable physical facts must demonstrate beyond question that the supporting evidence is false and that the verdict is in fact without evidentiary support. *Kroeger v. Safranek* 636

20. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. *Kroeger v. Safranek* 636

21. A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything of which a verbal description by a witness is competent and relevant. *Pribyl v. State* 691

22. Where a photograph illustrates or makes clear some controverted issue in the case, it may properly be received even though it may present a gruesome spectacle. *Pribyl v. State* 691

23. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony. *Pribyl v. State* 691

24. It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. *Pribyl v. State* 691

25. Rule for admission in evidence of ancient documents stated. *Worm v. Crowell* 713

26. An ancient map made under the direction of a private person, or one for which no official authorization or recognition appears, is inadmissible in evidence. *Worm v. Crowell* 713

27. An ancient survey made by competent authority, recorded or accepted as a public document, and produced from proper custody, is admissible in evidence to prove the location of boundary lines. *Worm v. Crowell* 713

28. An ancient survey which appears to have been made for a private purpose, and not officially authorized

or recognized, is inadmissible as an ancient document. *Worm v. Crowell* 713
29. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. *Peery v. State* 752
30. Evidence of possession of a revolver a short time after it was stolen is admissible as a circumstance to prove that it was stolen by the person in whose possession it was found. *Peery v. State* 752
31. Immaterial evidence which is admitted and which should have been stricken will not be regarded as prejudicial unless it fairly appears from the record that it could be calculated to mislead. *Peery v. State* 752
32. The admissibility of statements of a deceased as dying declarations to which objections have been made is a question of law for determination by the court in the light of the facts and circumstances disclosed. *Reizenstein v. State* 865
33. A witness who remained with a deceased a considerable period of time before death, heard him talk, witnessed his demeanor, and had an opportunity for reaching a correct conclusion, may testify to his opinion or conclusion that the deceased was aware of impending death. *Reizenstein v. State* 865
34. A declaration is admissible in evidence as a part of the res gestae if it was made at such a time and under such circumstances as to raise a presumption that it was the unpremeditated and spontaneous explanation of the matter about which it was made. *Reizenstein v. State* 865
35. Elements essential to render statements admissible as res gestae detailed. *Reizenstein v. State* 865
36. Where a proper foundation has been laid, photographs of the person or body of a deceased may ordinarily be received in evidence for purposes of identification, or to show the condition of the body, or to indicate the nature or extent of wounds or injuries thereon. *Reizenstein v. State* 865
37. When a fact in issue may be explained by the production of an article or object to which testimony relates, it is proper to produce such object or article and exhibit it to the jury. *Reizenstein v. State* 865
38. The admissibility in evidence of illustrative experiments rests within the discretion of the trial court, and unless there is a clear abuse of discretion a judgment will not be reversed on ac-

count of the admission or rejection of such evidence. *Reizenstein v. State* 865

39. Evidence of a course of hostility before and extending down to the commission of a homicide is admissible in evidence. *Reizenstein v. State* 865

Executions.

A creditor, by the levy of an execution, acquires no greater rights in the property levied upon than the judgment debtor had at the time of the seizure. *Universal C. I. T. Credit Corp. v. Vogt* 611

Extradition.

1. The Governor of a state is obliged by the Constitution of the United States to have delivered to the executive authority of any state of the United States any person charged in the latter state with a crime who is a fugitive from justice and is in the former state. *State v. Liakas* 503
2. However, if at the time a requisition is made the fugitive is in the custody of the court of the asylum state under a charge of offense against its laws, the Governor thereof is not required and cannot be compelled to surrender the fugitive until the laws of that state are satisfied. *State v. Liakas* 503
3. The Governor of the asylum state may honor a request for extradition and surrender the fugitive to a sister state in which event the asylum state waives its jurisdiction over the fugitive. *State v. Liakas* 503

False Pretenses.

To support a conviction for obtaining money or property by false pretenses, the State must adduce competent evidence that the owner relied upon such representations believing them to be true, and was induced thereby to part with his money or property. *Beyl v. State* 260

Fraud.

1. Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth and not suppress facts within his knowledge or materially qualify them. Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if

used to create an impression substantially false. *State ex rel. Nebraska State Bar Assn. v. Richards* 80
2. Degree of proof required to set aside a written instrument stated. *Pike v. Triska* 104
3. In an action based on fraud, the effect of a confidential or fiduciary relationship with respect to the burden of proof stated. *Pike v. Triska* 104
4. A confidential relation exists between two persons if one has gained the confidence of the other and purports to act or advise with the interest of the other in mind. *Boettcher v. Goethe* 363
5. The asking of a certain price for an item of property is not a representation of its value. *Boettcher v. Goethe* 363
6. A representation to be fraudulent must be made either with knowledge of its falsity or without such knowledge as a positive statement of a known fact. *Boettcher v. Goethe* 363
7. Fraud must relate to a present or preexisting fact and may not be generally predicated on a representation concerning an event in the future or acts to be done in the future. *Boettcher v. Goethe* 363
8. A court of equity will leave parties in pari delicto where it finds them. However where one party is imposed upon, although participating in an illegal or fraudulent transaction, relief may be granted. *Chambers v. Martin* 482

Frauds, Statute of.

1. A contract between an owner of real estate and an agent or broker authorized to sell the same is not binding upon the parties unless the contract is in writing and signed by both parties, and contains the description of the lands to be sold and the amount of compensation to be paid. *Svoboda v. DeWald* 50
2. Where a copy of a purchase agreement is relied upon to meet the requirements of the statute of frauds, it must be shown that the parties had knowledge that the necessary elements of a valid agreement were contained in the copy when it was signed by the carbon tracing and thus executed, and that it was so signed with the intention of making a valid contract. *Svoboda v. DeWald* 50
3. Whether or not a defendant knew that he was executing an agreement meeting the requirements of the statute of frauds when he attached his signature to

an original purchase agreement, the written agreement sued on being contained in the carbon copies thereof, presents a question for a jury where the evidence is in conflict. *Svoboda v. DeWald* 50

Habeas Corpus.

1. The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings. *Pribyl v. Frank* 239
2. Where a person stands charged with a criminal offense and seeks discharge therefrom by writ of habeas corpus, which writ is denied, he is not entitled to have the trial on the criminal charge delayed until an appeal from the denial of the writ of habeas corpus has been ultimately determined. *Pribyl v. State* 691

Highways.

1. When a person enters an intersection of two streets or highways he is obligated to look for approaching automobiles and to see those within that radius which denotes the limit of danger. *Wolfe v. Mendel* 16
2. A motor vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a motor vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. *Coyle v. Stopak* 594
3. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption. *Coyle v. Stopak* 594

Homicide.

1. By statute, whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle is guilty of a crime to be known as motor vehicle homicide. *Pribyl v. Frank* 239
2. Where the evidence on a preliminary hearing on a charge of motor vehicle homicide shows the motor vehicle was being driven at a rate of speed greater than was reasonable and proper, or at a rate of

speed in excess of the limit fixed by law where the accident occurred, and that the motor vehicle was being driven by the person charged, it is sufficient to hold such person for trial in the district court. *Pribyl v. Frank* 239

3. Feebleness of mind or will, even though not so extreme as to justify a finding that a defendant is irresponsible, may properly be considered by a jury in determining whether a homicide has been committed with a deliberate and premeditated design to kill. *Washington v. State* 275
4. A criminal statute which fails to provide a penalty cannot constitute the basis for an unlawful act in a charge of manslaughter. *Redding v. State* 307
5. The unlawful act required by the manslaughter statute does not necessarily require proof of a violation of a criminal statute. *Redding v. State* 307
6. In an action charging motor vehicle homicide the burden is on the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle in violation of one or more of the statutory provisions relating to the operation of motor vehicles. *Pribyl v. State* 691
7. In an action charging motor vehicle homicide the burden is on the State to prove that the unlawful acts were the proximate cause of the death. *Pribyl v. State* 691
8. Motor vehicle homicide is a separate and distinct crime and so defined by statute. *Pribyl v. State* 691
9. Negligence or gross negligence is not an element of the crime of motor vehicle homicide. *Pribyl v. State* 691
10. Evidence of a course of hostility before and extending down to the commission of a homicide is admissible in evidence. *Reizenstein v. State* 865

Husband and Wife.

1. In an action by plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. *Wieck v. Blessin* 282
2. The law does not provide any positive, definite mathematical formula or legal rule by which a jury

shall fix the pecuniary loss suffered in the death of the head of a family. Ordinarily the value of ordinary services to the wife is left to the good judgment and common sense of the jury under the circumstances of each case. *Kroeger v. Safranek* 636

3. The negligence of a husband while driving his automobile with his wife as his guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger and in failing to protest against unsafe driving by him. *Fairchild v. Sorenson* 667

Idem Sonans.

The doctrine of idem sonans has been modified or enlarged to conform to the rule that a variance in names to be material must be such as has misled a person to his prejudice. *Strasser v. Ress* 858

Indictments and Informations.

1. When words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements of the offense, they may be treated as surplusage and entirely disregarded. *Leistritz v. State* 220

2. The allegation in an information charging cattle stealing that the animal alleged to have been stolen had a specific value is surplusage and does not have the effect of changing the charge from cattle stealing to grand or petit larceny. *Leistritz v. State* 220

Infants.

A child of the tender age of 4 years and approximately 7 months is legally incapable of committing a willful and intentional act of destroying property. *Connors v. Pantano* 515

Injunctions.

An action for injunctive relief by an interested party may properly be maintained against a party who is engaged in intrastate commerce as a common carrier under a void certificate of public convenience and necessity. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

Installment Loans.

The design of the installment loan law is to license and control the business of making installment loans and to restrict the enforcement of collection of illegal loans once they have been made. *A-1 Finance Co., Inc. v. Nelson* 296

Insurance.

1. Where claim is outside the policy coverage, the refusal of the insurer to defend does not constitute a breach of contract. *Gottula v. Standard Reliance Ins. Co.* 1
2. Where an insurance policy obligates the insurer to defend all suits brought against the insured even though groundless, false, or fraudulent, the insurer is not liable to defend a suit based on a claim outside the coverage of the policy. *Gottula v. Standard Reliance Ins. Co.* 1
3. When the certificate delivered to an employee to certify that he is insured under a group or master policy is executed by the same insurance company which issued the group policy, such policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each, together constitute the entire contract between the employee and the insurance carrier. *Exstrum v. Union Cas. & Life Ins. Co.* 554
4. When the certificate delivered to an employee to certify that he is insured under a group or master policy is not revoked, recalled, or canceled by the insurance carrier, and proof of death is made by the beneficiary and all conditions precedent under the terms of the insurance contract are complied with, the insurance carrier is estopped to deny liability under the group insurance policy. *Exstrum v. Union Cas. & Life Ins. Co.* 554

Intoxicating Liquors.

A witness may give his opinion from observations made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor. *Pribyl v. State* 691

Judges.

1. A district judge has no inherent authority to act in chambers. He has in this regard only the juris-

diction given him by statute. *Krieger v. Schroeder* 657
2. There is no statutory authority in this state for a district judge in chambers to vacate or modify a judgment of the district court after the term at which it was rendered. *Krieger v. Schroeder* 657
3. The invalidity of an order made in chambers without statutory authorization does not result from procedural irregularity but from absence of jurisdiction. *Krieger v. Schroeder* 657

Judgments.
1. Where the evidence given on a former trial is not contained in the record under review, the Supreme Court cannot determine whether or not the judgment rendered was sustained by proper and sufficient evidence. *Vasa v. Vasa* 69
2. A general finding that judgment should be for a certain party warrants the conclusion that the court found in his favor all issuable facts. *Mueller v. Keeley* 243
3. An affidavit of a litigant consisting of denials, general allegations, conclusions, arguments, and statements that would not be admissible in evidence is of no avail in opposition to a motion for a summary judgment. *Eden v. Klaas* 323
4. An affidavit opposing the rendition of a summary judgment to be effective must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein. *Eden v. Klaas* 323
5. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. *Eden v. Klaas* 323
6. Summary judgment is effective and serves a separate useful purpose when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. *Eden v. Klaas* 323
7. If the undisputed facts conclusively establish in an action for negligence that plaintiff as a matter of law was guilty of contributory negligence more than slight when compared with the negligence of the defendant, a motion for summary judgment for

the defendant may properly be sustained. *Eden v. Klaas* 323

8. There is no statutory authority in this state for a district judge in chambers to vacate or modify a judgment of the district court after the term at which it was rendered. *Krieger v. Schroeder* 657
9. The invalidity of an order made in chambers without statutory authorization does not result from procedural irregularity but from absence of jurisdiction. *Krieger v. Schroeder* 657
10. All presumptions exist in favor of the regularity and correctness of a judgment of a court of general jurisdiction. The litigant who asserts the contrary is required to establish the claimed defect or error by an exhibition of the record. *Spidel Farm Supply, Inc. v. Line* 664
11. The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law. *Spidel Farm Supply, Inc. v. Line* 664
12. A judgment is the final determination of the rights of the parties in an action. *Spencer v. Spencer* 675
13. By statute, judgments and decrees for alimony or maintenance shall be liens upon the property of the husband, and may be enforced and collected in the same manner as other judgments of the court wherein they are rendered. *Spencer v. Spencer* 675
14. An unqualified allowance of alimony in gross survives the death of the husband. *Spencer v. Spencer* 675

Judicial Sales.

1. The doctrine of caveat emptor applies to all judicial sales in this state. *Universal C. I. T. Credit Corp. v. Vogt* 611
2. Mortgage foreclosure sales are not required to be held open for any length of time. *First Federal Savings & Loan Assn. v. Coryell* 886
3. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there was no satisfactory evidence that a higher bid could be obtained in the event of another sale. *First Federal Savings & Loan Assn. v. Coryell* 886

Juries.

1. Where the method pointed out for securing jurors is disregarded and due and timely objection is made by a defendant in a criminal case, error will be presumed. *Pribyl v. State* 691
2. Where the method pointed out for securing jurors is disregarded and due and timely objection has not been made by a defendant in a criminal case, a reversal may not be had on account thereof in the absence of the appearance of prejudice. *Pribyl v. State* 691
3. By statute, the right to summon persons from bystanders or the body of the county, commonly referred to as talesmen, for jury service was made to depend upon necessity, which necessity is determinable by the judge presiding. *Pribyl v. State* 691

Larceny.

1. The allegation in an information charging cattle stealing that the animal alleged to have been stolen had a specific value is surplusage and does not have the effect of changing the charge from cattle stealing to grand or petit larceny. *Leistritz v. State* 220
2. When the animal alleged to have been stolen is killed as a means of making its theft possible, the crime of cattle stealing is established the same as if it was alive at the time of its asportation. *Leistritz v. State* 220
3. Evidence of possession of a revolver a short time after it was stolen is admissible as a circumstance to prove that it was stolen by the person in whose possession it was found. *Peery v. State* 752

Libel and Slander.

1. Slander of title is the false and malicious, oral or written, statement disparaging a person's title to real or personal property or some right of his causing him special damage. *Norton v. Kanouff* 435
2. An action for slander of title is governed by 1-year statute of limitations governing libel and slander rather than 4-year statute respecting an action of trespass. *Norton v. Kanouff* 435
3. The 1-year statute of limitations applicable to actions for libel and slander is equally applicable to actions for slander of title. *Norton v. Kanouff* 435

Liens.

1. By statute, an old age assistance lien may be foreclosed either in the name of the county board of public welfare or in the name of the State Director of Public Welfare. *County of Dodge v. Christensen* 643
2. The State Director of Public Welfare is not a necessary party to the foreclosure of an old age assistance lien when the county board of public welfare is a party. *County of Dodge v. Christensen* 643

Limitations of Actions.

1. An action for slander of title is governed by 1-year statute of limitations governing libel and slander rather than 4-year statute respecting an action of trespass. *Norton v. Kanouff* 435
2. The 1-year statute of limitations applicable to actions for libel and slander is equally applicable to actions for slander of title. *Norton v. Kanouff* 435
3. The defense of the statute of limitations is a personal privilege of the debtor, and can be raised only by such debtor and those in privity with him. *Gurske v. Strate* 882

Mandamus.

Any private person may on his own relation sue out writs of mandamus without application to the prosecuting attorney. *McFarland v. State* 487

Marriage.

1. A common-law marriage is not valid in this state unless entered into prior to 1923. *Bourelle v. Soo-Crete, Inc.* 731
2. 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. *Bourelle v. Soo-Crete, Inc.* 731

Mechanic's Liens.

An action for foreclosure of a mechanic's lien must be commenced within 2 years after filing the lien. *Sorensen Constr. Co. v. Broyhill* 397

Mortgages.

1. The note is the principal or primary contract or obligation. The mortgage is an incident. In case of conflict, the terms of the note prevail. *A-1 Finance Co., Inc. v. Nelson* 296

2. Mortgage foreclosure sales are not required to be held open for any length of time. *First Federal Savings & Loan Assn. v. Coryell* 886

Municipal Corporations.

1. When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet. *Wolfe v. Mendel* 16
2. A finding by a board of equalization that lands were specially benefited to the full amount of the special assessment is tantamount to a finding that such benefits are equal and uniform, permitting the adoption and use of a zone formula. *Bitter v. City of Lincoln* 201
3. In the absence of a showing that special benefits found by a board of equalization to have accrued to property in an improvement district are excessive or unreasonable in amount, a finding by the board on the basis that paving has added to the value of the property a sum equal to the proportionate cost of the improvement is not so unreasonable as to render the assessment void. *Bitter v. City of Lincoln* 201
4. In the absence of legislation defining a method for ascertaining benefits to property accruing from a public improvement made by a municipality, any method of reaching a substantially just determination of the special benefits is permissible. *Bitter v. City of Lincoln* 201
5. The basis for a special assessment is benefit to the property affected by the public improvement made. An assessment may not be arbitrary or unreasonable but the law does not require that it correspond exactly to the benefit conferred on the property. Substantial and not precise accuracy is contemplated in the determination of special benefits. *Bitter v. City of Lincoln* 201
6. In making special assessments it is presumed that authorities arrived at the amounts thereof with reference alone to the benefits accruing to the property assessed and that the owners are required to contribute to the cost of the improvement only in proportion as their property is specially benefited thereby. *Bitter v. City of Lincoln* 201
7. There is a presumption of law that all real estate within an improvement district receives some degree of benefit from the paving of an alley therein. *Bitter v. City of Lincoln* 201

8. A property owner who attacks a special assessment as void has the burden of establishing its invalidity. *Bitter v. City of Lincoln* 201
9. In granting a variation from the provisions of a zoning ordinance, the decision of a board of adjustment will not be disturbed on appeal unless it is found to be illegal, or from the standpoint of fact it is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong. *Weber v. City of Grand Island* 827
10. The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity. *Weber v. City of Grand Island* 827
11. A city is a political subdivision of the state that has been created as a convenient agency for the exercise of the governmental powers by constitutional provision or legislative enactment. *Weber v. City of Grand Island* 827
12. A municipality has no inherent power to enact a zoning ordinance. Its authority to do so results from statutory or constitutional authorization. *Weber v. City of Grand Island* 827
13. The validity of zoning action or a zoning ordinance enacted to enforce same must be determined by the evidence of the special surrounding conditions and circumstances. *Weber v. City of Grand Island* 827
14. The courts will, in an appropriate action instituted for that purpose, declare invalid zoning action or a zoning ordinance where it clearly and satisfactorily appears that the action or ordinance is arbitrary and unreasonable or illegal. *Weber v. City of Grand Island* 827
15. The test of the validity of zoning action or a zoning ordinance stated. *Weber v. City of Grand Island* 827

Names.

The use of a name is to designate the person intended. That object is accomplished when the name given him has substantially the same sound and appearance as the true name. *Strasser v. Ress* 858

Negligence.

1. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. *Raile v. Toews* 184

2. It is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor. An employee of one contractor may recover against another contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee. *Raile v. Toews* 184

3. An issue concerning gross negligence must be decided upon the facts of each case. *Werner v. Grabenstein* 231
Gustason v. Vernon 745

4. An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions. *Werner v. Grabenstein* 231

5. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law. *Werner v. Grabenstein* 231
Gustason v. Vernon 745

6. To recover damages for injury received while riding in a motor vehicle, a guest must prove by the greater weight of the evidence in the case the gross negligence of the host and that it was the proximate cause of the accident and injury. *Werner v. Grabenstein* 231
Gustason v. Vernon 745

7. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty. *Werner v. Grabenstein* 231
Gustason v. Vernon 745

8. A finding of gross negligence is justified where host persists in negligent operation of motor vehicle despite timely warning by guest. *Werner v. Grabenstein* 231

9. In an action by plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant. *Wieck v. Blessin* 282

10. The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery. *Wieck v. Blessin* 282
Eden v. Klaas 232
Fairchild v. Sorenson 667
11. If the undisputed facts conclusively establish in an action for negligence that plaintiff as a matter of law was guilty of contributory negligence more than slight when compared with the negligence of the defendant, a motion for summary judgment for the defendant may properly be sustained. *Eden v. Klaas* 323
12. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence. *Frasier v. Gilchrist* 450
13. Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Frasier v. Gilchrist* 450
Larsen v. Omaha Transit Co. 530
14. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. *Frasier v. Gilchrist* 450
Strnad v. Mahr 628
15. A person who knowingly and of his own volition exposes himself to obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care. *Wisnieski v. Moeller* 476
16. Rule respecting liability under the doctrine of the last clear chance stated. *Larsen v. Omaha Transit Co.* 530
17. The violation of a safety regulation established by statute or ordinance is not negligence as a matter of law, but may be considered in connection with all of the other evidence in the case in deciding the issue of negligence. *Larsen v. Omaha Transit Co.* 530
18. 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. *Coyle v. Stopak* 594

19. Although the evidence may be entirely circumstantial as to the rate of speed at which a motor vehicle was operated, it may be sufficient to support a reasonable conclusion reached by the jury on the issue of negligence. Circumstances connected with an accident may be sufficient to overcome direct evidence. *Coyle v. Stopak* 594

20. Proximate cause is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Coyle v. Stopak* 594

21. An efficient, intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Coyle v. Stopak* 594

22. The causal connection is broken if between the defendant's negligent act and the plaintiff's injury there has intervened the negligence of a third person whose negligence was such as the defendant was not bound to anticipate and could not be said to have been contemplated, which later negligence resulted directly in the injury to the plaintiff. *Coyle v. Stopak* 594

23. 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. *Coyle v. Stopak* 594

24. An act done by another in normal response to fear or emotional disturbance to which the actor's negligent conduct is a substantial factor is not a superseding cause of harm done by the other's act to himself or a third person. *Coyle v. Stopak* 594

25. Rules announced in a prior case respecting gross negligence adhered to and followed. *Rahe v. Lewien* 625

26. Contributory negligence is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a prox-

imate cause or occasion of the injury of which complaint is made. *Strnad v. Mahr* 628

27. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject. *Strnad v. Mahr* 628

28. It is the duty of the driver of an automobile on approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger. *Fairchild v. Sorenson* 667

29. A driver of an automobile about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Fairchild v. Sorenson* 667

30. The negligence of a husband while driving his automobile with his wife as his guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger and in failing to protest against unsafe driving by him. *Fairchild v. Sorenson* 667

31. It is the duty of a guest in an automobile driven by another to use care in keeping a lookout commensurate with that of an ordinarily prudent person under like circumstances, and for failure so to do he is guilty of contributory negligence. *Fairchild v. Sorenson* 667

32. Duty of guest passenger in automobile stated. *Fairchild v. Sorenson* 667

33. Negligence or gross negligence is not an element of the crime of motor vehicle homicide. *Pribyl v. State* 691

34. In an action under the motor vehicle guest statute, a verdict should be directed for defendant only where the court can clearly say that the proof fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury. *Gustason v. Vernon* 745

35. Momentary inattention to the operation of a motor vehicle may not ordinarily amount to gross negligence. However, the continued or protracted voluntary failure of the operator to maintain a proper

lookout may constitute gross negligence. *Gustason v. Vernon* 745

36. When the driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way. The question of his contributory negligence in proceeding to cross the intersection is a jury question. *Pupkes v. Wilson* 852

37. Where an automobile proceeding across a highway intersection had passed the center of the intersecting highway and was struck by an automobile approaching from its left, and it appears that no collision would have occurred if the approaching automobile had proceeded on its right-hand side, no justification being shown for the approaching automobile being to the left of the center of the highway, any negligence of the driver of the first automobile in failing to see the approach of the second is not a proximate cause of the accident. *Pupkes v. Wilson* 852

New Trial.

1. To justify the granting of a new trial on the ground that the verdict is excessive, that fact must be plain and evident. *Kroeger v. Safranek* 636

2. An application for a new trial must be made within 10 days, either within or without the term, after the verdict, report, or decision was rendered. *County of Dodge v. Christensen* 643

3. The district court has an inherent power as a matter of judicial grace to consider assignments of error and to grant a new trial even though the motion was not made within the time required by statute. The inherent power of the court is limited to those situations where prejudicial error appears in the record of the proceedings. It expires with the term of court at which the judgment was rendered. *County of Dodge v. Christensen* 643

4. Objections to instructions in a motion for a new trial must be made separately to each instruction to which exception is taken. An objection to the instructions en masse is not sufficient. *Robinson v. Meyer* 706

5. The instructions to which exception is taken may be grouped together in a motion for a new trial and they will be deemed a separate exception to

each instruction in the group. The instructions objected to, however, must be specifically designated by number. *Robinson v. Meyer* 706

6. When the refusal of the trial court to give a requested instruction is not alleged as error in the motion for a new trial, it may not be asserted as error in the Supreme Court on appeal. *Robinson v. Meyer* 706

7. Rule of practice abrogated with respect to effect of single joint motion for a new trial. *Robinson v. Meyer* 706

Officers.

Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant nor operate to defeat the appeal. *Miller v. Peterson* 344

Parent and Child.

1. In determining the reasonableness of an order fixing the amount a father should pay for the support of his minor children it is proper to consider the property of the father, whatever be its nature, as well as his earning capacity. *Rice v. Rice* 778

2. An order of the district court directing a father to furnish a recognizance under the provisions of the Uniform Reciprocal Enforcement of Support Act will not be disturbed on appeal in the absence of a showing of an abuse of discretion by the trial court. *Rice v. Rice* 778

Parties.

1. It is not necessary that a dormant partner or a nominal partner be joined as a plaintiff if his nonjoinder does not in any way injure the defendant. *Brown v. Globe Laboratories, Inc.* 138

2. Where a contract is entered into and the subject matter thereof executed by a person in his own name, the fact that he is a member of a partnership does not make it necessary to join them as parties. *Brown v. Globe Laboratories, Inc.* 138

3. The real parties in interest in a proceeding in error to reverse the action of a county superintendent in creating a new district or changing the boundaries of districts, other than in city, village, or Class III districts, are the petitioners who signed the petitions

for change of boundaries or the creation of the new district. *Keedy v. Reid* 519
4. In a proceeding in error all real parties in interest must be made parties to the proceeding, either as plaintiffs in error or defendants in error. *Keedy v. Reid* 519
5. When the signers of petitions required by statute on reorganization of school districts have a common or general interest, where the signers are numerous, and it would be impracticable to bring all before the court, one or more may sue or defend for the benefit of all. *Keedy v. Reid* 519
6. In order to sue or defend for the benefit of a class, appropriate allegations, supported by the record, must be set forth in the petition in error sufficient to bring the representatives within the purview of statute authorizing class actions. *Keedy v. Reid* 519
7. In an error proceeding where all the real parties in interest are not made parties to the proceeding before the time for filing a petition in error expires, and objection is timely made, the right to a review is lost and the petition in error should be dismissed. *Keedy v. Reid* 519
8. By statute, an old age assistance lien may be foreclosed either in the name of the county board of public welfare or in the name of the State Director of Public Welfare. *County of Dodge v. Christensen* 643
9. The State Director of Public Welfare is not a necessary party to the foreclosure of an old age assistance lien when the county board of public welfare is a party. *County of Dodge v. Christensen* 643

Partnership.

1. It is not necessary that a dormant partner or a nominal partner be joined as a plaintiff if his nonjoinder does not in any way injure the defendant. *Brown v. Globe Laboratories, Inc.* 138
2. Where a contract is entered into and the subject matter thereof executed by a person in his own name, the fact that he is a member of a partnership does not make it necessary to join them as parties. *Brown v. Globe Laboratories, Inc.* 138

Pleading.

1. A general demurrer admits allegations of fact but does not admit conclusions of the pleader. *Gottula v. Standard Reliance Ins. Co.* 1

2. In passing on a demurrer to a petition, the court must consider an exhibit attached thereto and made a part thereof. *Gottula v. Standard Reliance Ins. Co.* 1
3. The use of a demurrer under the Uniform Declaratory Judgments Act is authorized. *Gottula v. Standard Reliance Ins. Co.* 1
4. Rule stated as to what is and what is not admitted by a general demurrer. *A-1 Finance Co., Inc. v. Nelson* 296
5. Exhibits attached to a petition are to be considered in passing on a demurrer to a petition. *A-1 Finance Co., Inc. v. Nelson* 296
6. An action on quantum meruit is properly pleaded when the petition alleges a right of recovery for the reasonable value of labor and materials for which there is an express or implied agreement to pay. *Sorensen Constr. Co. v. Broyhill* 397
7. A general demurrer admits all allegations of fact in a pleading to which it is addressed, which are issuable, relevant, material, and well pleaded, but it does not admit the pleader's conclusions of law or fact. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

Principal and Agent.

Duty of agent with respect to dealing on his own account stated. *Pike v. Triska* 104

Principal and Surety.

1. A surety on a bail bond is discharged from further liability if the sovereignty whose jurisdiction first attaches surrenders the accused, who is the principal on the bond, to another sovereignty. *State v. Liakas* 503
2. The doctrine of strict construction prevails concerning the liability of a surety on a bail bond. He cannot be subjected to liability beyond the strict scope of his engagement. *State v. Liakas* 503
3. Once a surety is discharged, liability cannot be revived without his consent. *State v. Liakas* 503

Process.

1. Before any state can subject a foreign corporation to the jurisdiction of that state such corporation must have either expressly consented to such jurisdiction or must have done sufficient business therein to constitute a submission to such jurisdiction. *Brown v. Globe Laboratories, Inc.* 138

2. No all-embracing rule can be laid down as to just what constitutes the doing of sufficient business in a state by a foreign corporation in order to subject it to process of that jurisdiction. Each case must necessarily be determined by its own facts. *Brown v. Globe Laboratories, Inc.* 138
3. A sales manager of a foreign corporation is a managing agent upon whom service of process on the corporation can be made. *Brown v. Globe Laboratories, Inc.* 138

Public Service Commissions.
1. The powers and duties of the railway commission under the Constitution, in the absence of specific legislation, include the regulation of rates, service, and general control of common carriers. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468
2. The Legislature by specific legislation may prescribe the powers which the railway commission may exercise over the regulation of rates, services, and general control of common carriers. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468
3. The Legislature has the right to prescribe how the railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for the operation of motor vehicles for hire in intrastate commerce. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468
4. The power of the railway commission to issue a certificate of public convenience and necessity is grounded on the filing of an application, the giving of notice to interested persons, and a hearing. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468
5. A certificate of public convenience and necessity issued without the filing of application therefor, the giving of notice to interested persons, and a hearing is void. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468
6. The operation by a party as a common carrier under a void certificate of public convenience and necessity in the area of one holding a valid certificate is the invasion of a property right of the holder of the valid certificate. *R. B. "Dick" Wilson, Inc. v. Hargleroad* 468

Reformation of Instruments.
1. It is unnecessary to secure a formal reformation

of a written instrument where it differs from the true agreement of the parties as it should have been expressed in the writing in order to enforce it or have the advantage of it as a defense. *Gurske v. Strate* 882

2. The reformation of an instrument has the effect of making it express the real intent of the parties. The rights of the parties are measured by the instrument as originally intended, and the effect of the reformation is to give all the parties all the rights to which they are equitably entitled under the instrument which they intended to execute. *Gurske v. Strate* 882
3. Upon the reformation of an instrument the general rule is that it relates back to, and takes effect from, the time of its original execution. *Gurske v. Strate* 882
4. The equity of reformation is superior to and operative against the demands of general creditors, and is not affected by the securing of a judgment and the levy of an execution by a general creditor. *Gurske v. Strate* 882

Robbery.

The positive testimony of one credible witness, identifying the defendant as the perpetrator of the crime of robbery, may be sufficient to support a conviction. *Small v. State* 381

Sales.

1. In order for an express warranty to exist there must be something positive and unequivocal concerning the thing sold which the vendee relies upon and which is understood by the parties as an absolute assertion concerning the thing sold, and not the mere expression of an opinion. *Brown v. Globe Laboratories, Inc.* 138
2. Representations which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty. Dealer's talk is permissible; and puffing, or praise of the goods by the seller, is not a warranty. *Brown v. Globe Laboratories, Inc.* 138
3. The Uniform Sales Act provides in effect that where the buyer 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 and judgment, there is an implied warranty that

the goods shall be reasonably fit for such purposes. *Brown v. Globe Laboratories, Inc.* 138
4. The fact that an article had a trade name does not necessarily negative the existence of an implied warranty for fitness for a particular purpose when it is purchased not by name but for a particular purpose. *Brown v. Globe Laboratories, Inc.* 138
5. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. *Brown v. Globe Laboratories, Inc.* 138
6. In a contract to sell or a sale of exactly described goods, there is no warranty of fitness for any particular or extraordinary purpose if the buyer does not rely upon the judgment or representation of the seller that the goods are fit for such particular or extraordinary purpose. *Mueller v. Keeley* 243
7. Whether or not the defects of a machine amount to a breach of warranty is ordinarily a question of fact where the evidence is conflicting or is reasonably susceptible of more than one inference. *Mueller v. Keeley* 243
8. Unless there is a definite condition to that effect, the buyer is not obliged, as a condition precedent to recovery on a warranty, to allow the seller to remedy defects. If, however, the contract so stipulates, no liability for a breach of warranty attaches until the seller has had an opportunity to remedy defects. *Mueller v. Keeley* 243
9. Under a conditional sales contract each party has certain property interests in the goods less than complete and absolute ownership. The right of the seller to collect the price is the principal thing; the reservation of title, the secondary thing. The reservation of title is not absolute but for the limited purpose of collecting the price. *Southwestern Truck Sales & Rental Co. v. Johnson* 407
10. The vendor under a conditional sales contract retains title solely for security; other attributes of ownership as possession, use, control, or right thereto under such a contract belong to the vendee. *Southwestern Truck Sales & Rental Co. v. Johnson* 407
11. In the absence of statute or of some provision in the contract to the contrary, a conditional seller of goods who repossesses the property sold may not thereafter recover the unpaid purchase money. The operation of the rule is not affected by the fact

that the retaking of the property was after suit had been commenced to enforce the payment of the purchase price. *Southwestern Truck Sales & Rental Co. v. Johnson* 407

12. It is not generally regarded as contrary to public policy to enforce the title reserved by the vendor in a conditional sales contract, valid by the law of another state in which the contract was made and the property was then located, as against purchasers in good faith from, or creditors of, the vendee. *Universal C. I. T. Credit Corp. v. Vogt* 611

13. Whether a sale of a chattel conditioned upon the retention of title by the vendor pending payment of the purchase price is legally effective depends upon the law of the place where the chattel was at the time of the sale. So the requirements of acknowledgment and registration applicable are those of the state of the situs of the chattel. *Universal C. I. T. Credit Corp. v. Vogt* 611

14. Compliance with the certificate of title and registration laws of the state where the contract was made and the motor vehicle was then located, by notation of the lien of a conditional sales contract on the certificate of title, generally gives such lien priority over the rights of third persons acquired in another state after removal of the property thereto. *Universal C. I. T. Credit Corp. v. Vogt* 611

Schools and School Districts.

1. The personnel of the board created to change school district boundaries is not a test of the judicial power of courts to review orders made by it, but rather the nature of the power exercised by that board. *Roy v. Bladen School Dist. No. R-31* 170

2. The action of the board in changing boundaries of school districts is the exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom the cause is triable de novo. *Roy v. Bladen School Dist. No. R-31* 170

3. By statute, it was the intention of the Legislature that the board in making its determination should predicate it upon educative interests of the petitioners and not on their mere personal preference based upon noneducational reasons. *Roy v. Bladen School Dist. No. R-31* 170

4. When the signers of petitions required by statute on reorganization of school districts have a common

or general interest, where the signers are numerous, and it would be impracticable to bring all before the court, one or more may sue or defend for the benefit of all. *Keedy v. Reid* 519

5. A final order made by a joint board of county superintendents may be reversed, vacated, or modified on petition in error filed in the district court for the county in which such board held the hearing and performed its judicial functions. *School Dist. No. 49 v. Kreidler* 761

6. A complete transcript of proceedings, containing the final orders rendered by a joint board of county superintendents in the county of its jurisdictional forum, is sufficient when properly authenticated by the county superintendent who presided at the hearing. *School Dist. No. 49 v. Kreidler* 761

7. By statute, the transfer of a child from or to a city or village school district, however classified, located wholly or partly within the boundaries of any city or village, is invalid and of no force and effect without written permission of the owner or owners in fee simple of the real estate involved in the transfer. *School Dist. No. 49 v. Kreidler* 761

8. When proper petitions are filed, it is the duty of the county superintendents to give proper notice of and hold a multilateral public hearing on a change of boundaries of school districts and at or after such hearing to factually determine whether or not such districts have lawfully petitioned for the same. *School Dist. No. 49 v. Kreidler* 761

9. When the record of proceedings before county superintendents discloses that the legal voters of the districts involved have signed and filed proper petitions requesting creation of a new district from other districts or a change of boundaries thereof, such superintendents, acting multilaterally and not unilaterally, have jurisdiction and the mandatory duty to order the changes requested. *School Dist. No. 49 v. Kreidler* 761

Specific Performance.

Specific performance should be granted as a matter of course of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where

the ends of justice will be subserved thereby. *Kucera v. Kavan* 131

Statutes.

1. In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *Roy v. Bladen School Dist. No. R-31* 170
2. In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute the courts must consider the preexisting law and any other laws relating to the same subject. *Roy v. Bladen School Dist. No. R-31* 170
3. Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions. *Roy v. Bladen School Dist. No. R-31* 170
4. In general, the word "may" will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory. *Roy v. Bladen School Dist. No. R-31* 170
5. 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. *A-1 Finance Co., Inc. v. Nelson* 296
6. The basic rule of statutory construction is to ascertain and give effect to the intention of the Legislature. *Conners v. Pantano* 515
7. It is a fundamental rule of statutory construction that the usual and ordinary meaning of words will be used in construing a statute. *Conners v. Pantano* 515
8. Where a statute is plain and certain in its terms, and free from ambiguity, a reading suffices, and no interpretation is needed or proper. *Connors v. Pantano* 515

Taxation.

1. In error proceedings the findings and conclusions of a board of equalization, which acts judicially,

have the weight and conclusiveness of the verdict of a jury. *Bitter v. City of Lincoln* 201
2. When an officer or assessing body values property for assessment purposes, it is presumed that the action taken was fair and impartial. *Lucas v. Board of Equalization* 315
3. If the assessor does not make an inspection of the property but accepts the valuation thereof fixed by a professional appraiser, the presumption in favor of the assessment does not obtain but the burden in such a case remains upon the protesting party to prove that the assessment was excessive. *Lucas v. Board of Equalization* 315
4. Burden imposed on complaining taxpayer in attacking valuation of assessor stated. *Lucas v. Board of Equalization* 315
5. 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 the officers were excessive or discriminatory when compared with values placed thereon by such witnesses. *Lucas v. Board of Equalization* 315
6. The exemption from taxation provided by Congress, in respect to payments of benefits to veterans by the government of the United States, does not extend to real estate purchased in part or wholly out of such payments. *Lucas v. Board of Equalization* 315
7. A person who claims that his property is not subject to taxation must show affirmatively the facts rendering it exempt. *Iota Benefit Assn. v. County of Douglas* 330
8. The property which is claimed to be exempt must come clearly within the provisions granting such exemption. *Iota Benefit Assn. v. County of Douglas* 330
9. In determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control. *Iota Benefit Assn. v. County of Douglas* 330
10. A property that is being used by members of a university or college fraternity as a home while attending such university or college is not being used exclusively for charitable or educational purposes within the intent and meaning of the Constitution and statutes of Nebraska granting exemption. *Iota Benefit Assn. v. County of Douglas* 330
11. The assessment of property for tax purposes is a

matter for the Legislature, whose power with respect thereto is plenary, except as limited by the Constitution. *Lynch v. Howell* 525

12. The assessment of property for tax purposes, as it generally relates to an ad valorem tax, includes the determination of the ownership, quantity, and value on the assessment date fixed by the Legislature. The assessment of property does not involve the power to tax. *Lynch v. Howell* 525

13. The power to tax is determinable as of the date the tax is levied. *Lynch v. Howell* 525

14. Where a valid assessment of property has been made and the property is within the limits of the municipal corporation imposing the tax on the date the tax is levied, the power to tax is generally held to exist. *Lynch v. Howell* 525

15. The review by the district court of assessments made by the county assessor is limited to questions presented to the county board of equalization. *K-K Appliance Co. v. Board of Equalization* 547

16. Where a taxpayer objects to the amount of the assessment of a stock inventory, the correctness of the inventory as well as the actual valuation placed upon it by the county assessor are issuable facts before the county board of equalization. *K-K Appliance Co. v. Board of Equalization* 547

17. All nonexempt property is subject to assessment for tax purposes in this state, including used and obsolete property having an actual value. *K-K Appliance Co. v. Board of Equalization* 547

18. Ordinarily the valuation of a county assessor for tax purposes will be presumed to be correct. The burden of proof rests upon the taxpayer to prove that an assessment is excessive. *K-K Appliance Co. v. Board of Equalization* 547

19. Where the evidence shows that an assessment by a county assessor was arbitrarily made, the assessment cannot be sustained. In such a situation the valuation becomes one of fact to be determined from the evidence, unaided by presumption. *K-K Appliance Co. v. Board of Equalization* 547

Torts.

1. A child of the tender age of 4 years and approximately 7 months is legally incapable of committing a willful and intentional act of destroying property. *Connors v. Pantano* 515

2. In an action for personal injury plaintiff may recover all the damages proximately caused by the tort under a general allegation of the gross amount of the damages caused, including damages for future pain and suffering. *Husak v. Omaha National Bank* 537

Trial.

1. Instructions not complained of in such a way as to be reviewable in the Supreme Court will be taken as the law of the case. If, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments of error will not be sustained. *Wolfe v. Mendel* 16
2. When a person fails to see an automobile not shown to be in a favored position, the presumption is that its driver will respect his right-of-way. The question of his contributory negligence in proceeding to cross the intersection is a jury question. *Wolfe v. Mendel* 16
3. Before a verdict can be properly directed, the position of the defendant's automobile must be definitely located in a favored position, otherwise the question becomes one for the jury. *Wolfe v. Mendel* 16
4. Where a person looks and does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury. *Wolfe v. Mendel* 16
5. Where the defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, the judgment will not be reversed because no such instruction was given. *Wolfe v. Mendel* 16
6. Where an instruction does not prohibit or negative the computation of damages upon the basis of their present worth, it will not be assumed that the jury did not understand that it was to estimate the present value of future earnings lost. *Wolfe v. Mendel* 16
7. 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. *Wolfe v. Mendel* 16
Husak v. Omaha National Bank 537
8. When the court adequately 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. *Svoboda v. DeWald* 50

9. Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. *Raile v. Toews* 184

10. If there is any evidence which will sustain a finding for the party having the burden of proof in a cause, the trial court may not disregard it and direct a verdict against him. *Raile v. Toews* 184

11. If it does not appear from the record that an incorrect instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it, the giving of the instruction must be considered prejudicial error. *Raile v. Toews* 184

12. An instruction which does not purport to set out all the essential elements of an offense will not be held to be prejudicially erroneous when by another instruction the whole case is properly covered and the essential elements necessary to be established are set out, and when there is no inconsistency in the two instructions. *Leistritz v. State* 220

13. A timely objection at the trial to alleged improper conduct by a trial judge is a prerequisite to review thereof on appeal. *Danze v. Stange* 227

14. An issue concerning gross negligence must be decided upon the facts of each case. *Werner v. Grabenstein* 231

15. An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions. *Werner v. Grabenstein* 231

16. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law. *Werner v. Grabenstein* 231

17. By statute, upon trial to a court without a jury, a general finding is sufficient unless a request is made in writing for findings of fact separate from conclusions of law. *Mueller v. Keeley* 243

18. A general finding that judgment should be for a certain party warrants the conclusion that the court found in his favor all issuable facts. *Mueller v. Keeley* 243

19. In order to obtain a summary judgment the movant

must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. *Eden v. Klaas* 323

20. Summary judgment is effective and serves a separate useful purpose when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. *Eden v. Klaas* 323

21. The rules of law which are applicable and controlling in this case appear in prior cases cited. *Carranza v. Payne-Larson Furniture Co.* 352

22. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, an alleged crime. If the facts which the evidence tends to establish cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Small v. State* 381

23. The unsupported testimony of the accused in a criminal case, which the jury does not believe, cannot be said to furnish a hypothesis consistent with the innocence of the accused. *Small v. State* 381

24. It is for the jury to determine controverted issues of fact in a law action if the evidence is in dispute. *Ziemba v. Zeller* 419

25. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom. *Ziemba v. Zeller* 419

26. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Ziemba v. Zeller* 419

27. It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence. *Frasier v. Gilchrist* 450

28. Where different minds may reasonably draw different conclusions from the evidence, or there is a

conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury. *Frasier v. Gilchrist* 450
Larsen v. Omaha Transit Co. 530
29. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. *Frasier v. Gilchrist* 450
30. If a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusion deducible from it. *Armbruster v. Stanton-Pilger Drainage Dist.* 459
31. Rule for consideration of motion for directed verdict stated. *Larsen v. Omaha Transit Co.* 530
32. 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. *Larsen v. Omaha Transit Co.* 530
33. It is the duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence. *Coyle v. Stopak* 594
34. The purpose of an instruction is to furnish guidance to the jury in its deliberations and to aid it in arriving at a proper verdict. With this end in view, an instruction should state clearly and concisely the issues of fact and the principles of law which are necessary to enable it to accomplish the purpose desired. *Coyle v. Stopak* 594
35. Instructions are to be considered together to the end that they may be properly understood, and, when so construed, if as a whole they fairly state the law applicable to the evidence, error cannot be predicated on the giving of the same. *Coyle v. Stopak* 594
Reizenstein v. State 865
36. If instructions are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects. *Coyle v. Stopak* 594
37. There is no impropriety in a trial court interroga-

ting witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the questions of fact in issue. *Coyle v. Stopak* 594

38. The right of the trial court to interrogate witnesses should be very sparingly exercised. Generally counsel for the parties should be relied on and allowed to manage and bring out their own case. *Coyle v. Stopak* 594

39. Duty of trial judge in conduct of case stated. *Coyle v. Stopak* 594

40. Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong. *Universal C. I. T. Credit Corp. v. Vogt* 611

41. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. *Strnad v. Mahr* 628

42. Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence for a finding of contributory negligence, it is error to instruct on the subject. *Strnad v. Mahr* 628

43. The trial court should submit to the jury only such issues as find some support in the evidence. Where an issue is submitted without support in the evidence which is calculated to mislead the jury in the consideration of the facts to the prejudice of the complaining party, the judgment must be reversed. *Strnad v. Mahr* 628

44. To justify the overturning of a verdict supported by direct testimony on the ground that it is in conflict with natural laws or some established principle of mathematics, mechanics, physics, or the like, the indisputable physical facts must demonstrate beyond question that the supporting evidence is false and that the verdict is in fact without evidentiary support. *Kroeger v. Safranek* 636

45. Where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. *Kroeger v. Safranek* 636

46. A litigant is entitled to have the jury instructed as to his theory of the case as shown by the pleadings and evidence. A litigant, however, is not en-

titled to have repetitious allegations of the same act of negligence submitted to the jury. *Kroeger v. Safranek* 636

47. When an instruction correctly states the law and a litigant does not consider it sufficiently specific as it relates to the evidence adduced, it is the duty of counsel to request an instruction that will supply the omission. *Kroeger v. Safranek* 636

48. The Supreme Court can properly set aside a verdict for excessiveness where there is no evidence to sustain it, or where reasonable minds can come to no conclusion other than that the verdict is the result of passion and prejudice. *Kroeger v. Safranek* 636

49. In an equity case the presumption obtains that the trial court, in arriving at decision, considered only such evidence as was competent and relevant. The Supreme Court will not reverse the judgment in a case so tried because other evidence was admitted, if, upon a trial de novo, the court finds that a preponderance of competent and relevant evidence appearing in the record sustains the judgment. *Heider v. Kautz* 649

50. The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law. *Spidel Farm Supply, Inc. v. Line* 664

51. Rule for consideration of sufficiency of evidence to support a verdict stated. *Fairchild v. Sorenson* 667

52. For an error at law occurring at the trial to be considered by the Supreme Court, the alleged error must be properly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal. *Robinson v. Meyer* 706

53. When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal 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. *Gustason v. Vernon* 745

54. Where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Gustason v. Vernon* 745

55. A statement made by a county attorney in the closing argument to which exception is taken must appear in the bill of exceptions, otherwise it does not become the subject of review. *Peery v. State* 752
56. In an action at law, the credibility of witnesses and the weight of evidence are for the jury. Its verdict will not be disturbed by the Supreme Court unless it is clearly wrong as a matter of law. *Pueppka v. Iowa Mutual Ins. Co.* 781
57. In an action at law, disputed questions of fact are by the verdict of the jury resolved in favor of the prevailing party. In deciding an appeal the evidence and reasonable inferences therefrom are required to be considered most favorably to him. *Pueppka v. Iowa Mutual Ins. Co.* 781
58. A verdict so clearly wrong as to induce a belief by the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, must be vacated. *Pueppka v. Iowa Mutual Ins. Co.* 781
59. If material evidence has been disregarded by the jury which if considered in a proper manner requires a different conclusion than the one made by the jury, its verdict and the judgment thereon will be vacated on appeal. *Pueppka v. Iowa Mutual Ins. Co.* 781
60. Where the evidence is insufficient to justify a verdict or to sustain a judgment, the trial court or the Supreme Court on appeal should set the verdict and judgment aside, even though the evidence may be conflicting. *Pueppka v. Iowa Mutual Ins. Co.* 781
61. It is not error for the court to refuse to give an instruction containing the following maxim, or one containing in substance: "He who speaks falsely on one point will speak falsely on all." *Reizenstein v. State* 865
62. An instruction which has no foundation in the evidence is properly refused. *Reizenstein v. State* 865

Trusts.

Duty of trustee with respect to keeping trust property separate from individual property stated. *Pike v. Triska* 104

Usury.

1. Any loan made by a licensee under the installment loan law in excess of $1,000 wherein an interest rate

in excess of 9 percent per annum is contracted for is void, and the licensee has no right to collect any principal or interest on such loan. *A-1 Finance Co., Inc. v. Nelson* 296

2. A loan made by a licensee under the installment loan law which is not secured by a real estate mortgage and is not due or payable within a period of 21 months as provided by statute is void. *A-1 Finance Co., Inc. v. Nelson* 296

3. Any loan made by a licensee under the installment loan law which fails to conform to statutory requirement of substantially equal periodic payments is violative thereof and void. *A-1 Finance Co., Inc. v. Nelson* 296

Vendor and Purchaser.

1. An option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired. *Kucera v. Kavan* 131

2. Effect of unconditional tender upon exercise of rights under an option contract stated. *Kucera v. Kavan* 131

Waters.

1. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water. Reliction is the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. *Ziemba v. Zeller* 419

2. Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. *Ziemba v. Zeller* 419
Worm v. Crowell 713

3. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. *Ziemba v. Zeller* 419

4. Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. *Ziemba v. Zeller* 419

5. Where a stream which is a boundary from any cause suddenly abandons its old and seeks a new bed,

such change of channel works no change of boundary, and the boundary remains as it was in the center of the old channel, although no water may be flowing therein. *Ziemba v. Zeller* 419

6. If the change in the stream is violent and visible, and arises from a known cause, such as a freshet, or a cut though which a new channel has been formed, the original thread of the stream continues to mark the limits of the two estates. *Ziemba v. Zeller* 419

7. Water flowing in a well-defined course cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors. This applies to public authorities. *Armbruster v. Stanton-Pilger Drainage Dist.* 459

8. Where the flow of water in a well-defined course which seeks its discharge in a neighboring stream is interfered with to the injury and damage of a neighboring proprietor, an action in equity is available to prevent such interference. *Armbruster v. Stanton-Pilger Drainage Dist.* 459

9. Where an island in a nonnavigable stream has been separately surveyed, platted, and deeded by government patent and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center of the thread of each surrounding channel. *Heider v. Kautz* 649

10. The thread or center of a channel is the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow. *Heider v. Kautz* 649

11. The title and possession of land formed by accretion follows the ownership of the riparian lands to which it is attached. *Heider v. Kautz* 649

12. Generally, where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the shores opposite to the island is in other owners, the same riparian rights appertain to the island as to the mainland. *Heider v. Kautz* 649

13. When, by gradual erosion, a river becomes the boundary of land the owner thereof then becomes a riparian owner and is entitled to all accretions thereto. *Worm v. Crowell* 713

Witnesses.

1. Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true but are generally regarded as purely advisory in character. A jury may place whatever weight it may choose upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise unreasonable. *Brown v. Globe Laboratories, Inc.* 138
2. A failure or refusal of the district court to comply with statutory requirement, that before testifying the witness shall be sworn, may not be properly assigned as error if timely objection was not made thereto. *Danze v. Stange* 227
3. Statements by an injured person as to the cause of an injury and the circumstances attending its occurrence, made to a physician so long thereafter as not to be a part of the res gestae, are not ordinarily admissible since they are a narration of a past event and hearsay. *Redding v. State* 307
4. In a proper case a physician may testify to the injured person's narrative of the history of the injury, which was necessary for the purpose of diagnosis and treatment, where the statements are a part of the description of the injury and separable from the patient's complaint with respect thereto. *Redding v. State* 307
5. A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. *Southwestern Truck Sales & Rental Co. v. Johnson* 407
6. Anyone with a knowledge of time and distance is a competent witness to give an estimate of the speed of a motor vehicle. *Pribyl v. State* 691
7. The segregation of the witnesses in a criminal trial is ordinarily a matter within the discretion of the trial court. *Pribyl v. State* 691
8. A county attorney is not prohibited from becoming a witness in a criminal action. *Pribyl v. State* 691
9. A person claiming a right descending to him from a deceased person is not barred from testifying when the adverse party is not a representative of the deceased person. *Bourelle v. Soo-Crete, Inc.* 731
10. Before a witness, not a party to the suit, can be impeached by proof that he has made statements

contradicting or differing from the testimony given by him on the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements. *Peery v. State* 752

11. The value of the opinion of an expert witness is dependent on and is no stronger than the facts on which it is predicated. The opinion has no probative force unless the assumptions upon which it is based are shown to be true. *Pueppka v. Iowa Mutual Ins. Co.* 781

12. The determination of the competency of a child of tender years to testify rests largely in the sound discretion of the trial court. *Reizenstein v. State* 865

Work and Labor.

1. An action on quantum meruit is properly pleaded when the petition alleges a right of recovery for the reasonable value of labor and materials for which there is an express or implied agreement to pay. *Sorensen Constr. Co. v. Broyhill* 397

2. Where there is no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced. *Sorensen Constr. Co. v. Broyhill* 397

3. In an action on quantum meruit for services rendered, evidence of stated rates is competent evidence tending to show value. *Sorensen Constr. Co. v. Broyhill* 397

Workmen's Compensation.

1. In a workmen's compensation case an appeal to the Supreme Court is considered and determined de novo upon the record. *Eschenbrenner v. Employers Mutual Casualty Co.* 32

2. 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. *Eschenbrenner v. Employers Mutual Casualty Co.* 32

3. In order that a recovery may be had under the Workmen's Compensation Act, it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death. *Eschenbrenner v. Employers Mutual Casualty Co.* 32

4. In a workmen's compensation case, the burden rests upon the claimant to establish his claim by a preponderance of the evidence. *Eschenbrenner v. Employers Mutual Casualty Co.* 32
5. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. *Eschenbrenner v. Employers Mutual Casualty Co.* 32
6. Mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability or results in death, it does not constitute a compensable accidental injury. *Eschenbrenner v. Employers Mutual Casualty Co.* 32
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. This rule does not permit a court to award compensation where the requisite proof is lacking. *Eschenbrenner v. Employers Mutual Casualty Co.* 32
8. If the task of a laborer on a farm or ranch is one which is usually classed as farm or ranch labor and the operation in which he is engaged is generally in furtherance of farming and ranching purposes, the employee will be regarded as a farm and ranch laborerer within the meaning of the Workmen's Compensation Act. *Keith v. Wilson* 58
9. An employer of farm or ranch labor, being excepted from the Workmen's Compensation Act, who elects to subject himself to it becomes subject to all of the provisions of the act to the same extent as an employer who is not excepted from it. *Keith v. Wilson* 58
10. A scheme, artifice, or device to enable a person to execute work without responsibility to workmen results when he contracts with another for the performance of the work without exacting that the other contracting party obtain workmen's compensation insurance. *Keith v. Wilson* 58
11. The liability which attaches to an employer of farm and ranch labor who has brought himself under the Workmen's Compensation Act applies only to a party or parties who have effected or carried out a scheme, artifice, or device to evade the operation of the act. *Keith v. Wilson* 58
12. An innocent party excepted from the Workmen's Compensation Act does not become liable thereunder

by the performance of a scheme, artifice, or device, within the meaning of the act, of another. *Keith v. Wilson* 58

13. There may be an award of compensation when an employee meets with an accident that accelerates or aggravates an existing impairment to a state of disability, and where such disability is not the result of a natural progression of the impairment. *Turner v. Beatrice Foods Co.* 338

14. Jurisdiction of an appeal in a workmen's compensation case is obtained by the Supreme Court by the filing of a notice of appeal in the office of the clerk of the district court and depositing therein the docket fee required by law within the time prescribed. *Miller v. Peterson* 344

15. An employee who is unable to perform or to obtain any substantial amount of work, solely because of the accident and resulting injury, either in his particular line of work or in any other for which he is fitted, is totally disabled within the meaning of the workmen's compensation law. *Miller v. Peterson* 344

16. Disability under subsections of statute providing for total and partial permanent disability is defined by statute in terms of employability and earning capacity rather than in terms of loss of bodily function. *Miller v. Peterson* 344

17. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof. *Miller v. Peterson* 344

18. The rules of law which are applicable and controlling in this case appear in prior cases cited. *Carranza v. Payne-Larson Furniture Co.* 352

19. 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 him in an accident arising out of and in the course of his employment. *Frederick v. Cargill, Inc.* 589

20. "Earning power," as used in the Workmen's Compensation Act, is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment

in which he is engaged or for which he is fitted. *Frederick v. Cargill, Inc.* 589
21. If, after injury, an employee receives the same or higher wage than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired. *Frederick v. Cargill, Inc.* 589

Zoning.
1. The burden is on one who attacks the validity of a zoning ordinance, valid on its face and enacted under lawful authority, to prove facts which establish its invalidity. *Weber v. City of Grand Island* 827
2. A municipality has no inherent power to enact a zoning ordinance. Its authority to do so results from statutory or constitutional authorization. *Weber v. City of Grand Island* 827
3. The validity of zoning action or a zoning ordinance enacted to enforce same must be determined by the evidence of the special surrounding conditions and circumstances. *Weber v. City of Grand Island* 827
4. The courts will, in an appropriate action instituted for that purpose, declare invalid zoning action or a zoning ordinance where it clearly and satisfactorily appears that the action or ordinance is arbitrary and unreasonable or illegal. *Weber v. City of Grand Island* 827
5. Spot zoning has generally been defined as the singling out of a small parcel of land for a use or uses classified differently from the surrounding area, primarily for the benefit of the owner of the property so zoned, to the detriment of the area and other owners therein. *Weber v. City of Grand Island* 827
6. The validity of spot zoning depends upon more than the size of the spot. Spot zoning as such is not necessarily invalid, but its validity depends upon the facts and circumstances appearing in each particular case. *Weber v. City of Grand Island* 827
7. The test of the validity of zoning action or a zoning ordinance stated. *Weber v. City of Grand Island* 827