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IN RE LEWIS M. SANDERS, A MINOR CHILD. LAWRENCE C. KRELL, APPELLEE, V. LEWIS M. SANDERS, APPELLANT.

96 N. W. 2d 218

Filed April 24, 1959. No. 34549.

1. **Appeal and Error: Courts.** An appeal from a finding and adjudication of the district court by authority of section 43-202, R. R. S. 1943, that a child is a delinquent is disposed of in this court by trial de novo upon the record.
2. **Infants: Courts.** A complaint under section 43-205, R. R. S. 1943, must allege facts as distinguished from conclusions showing that the accused is a neglected, dependent, or delinquent child.
3. ———: ———. A complaint under the Juvenile Court Act which alleges that the accused child committed, without legal provocation, an assault and battery upon another person and that the accused is a delinquent child is sufficient.
4. ———: ———. That act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of issues of fact in that court.
5. ———: ———. The duties imposed by that act on the district court are judicial and not administrative.
6. ———: ———. An issue of fact in a proceeding authorized by that act concerning the alleged delinquency of a child must be heard and determined by substantial observance of the rules of evidence and procedure that are considered essential and appropriate to ascertain the truth and to protect rights in hearings had in civil cases in the district court.
7. **Courts.** The essential processes, rules, and procedure of the law established and observed to aid courts in the investigation and adjudication of contested issues of fact are not discarded or permitted to be disregarded because a pertinent statute refers to the proceeding as a summary one.
8. **Appeal and Error.** This court on the trial of a cause de novo takes cognizance of only legal evidence in the record and gives no consideration to incompetent or irrelevant matters therein.
9. **Infants: Courts.** A single violation of a law of the state by an infant does not always permit of a conclusion that the transgressor is a juvenile delinquent.

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

Ross & O'Connor, for appellant.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellee.

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

BOSLAUGH, J.

The authority for this proceeding is the Juvenile Court Act. Laws 1905, c. 59, p. 305. It is now a part of Chapter 43, article 2, R. R. S. 1943. A delinquent child is within its reach. The substance of a complaint filed in the district court for Douglas County on September 18, 1958, is that Lewis Marvel Sanders was less than 18 years of age; that he was a delinquent child because on or about June 6, 1958, in the city of Omaha he was involved with others in an unprovoked assault upon James LeRoy Stewart who was 17 years of age; and that as a result thereof his left jaw was fractured.

The court found that the accused was a delinquent child within the Juvenile Court Act and was a proper subject for commitment to the Boys' Training School of the state. The adjudication of the court was in harmony with and appropriate to the findings. A motion for a new trial was denied. This appeal concerns the legality of the action of the trial court. The record in this court designates the accused as appellant and the complainant as appellee and this designation will be observed herein.

This is a special statutory proceeding. The adjudication made herein by the trial court is reviewable in this court by appeal. Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122; Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151. The manner of disposing of such an appeal in this court is by trial de novo. See, Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823; Rhoades v. State Real Estate Commission, 152 Neb. 701, 42 N. W. 2d 610.

The sufficiency of the complaint to sustain the judgment is contested by appellant. The complaint alleges appellant was involved with others in an assault upon a named victim and that appellant was a delinquent child less than 18 years of age. The relevant statute provides that the description "delinquent child" shall include anyone less than 18 years of age who violates any law of this state. § 43-201, R. R. S. 1943. An assault by one person upon another person violates a law of this state. § 28-411, R. R. S. 1943. It is true, as appellant asserts, that there are many things specified in the Juvenile Court Act which constitute child delinquency within the meaning of that act and that a proper complaint thereunder must set forth facts showing that the accused child is a delinquent. Laurie v. State, 108 Neb. 239, 188 N. W. 110. The complaint in this case was not insufficient. Phillips v. State (Tex. Cr.), 20 S. W. 2d 790. The right of appellant to have a more definite statement of the accusation made against him upon timely and proper application therefor is not considered or discussed because it is not appropriate in this case.

The substance of the evidence is this: The time of the misconduct referred to was in the forenoon of June 6, 1958. James LeRoy Stewart, hereafter referred to as Stewart, was 17 years of age, a senior student of North High School in Omaha, and he took shop lessons at Omaha Tech High School. He was at the last-mentioned school, left there, and was walking north on Thirtieth Street. He said a person whom he spoke of as Doakes was following him and Doakes overtook Stewart and asked him why he came up there to school and Stewart said he was there for shop. He proceeded north on Thirtieth Street to Franklin Street where he noticed other boys. When he was about midway of the intersection of these streets he was hit twice, once by a person he said he later learned was Doakes and once by a person he said he later learned was Hunter. He did not

testify the source of his information. Stewart was not knocked or thrown down but did have one knee on the ground. He had and was treated for a broken jaw. He thought there were five boys at the intersection but did not identify them. Stewart did not mention appellant in his testimony. He made no claim of having known or seen appellant that day. Stewart had no acquaintance with or knowledge of appellant or any of the persons whom he said he saw at the intersection when he was struck. The court found that Doakes did not strike Stewart.

Appellant was 17 years of age, a senior student at Omaha Tech High School at the time of the hearing. He and William Doakes, spoken of herein as Doakes, were on the day mentioned above walking up Thirtieth Street and met Stewart. Doakes engaged Stewart in conversaton. Appellant thought Stewart made a statement which appellant disliked and he with his open hand slapped Stewart. Appellant and Doakes immediately left and went up Hamilton Street. Appellant had no part in or knowledge of any other act, conduct, or happening concerning or involving Stewart. Appellant knew nothing of anyone else striking or injuring Stewart until some time after that day. Appellant and Doakes were not with and had no arrangements to meet any other boys that day and they saw no other boys that morning either before or after they met Stewart. Neither Doakes nor appellant was acquainted with or had any knowledge of Stewart until they by chance met him as above stated. Stewart gave no evidence of either hurt or injury from the slap he received from appellant.

There was testimony by an assistant probation officer that early in September of 1958 appellant told him that appellant called Stewart names, struck Stewart, and appellant then walked away with Doakes. There is no mention otherwise in the record that appellant called Stewart any name and the effect of the testimony of appellant is that he did not. The record shows that

previous conduct of appellant was good and that there had been no previous complaint concerning him of any nature. His school record was clear of any charge of misbehavior or misconduct. His conduct in school was satisfactory and his scholastic conduct in school was satisfactory.

The Juvenile Court Act did not provide a new court. It only imposed additional powers on the district courts of the state. It did not change the rules or procedure of hearings without a jury of issues of fact. Ripley v. Godden, *supra,* declares: "The Juvenile Court Act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of contested issues of fact in that court." The duties imposed by the Juvenile Court Act on the district courts are judicial. The validity of the act depends on that. The Legislature may not delegate to the courts the performance of nonjudicial duties. Art. II, § 1, Constitution of Nebraska; Searle v. Yensen, 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257; Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397; Laverty v. Cochran, 132 Neb. 118, 271 N. W. 354.

The rules of evidence are applicable to a hearing of a charge made under the Juvenile Court Act and they must be substantially observed. It is only legal evidence which can establish a charge under the act or sustain a judgment rendered in the proceeding involving the charge. It has been previously said and is now affirmed that in a hearing before the Juvenile Court the customary rules of evidence must be adhered to and a finding of fact may not rest on or be sustained by hearsay or unsworn statements; that the essential processes, rules, and procedures of the law established and observed to guide and aid courts in the trial and decision of issues of fact are applicable to proceedings under the Juvenile Court Act and they are not permitted to be

disregarded because the act refers to such a proceeding as a summary one; and that an issue of fact in such a proceeding must be heard and determined by observance of the rules of evidence that are considered essential and appropriate to ascertain the truth and to protect substantial rights in hearings had without a jury for the adjudication of issues of fact of civil cases in the district court. Krell v. Mantell, *supra;* Ripley v. Godden, *supra;* State ex rel. Fitzgerald v. Barkus, *ante* p. 257, 95 N. W. 2d 674; Annotation, 43 A. L. R. 2d 1141.

It is recognized that there is a presumption that the trial court in a cause heard without a jury disregarded incompetent evidence in reaching a decision in the cause and that this court on the trial of a cause de novo takes cognizance of only the legal evidence before it and gives no consideration to incompetent or irrelevant evidence in the record. Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849. It is upon these considerations that the hearsay, incompetent, and irrelevant testimony of the assistant probation officer must be and is disregarded in the consideration and decision of this appeal.

A fair appraisal of the evidence is that appellant in company with Doakes met Stewart who was, without legal justification, slapped with the open hand of appellant without any significant result. This was such a minor incident it was entirely forgotten by Stewart while he was a witness giving testimony at the hearing. There was no mention of appellant in the testimony of Stewart. Appellant and Doakes immediately withdrew and at that time there was no other person or persons near Stewart or seen by appellant. Later, without the knowledge or participation of appellant, Stewart was assaulted and injured. Proof of any acquaintance with or concert of action of appellant with the persons who made the assault upon Stewart is absent. There is no proof of the charge made in the complaint that appellant was involved with others in an attack on Stewart which re-

sulted in a fracture of his jaw. The charge that appellant was a delinquent child because of this alleged occurrence or otherwise was not established. The evidence is quite to the contrary. There was no previous misconduct of appellant claimed or shown. It was established at the hearing that appellant had no record of improper conduct and that his school experience was acceptable and satisfactory both as to comportment and scholarship. A single violation of a law of the state by a minor does not always permit of a conclusion that the transgressor is a juvenile delinquent. In re Hook, 95 Vt. 497, 115 A. 730, 19 A. L. R. 610, contains this: "So, when analyzed, we find here only a single act of disobedience as a basis of the charge of delinquency. This was not enough. A child is not incorrigible who disobeys but once."

The judgment should be and it is reversed.

REVERSED.

CLAYTON LAVERNE SHEPPERD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

96 N. W. 2d 261

Filed April 24, 1959. No. 34567.

1. **Indictments and Informations.** The State is required to furnish a defendant informed against for a felony with a copy of the information filed against him within 24 hours after such filing.
2. ———. There is no specified time that must elapse between filing of an information or indictment and the commencement of trial thereon, except defendant may not without his consent be arraigned or required to answer it until at least 1 day after he has received a copy thereof.
3. **Appeal and Error.** All presumptions exist in favor of regularity and correctness of orders and judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish a claimed defect or error by an exhibition of the record.
4. **Indictments and Informations.** If the information informs the

accused with reasonable certainty of the charge made against him, it is sufficient.

5. **Criminal Law.** One charged with a crime, who becomes a witness in his own behalf upon his trial, is subject to the same rules that govern other witnesses upon cross-examination and may, on cross-examination, be interrogated as to matters brought out on direct examination.

6. ———. If a witness is permitted to be cross-examined as to matters not brought out on his direct examination, a judgment in the case will not be reversed if it appears that no prejudice could have resulted therefrom.

7. **Rape.** Where assault with intent to commit rape is charged, the testimony of prosecutrix must be corroborated by facts and circumstances established by other competent evidence to justify conviction.

8. ———. In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

9. **Criminal Law.** Where the trial court has by its instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, it is not required to give further or additional instructions requested by the defendant.

10. **Rape.** Where, in a prosecution for assault with intent to commit rape, prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and inclination, on the part of the defendant, to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix.

11. **Criminal Law.** Where several persons participate in the actual commission of a crime, the acts and declarations of any one of them, while so participating, are admissible against all the others.

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

John R. Sullivan, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Kyle,* for defendant in error.

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

MESSMORE, J.

The plaintiff in error, Clayton LaVerne Shepperd, hereinafter referred to as defendant, was charged with the crime of assault with intent to commit rape. He was convicted and sentenced to be confined in the Nebraska State Reformatory. He brings the cause here by petition in error to seek to have the conviction and sentence vacated.

The defendant contends that the trial court committed prejudicial error in failing to quash the information, for the reason that a copy thereof had not been served upon the defendant or his counsel within 24 hours after the information was filed in the office of the clerk of the district court for Loup County.

Section 29-1802, R. R. S. 1943, provides: "The clerk of the district court shall, upon the filing of any indictment with him, and after the person indicted is in custody or let to bail, cause the same to be entered of record on the journal of the court; * * *. Within twenty-four hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant. No one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid."

Section 29-1602, R. R. S. 1943, provides in part: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant."

Section 29-1604, R. R. S. 1943, provides in part: "The provisions of the criminal code in relation to indict-

ments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, * * * shall in the same manner and to the same extent, as nearly as may be, apply to informations, and all prosecutions and proceedings thereon."

In the instant case the information was filed January 29, 1958, in the office of the clerk of the district court for Loup County. The defendant was served with a copy thereof on Saturday night, October 11, 1958.

At the beginning of the trial, the defendant objected to any testimony of the prosecutrix because of the failure of the State to serve upon the defendant a copy of the information within the time specified by statute. The court overruled the objection.

The defendant cites Bush v. State, 62 Neb. 128, 86 N. W. 1062, wherein the court held: "The state is required to furnish a defendant informed against for a felony with one copy, and no more, of the information filed against him, within twenty-four hours after such filing." To the same effect is Eigbrett v. State, 111 Neb. 388, 196 N. W. 700, and Hoctor v. State, 141 Neb. 329, 3 N. W. 2d 558.

On Monday morning, October 13, 1958, the defendant was arraigned in the district court. He was asked by the court if he had been served with a copy of the information, and replied that he had been served with a copy on Saturday night. The information was then read to him by the county attorney, and the defendant entered a plea of not guilty. The defendant was represented by counsel at that time.

The obvious purpose of section 29-1802, R. R. S. 1943, relative to service of a copy of an indictment or information, is to insure the defendant a reasonable time in which to prepare his defense. Why a copy of the information was not served upon the defendant until October 11, 1958, does not appear in the record. It does appear from the record, however, that the defendant

had been a member of the United States Air Force for 2 years and 4 months, and had been stationed at Las Vegas, Nevada. Perhaps these facts account for the delay in serving the information.

It is true that the defendant was not served with a copy of the information within 24 hours after it was filed, or, in fact, until several months thereafter. The question presented is, were the defendant's rights prejudiced thereby?

In Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468, this court said: "There is no specified time that must elapse between filing of an information or indictment and the commencement of trial thereon, except defendant may not without his consent be arraigned or required to answer it until at least one day after he has received a copy thereof."

In the event the defendant was unable to prepare his defense, a proper remedy would have been for him to file a motion for continuance or postponement of the trial. No affidavits were filed or showing of any kind made by the defendant to indicate that any of his rights were prejudiced by the delay in serving a copy of the information on him.

"All presumptions exist in favor of regularity and correctness of orders and judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish a claimed defect or error by an exhibition of the record." Darlington v. State, *supra*.

We find the defendant's assignment of error to be without merit.

The defendant predicates error on the failure of the trial court to sustain his motion to quash the information for the reason that it was defective in failing to allege all of the essential elements of the offense charged, and deprived the defendant of his constitutional and statutory rights.

The information charged, in part: "* * * that Clayton LaVerne Shepperd * * * did then and there felon-

iously assault Bertha Sarnowski a female child under age of 15 years, with the intent of him the said Clayton LaVerne Shepperd to commit a rape upon the said Bertha Sarnowski, * * *." It is the theory of the defense that this information was defective in that it does not specify that the defendant had the intent to "then and there" commit a rape.

Section 28-409, R. R. S. 1943, provides in part: "Whoever assaults another with intent to commit a murder, rape, sodomy or robbery upon the person so assaulted, shall be imprisoned in the penitentiary * * *." This is the section of the statutes under which the defendant was charged. It will be observed that the statute does not require that the assault must be accompanied by an intent to commit a rape "then and there." The language of the information substantially follows the language of the statute.

In Emery v. State, 138 Neb. 776, 295 N. W. 417, this court said: "It is generally sufficient in an information to describe the crime charged in the language of the statute * * *." See, also, Pandolfo v. State, 120 Neb. 616, 234 N. W. 483.

If the information informs the accused with reasonable certainty of the charge made against him it is sufficient. See May v. State, 153 Neb. 369, 44 N. W. 2d 636.

We conclude that the trial court did not err in overruling the defendant's motion to quash the information.

The record discloses that Bertha Sarnowski, hereafter referred to as Bertha or the prosecutrix, lived in Taylor, Nebraska, with her parents; and that she was 14 years of age on November 25, 1957. Early that evening she went to a show at Sargent, Nebraska, with the Andreesen family who were her neighbors and who employed her on occasions as a baby sitter. After the show they returned to Andreesen's at approximately 10 p.m. The Andreesens let Bertha out at their home and she walked to her home. There was a teen-age

dance in progress in Taylor, and Bertha obtained permission from her parents to attend. Her older sister Lois was presumed to be present at the dance, but apparently had left and returned home without the knowledge of the family. Bertha stayed at the dance until approximately 11 p.m. She left the dance with Barbara Brodine and Nadine Zalud, and left them at the end of the park and cut across toward an old cafe on the corner where she stood on the sidewalk near the crosswalk. A car drove up and stopped at the stop sign. This car was a few yards directly in front of Bertha. Someone in the car called and asked her where she was going. She replied that she was going home, and started to walk in that direction. The defendant got out of the car, and the car drove off. The defendant asked Bertha questions and told her that his name was Jerry Perkins, how old he was, and that he had been "kicked" out of school. He was endeavoring to get a date with her, but she told him she was too young to date, and would not date him anyway. After a short time the car came back and stopped in the middle of the street. The defendant opened the car door and his companions who were in the car tried to persuade Bertha to get into the car. She told them that she did not know their right names, and the defendant kept asking her to get in the car and told her that they would take her home. A young man by the name of Chilewski was driving. Bertha got in the car and sat in the middle of the front seat with Chilewski to her left and the defendant to her right. There were two other young men in the back seat of the car. Chilewski drove the car around town for a few minutes and went by her home. She asked to be let out, but the young men just laughed and drove on toward the highway and turned on the road to Almeria. The car was driven until they arrived at an irrigation ditch, which was about a mile from Taylor, and then turned on another road and stopped near a haystack. At this point three of the young men got

out of the car. The defendant stayed in the car with Bertha and began putting his hands under her clothes, telling her they were "all going to have" her that night, and if she would give in, they would take her back to town. She repeatedly asked him to take her back to town and let her alone. The defendant laughed and said he did not think that was the thing to do. He kept saying the reason they picked her up was so they could have what they wanted, and it would not make any difference, they would get what they wanted before the evening was over. After a while the three other young men returned and got into the car. They then drove on toward Almeria. Bertha kept asking them to take her home, and they refused.

Bertha further testified that the defendant put his arm around her and held her left arm down, and at that time Chilewski and the defendant put their hands under her dress. She struck them when she could, and begged them to stop, but they refused. Once when Chilewski put his hand under her dress he almost had to stop the car to keep it from running into a ditch. The car was stopped along the road several times. The young men started getting rough, and someone said something about taking her clothes off, and they started to do so. Chilewski told one of the boys in the back seat to hold her hand, and one of them took hold of her left arm and hung on. The defendant held her right arm. They unbuttoned her coat. She kept biting and scratching, and asking them to stop. When they had her coat unbuttoned, they pulled her arms out of the sleeves and dropped the coat in the back seat of the car. They then started to unbutton her dress. When they had her dress unbuttoned, they pulled it off her shoulders and down to her waist. Chilewski told one of the young men in the back seat to unfasten her "bra." He started to do so, but did not know how to loosen it. Bertha bit and scratched as she could during this action. The defendant got his hands in her "bra" and kept pinching

her. Chilewski decided to take her panties off, and the defendant held her arms so that she would be unable to resist. About that time Bertha noticed the headlights of a car approaching. Chilewski let go of her and started the car. Bertha opened the car door and tried to jump out. When the car was even with them she honked the horn and called for help, but the defendant pulled her back into the seat. The car went on by. Thereafter Chilewski drove up a side road and stopped. At that point Chilewski and the defendant kept putting their hands between her legs. She attempted to resist them. They became mad, started calling her vulgar and indecent names and said they were going to have intercourse with her that night, and that the defendant was to be the first one to accomplish the act. Three of the young men got out of the car, leaving the defendant and Bertha alone. The defendant started putting his hands under her clothing, holding her arms down, and trying to push her down in the seat, but he was unable to do so. He then asked her to get into the back seat with him, and she refused. Bertha further testified that she tried to "talk sense" to him and requested that he take her home as she did not want to cause her folks any trouble. Everything that she said, the defendant said was "beyond the point." Finally, Chilewski came back and opened the car door and said: "Get the hell out of there. I can make her." The defendant took out a package of cigarettes, and when he attempted to light one Bertha opened the door on the driver's side and jumped out. She ran up a bank beside the road and into a barbed wire fence. Before she got under the fence, Chilewski caught her and knocked her down. She took off her glasses and put them under the fence, then told Chilewski she had lost them. He called for the other boys to come and help look for the glasses. Bertha jumped up and ran down the bank behind the car. Chilewski caught up with her, twisted her arm behind her back, and shoved her against the car. She asked

the other boys to help her, and they just looked at her and got back in the car. Chilewski then endeavored to force her to do as he desired, and she twisted away from his grasp. He grabbed her dress, which was unbuttoned all the way down, and she twisted out of it and proceeded to run. After that she had on only a light taffeta half slip, her bra, and anklets. When Chilewski saw that he wouldn't be able to catch her, he returned to the car. She climbed a bank and started running across the hills. After a while she came to a farmhouse occupied by Mrs. Ethel Cook who invited her into the house and got her an old coat to put on. At Bertha's request, Mrs. Cook called the Andreesens and they in turn called Bertha's mother to the telephone. Finally, Bertha's father came and took her home.

Mrs. Ethel Cook testified that she lived about 11 miles from Taylor; that Bertha came to her house about 2 a.m., the morning of November 26, 1957; and that Bertha had on just a brassiere, a skirt, and anklets. She seemed very cold and frightened. She was shivering and trembling. Her anklets were full of sandburs when she took them off.

Bertha's mother testified that when Bertha was returned to her home that morning she was crying, her hair was "messed up," and she had a split lip. Later she had black and blue marks on her arm and between her legs.

A deputy sheriff investigated the complaint he received the morning of November 26, 1957. This witness, together with the county attorney, Bertha, and Bertha's parents drove to the place where the car had parked. They found one shoe and a pair of glasses belonging to Bertha. Continuing his investigation, he learned that the young men who occupied the car that night were George Chilewski, Marvin Amos, Kenneth Richardson, and the defendant. Later in the day this witness and the town marshal of Sargent contacted Amos, and he took them to a bridge on the highway about 3 miles

southeast of Milburn where Bertha's clothes were found. They were in a bundle and had been placed on a rafter under the bridge.

The defendant testified in his own behalf that he was 18 years old at the time of the commission of the alleged offense. He was married in May 1958. He then testified as to his position in the Air Force. He further testified that he knew George Chilewski, and that on the night in question Chilewski came to his house and they started to go to a dance in Loup City. After driving around to several places, the four young men arrived in Taylor at 10:45 or 10:50 p.m. They saw Bertha and several other girls standing on the opposite side of the park. The young men decided to drive around to where the girls were. When they arrived, the other girls had left and Bertha was alone. The defendant got out of the car and talked to Bertha. The others in the car left and returned in about 3 minutes. The defendant took hold of Bertha's elbow and helped her into the car.

The principal part of the defendant's testimony is a denial of any intention on his part to rape the prosecutrix. He denied, for the most part, the evidence of Bertha relating to such facts, but admitted that he was alone with her in the car at times. He testified that he did not believe that he made any statement to her that he was going to have intercourse with her.

On cross-examination the defendant testified that after Bertha had escaped he and one of the other boys walked up and down the road 200 or 300 yards each way, and the car was driven 4 or 5 miles, looking for her, but no one saw her. Chilewski finally said: "* * * let's go home and go to bed." The defendant testified that he placed her clothes on a rafter under a bridge.

Other testimony offered in behalf of the defendant related to his good reputation in the community in which he lived.

The defendant contends that the trial court committed prejudicial error by permitting the defendant to be

cross-examined as to matters foreign to the scope of his direct examination.

In this connection, the defendant asserts that when he finished his direct examination he had testified that the last time he saw Bertha she was on the trunk of Chilewski's car; that the defendant did not testify on direct examination to anything that happened after the last time he saw Bertha; and that the county attorney inquired of the defendant facts relating to what happened after the defendant last saw Bertha, that is, what he did to find her after she ran away and what he did next. The defendant's counsel objected to these questions on the grounds of improper cross-examination and going into facts not brought out on direct examination. These objections were overruled.

In Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151, this court said: "The rule is that one charged with a crime, who becomes a witness in his own behalf upon his trial, is subject to the same rules that govern other witnesses upon cross-examination and may, on cross-examination, be interrogated as to matters brought out on direct examination." See, also, Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

On direct examination the defendant testified to the events occurring on the night of November 25, 1957, up to the time that he saw Chilewski catch the prosecutrix when she tried to escape, and that the last time he saw her she was fully clothed and was on the trunk of Chilewski's car. On cross-examination, over objections of the defense counsel, the defendant testified that after the prosecutrix left, Chilewski brought her coat and dress back to the car. This testimony obviously related to the defendant's testimony on direct examination that the last time he saw the prosecutrix she was fully dressed. The defendant further testified on cross-examination that the young men in the party, including himself, made an effort to find the prosecutrix after she escaped and ran away from them, and that he was

given the clothing belonging to the prosecutrix and told to put it under the bridge, which he did. The purpose of this cross-examination was to at least contradict the defendant's testimony given by him on direct examination that he knew nothing about the disrobing of the prosecutrix.

There is a well-established rule that although a witness is permitted to be cross-examined as to matters not brought out on direct examination, the judgment will not be reversed when it appears that no prejudice could have resulted. See, Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701; Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413; Manley State Bank v. Spangler, 130 Neb. 196, 264 N. W. 459.

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

The defendant contends that the trial court committed prejudicial error in refusing to dismiss the action or to direct a verdict of not guilty in favor of the defendant at the close of the State's evidence and at the conclusion of all of the evidence. Both of these motions were overruled.

The rule is: "Where assault with intent to commit rape is charged, the testimony of prosecutrix must be corroborated by facts and circumstances established by other competent evidence to justify conviction." Frank v. State, 150 Neb. 745, 35 N. W. 2d 816. See, also, Pew v. State, 164 Neb. 735, 83 N. W. 2d 377.

However, this court has held repeatedly, as stated in Hughes v. State, 154 Neb. 86, 46 N. W. 2d 904: "In a prosecution for assault with intent to commit rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." See,

also, Wheeler v. State, 106 Neb. 808, 184 N. W. 883; Beer v. State, 129 Neb. 366, 261 N. W. 824; Haynes v. State, 137 Neb. 69, 288 N. W. 382; Aller v. State, 114 Neb. 59, 205 N. W. 939; Frank v. State, *supra*.

Under these rules and in the light of the evidence above set forth, we find it ample to sustain the submission of the case to the jury on the crime charged. There is no merit to the defendant's contention that the verdict should be set aside because of insufficient evidence to sustain it.

The defendant predicates error on the part of the trial court in failing to give the defendant's requested instructions Nos. 3 and 5.

Requested instruction No. 3 reads as follows: "You are instructed that in order to find the defendant guilty of the crime charged here it is necessary for you to find, beyond a reasonable doubt, that the defendant had the intent to immediately have intercourse with Bertha Sarnowski and not to merely take liberties with her person; such mere familiarity in the absence of indecent and improper liberties coupled with the intent to immediately have intercourse does not constitute the crime charged."

Requested instruction No. 5 is a lengthy instruction which is much more detailed than instruction No. 3 and seeks to define assault with intent to commit rape and the lesser crime of assault and battery, and what the jury must find to convict the defendant.

Section 28-409, R. R. S. 1943, provides that the assault must be committed with the intent to commit rape, but it does not say the assault must be committed with the intent to "immediately" commit rape. Consequently, the tendered instruction contains an alleged element of the offense which is not found in the statute defining the crime and in such respect is erroneous.

The trial court, in instructions Nos. 5, 6, 9, and 10 fully and accurately instructed the jury on the points

sought to be covered by defendant's requested instructions Nos. 3 and 5.

In Danielson v. State, 155 Neb. 890, 54 N. W. 2d 56, this court held: "A trial court may properly refuse tendered instructions which are covered by instructions given on its own motion." See, also, May v. State, 155 Neb. 786, 54 N. W. 2d 62.

In Graham v. State, 90 Neb. 658, 134 N. W. 249, the court said: "Where the district court has by his instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, he is not required to give further or additional instructions requested by the defendant."

We conclude that the trial court did not commit prejudicial error as contended for by the defendant.

The defendant predicates error on the part of the trial court in receiving into evidence certain articles of clothing worn by the prosecutrix at the time of the alleged assault, to which evidence the defendant objected.

The articles of clothing in question were identified by the prosecutrix as a coat, dress, a red half slip, a white half slip, panties, a handkerchief, and a purse. The defendant argues that this type of testimony should not have been admitted for the reason that the evidence discloses that the defendant had nothing to do with the removal of the clothing of the prosecutrix; that there is nothing to connect the defendant with the taking off of the clothing of the prosecutrix; that the prosecutrix testified that George Chilewski was the one who pulled her panties down and pulled her dress off; and that the only purpose of introducing these articles of clothing and accessories into evidence was to inflame the minds of the jurors.

The defendant cites Hughes v. State, *supra,* wherein it was held: "No force on the part of the defendant, or resistance on the part of the female, is essential to constitute the crime of rape, or of an assault with intent to commit that offense, when it is alleged and proved

that the female is under the statutory age of consent and the defendant is at least 18 years old."

The prosecutrix testified that these articles were removed from her body during the assault by the defendant and his companions. The defendant admitted that he and Chilewski were trying to unbutton the prosecutrix's dress when she was sitting in the front seat of the car between them. During the course of the ride her clothing was removed. We make reference to the evidence of the prosecutrix and of Mrs. Cook heretofore set out, and the evidence that one of the young men who was in the party took the police officers to a bridge over an irrigation ditch located about 3 miles southeast of Milburn, and showed the officers where the clothing which they had removed from the prosecutrix had been hidden under the bridge. The evidence discloses that the defendant put it there. The articles of clothing which were removed from the body of the prosecutrix, the testimony relating thereto, and the discovery of the clothing were circumstances which served to corroborate her testimony that the clothing was removed from her body.

In Frank v. State, *supra,* this court said: "It has long been the rule in this jurisdiction that: 'Where, in a prosecution for assault with intent to commit rape, prosecutrix testifies unequivocally to facts which would constitute the offense, a sufficient corroboration is shown if opportunity and inclination, on the part of the defendant, to commit the offense are shown, and the circumstances proved by other witnesses tend to corroborate the testimony of prosecutrix.' Aller v. State, 114 Neb. 59, 205 N. W. 939. See, also, Lewis v. State, 115 Neb. 659, 214 N. W. 302."

The defendant contends that the testimony shows that many of the articles removed from the body of the prosecutrix were removed by others in the party and not by the defendant, therefore, such evidence was inadmissible.

In 22 C. J. S., Criminal Law, § 777, p. 1328, it is said: "Where several persons participate in the actual commission of a crime, the acts and declarations of any one of them, while so participating, are admissible against all the others." See, also, Marshall v. State, 35 Ariz. 449, 280 P. 491; Hollingshead v. State, 21 Okl. Cr. 306, 207 P. 104, and other cases cited under note 72.

We conclude that the trial court did not commit prejudicial error as contended for by the defendant.

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

AFFIRMED.

GEORGE J. BARTON, APPELLANT, V. WALTER F. WILSON ET AL., APPELLEES.

96 N. W. 2d 270

Filed May 1, 1959. No. 34468.

1. **False Imprisonment.** In an action for damages for false arrest or false imprisonment, whether or not the acts of a defendant amount to false arrest or false imprisonment is a question for the jury provided the evidence is sufficient to support a verdict for the plaintiff.
2. ———. In order to recover in a civil action for false arrest or imprisonment, the burden is upon the plaintiff to prove facts and circumstances amounting to an unlawful restraint of liberty.
3. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, it is required that appropriate reference be made to the specific evidence against which objection is made.
4. **Trial.** 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 the court is requested to do so or not.
5. **Evidence.** Proof in the trial of a jury case should be confined to legal evidence which tends to prove or disprove the issues made by the pleadings.
6. **Evidence: Appeal and Error.** Evidence erroneously received may not be treated as being without prejudice to the party

against whom it was admitted if it may have influenced the result adversely to him.

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

Schrempp & Lathrop and *Henry C. Rosenthal, Jr.*, for appellant.

Herbert M. Fitle, Irving B. Epstein, Albert G. Schatz, and *Gross, Welch, Vinardi & Kauffman,* for appellees.

Wilbur L. Phillips, amicus curiae.

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

YEAGER, J.

This is an action wherein George J. Barton is plaintiff and appellant, and Walter F. Wilson and John R. Steiner are defendants and appellees. By the petition the plaintiff charged that on March 18, 1956, at about 1:45 a.m., the defendant Steiner falsely arrested and imprisoned the plaintiff, and that after he had been so arrested and imprisoned, the defendant Wilson participated in the false imprisonment. On account of this he claimed that he sustained damages which damages he seeks to recover in this action.

The defendants filed separate answers and later amended answers. The case was presented on the amended answers. The answers, to the extent necessary to state here, were general denials and a charge that the plaintiff caused and provoked his own arrest.

The case was tried to a jury. The verdict of the jury was in favor of the defendants and against the plaintiff. Judgment was rendered on the verdict. A motion for new trial was duly filed and in due course overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

As grounds for reversal the plaintiff has set forth eight assignments of error. Before considering them

it appears proper to point out that the plaintiff was arrested by the defendant Steiner without warrant at the time and place charged; that he was taken to the Omaha police station, booked for "investigation," and confined in the jail until the following afternoon when he was released on a cash bond of $25; that while he was in custody he was interviewed by the defendant Wilson and ordered returned to jail where he remained until he was released on the cash bond; and that he was never charged with a criminal offense against the laws of the state or with violation of any ordinance of the city of Omaha, Nebraska.

The disputed question, as disclosed by the record, therefore, was that of whether or not under the facts the arrest and detention of plaintiff was lawful.

In this connection it is pointed out, although it is not presented by any assignment of error, that in this area where the facts are in dispute the determination thereon is to be made by the jury. In Dillon v. Sears-Roebuck Co., 126 Neb. 357, 253 N. W. 331, this court approved the proposition that in an action for damages for false imprisonment whether or not the acts of a defendant amount to false imprisonment is a question for the jury provided the evidence is sufficient to support a verdict for the plaintiff.

Returning now to the assignments of error it is pointed out that by the first of these the plaintiff asserts the court erred in instructing the jury that the burden of proof on the issue of probable cause for arrest was on the plaintiff rather than the defendants. The assignment is without merit. The court has spoken directly on this question and contrary to the contention contained in this assignment. In Dillon v. Sears-Roebuck Co., 125 Neb. 269, 249 N. W. 604, it was said: "To recover in a civil action for false imprisonment, the burden is upon the plaintiff to prove facts and circumstances amounting to an unlawful restraint of her liberty."

It is true that the ultimate decision in this case was

reversed in Dillon v. Sears-Roebuck Co., 126 Neb. 357, 253 N. W. 331, but this legal pronouncement was not disturbed, and it has not been disturbed by any later decision.

The plaintiff insists that the effect of Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995, supports his contention. By this insistence the plaintiff mistakes the true purport of that decision. In that case, which was one for damages for false imprisonment, this court upheld the refusal of the district court to instruct as follows: "'In an action of false imprisonment it is incumbent upon the plaintiff to prove by a preponderance of evidence that the original prosecution was without probable cause and was malicious.'" Responding to this it was said: "These instructions were properly refused. False imprisonment is the unlawful detention of the injured party. * * * The question of malice is immaterial except so far as it affects the measure of damage. * * * Casebeer v. Rice, 18 Neb. 203, relied upon by plaintiff in error, was an action for malicious prosecution and, therefore, not applicable."

It becomes clear from this that the court did not reject the instruction because of improper placement of the burden of proof in an action for false arrest or imprisonment but because of the purpose to inject malice as an essential element in such an action.

By the second assignment of error it is urged that the court erred in admitting testimony of police officers that other arrests had been made and violations committed in the general neighborhood through which plaintiff was passing when he was arrested.

This assignment of error, by reason of its own context and the consideration given to it in the brief, requires only limited consideration. The particular thing or things to which the assignment refers is not pointed out therein. The only thing to which particular attention is directed in the argument is the following quoted from pages 148 and 149 of the bill of exceptions: "Q.

What occasion did you have to stop and make an investigation at this time of night or early morning—investigation as to these men talking to the cab driver? A. Well, we have had several complaints— * * * A. (Continuing) Prior to this night we had made a numerous amount of arrests in connection with prostitution activities and liquor violations stemming from the cab drivers hanging around that corner in that vicinity. Q. Is that the corner where the Ritz Cab Stand is located? A. Yes, sir."

This quotation was introduced by the following argumentative statement in the brief: "Apparently seeking to justify their arrest of plaintiff, the defendants sought to introduce evidence of arrests and violations in the negro district, and a good sampler of this type of evidence is the following excerpt from the Bill of Exceptions: * * *."

If this is a true sample of that to which this assignment is directed then it would be difficult to find any fault. If this indicates anything of which cognizance should be taken it is that these defendants were acting zealously in the performance of duty. Certainly it may not be said from this that within the contemplation of the assignment of error any rights of the plaintiff were prejudiced.

In the light of the rules for the consideration of cases on appeal this is the only evidence which under this assignment may be considered. In Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, this court 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; Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628. The second assignment of error, in the light of what has been

said, provides no basis for a reversal of the judgment in this case.

By the third assignment of error it is urged that the court erred in instructing the jury that it might consider the "district in which the arrest occurred" as a factor in determining whether or not the defendants had probable cause to arrest and detain the plaintiff. The statement to which attention is called, if given alone and not in context with other provisions, could conceivably be regarded as error in a case of false arrest and imprisonment, but that is not the situation here. Here the statement is taken out of context and an emphasis placed upon it which the full context does not warrant. The full context is the following: "In determining whether or not the defendants had probable cause to detain the plaintiff and detained him no longer than a reasonable time, you should consider the acts and conduct of the plaintiff himself, the district in which the arrest occurred, the time of day, and all other facts and circumstances in evidence."

This statement in context suggests no impropriety and no case cited by the plaintiff arrives at an opposite conclusion. As was pointed out earlier herein, where in a case of this kind the facts are in dispute the determination thereon is for the jury. No citation is required to sustain the statement that in a case where a jury is required to determine a question of fact it has the right and duty to consider all facts and circumstances disclosed by the evidence in making that determination, and the court has the duty to instruct accordingly. That is all that was done by the instruction of which the statement objected to was a proper part. No error was involved.

By the sixth assignment of error it is charged that the court by instruction permitted the jury to consider other offenses for which the plaintiff was not arrested or charged. The assignment lacks comprehensibility. There was no such instruction as that described. If

the purpose of the assignment was to call attention to the various phases embraced in the Omaha vagrancy ordinance, a sufficient answer will be found in what will be said with regard to assignment No. 7.

Nothing need be said with regard to the eighth assignment of error beyond the statement that the plaintiff has pointed to no statutory provision or legal decision in this state, and we have found none, requiring that forms of verdict shall be supplied to the jury with the instructions.

By the fourth assignment of error it is asserted that the court erred in refusing to instruct on the definition of what constitutes the lawful right of arrest. This assignment appears to have merit. The instructions do not define either positively or negatively, in the light of the evidence adduced on the trial, what would amount to false arrest or false imprisonment. From the instructions given the jury could not comprehensively determine the paramount issue in this case, that is, whether or not plaintiff was unlawfully arrested and detained by the defendants. It is true that some illustrative situations bearing on this issue were presented by the instructions but these were not sufficient to permit the jury to intelligently approach a determination of this issue.

A request was made for instruction in this area but even without such request, or a request which was deficient, it was the duty of the court to instruct sufficiently and properly.

In Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877, it was said: "This court has said many times in somewhat varying terms but with a single meaning that 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." Numerous citations supporting this statement appear in that opinion. The

error asserted by this assignment must be regarded as prejudicial.

By the fifth assignment of error it is urged substantially that the court should have directed a verdict in favor of plaintiff on the issue of liability since the evidence established that the arrest and imprisonment were violative of the rights of the plaintiff under the Constitutions of the United States and the State of Nebraska.

As has been pointed out the evidence on this issue was in substantial conflict and therefore presented a question for the jury. The assignment is accordingly without merit.

By the seventh assignment of error, which is the only one remaining for consideration, the plaintiff urges that the court erred in admitting in evidence the ordinance of the city of Omaha defining vagrancy. This ordinance, which was admitted, contains 13 paragraphs of definitions of vagrancy. The instructions fail to relate any of these definitions to the arrest and imprisonment of plaintiff, to the incidents leading thereto, or to the question of whether or not it could be found that there was justification for the arrest and imprisonment of plaintiff if it should be found that the plaintiff was at the time violating any of these provisions of the ordinance. The use to which the ordinance could properly be put and the purpose to which it could be applied by the jury was left in the realm of conjecture and speculation. Whether or not its effect was adverse to the plaintiff is not and cannot be known. It cannot well be doubted that it could have resulted improperly and detrimentally to him, and accordingly its admission was prejudicially erroneous.

Under such circumstances this court has said: "Proof in the trial of a jury case should be confined to legal evidence which tends to prove or disprove the issues made by the pleadings. Evidence erroneously received in such a case may not be considered without prejudice

against whom it is admitted if it may have influenced the result as to him." Borden v. General Ins. Co., 157 Neb. 98, 59 N. W. 2d 141. See, also, Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170; Lane v. Burt County Rural Public Power Dist., 163 Neb. 1, 77 N. W. 2d 773.

There is no purpose to say that under no circumstances would this ordinance or parts of it be admissible. The only purpose here is to say that on the basis of lack of proper foundation, failure to limit its admissibility to the portions contemplated by the evidence, and failure to apprise the jury of the purpose for which it could be considered it was inadmissible on the trial of this case.

For the reasons set forth herein the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

PAULINE ABEL, APPELLEE, V. ROBERT ABEL, APPELLANT.
96 N. W. 2d 276

Filed May 1, 1959. No. 34586.

1. **Divorce.** The court in determining the amount of alimony or in making a division of property in a divorce case will consider the age of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts.
2. ———. Upon the granting of an absolute divorce the trial court has a legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require.

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

Wright, Simmons & Harris, for appellant.

Neighbors & Danielson, for appellee.

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

MESSMORE, J.

This is a divorce action brought by Pauline Abel, plaintiff, in the district court for Morrill County, against Robert Abel, defendant. The plaintiff filed her petition on February 24, 1955. On September 21, 1955, a default decree was rendered by the trial court granting the plaintiff an absolute divorce from the defendant on the ground of extreme cruelty, and due to the excessive use of intoxicating liquor by the defendant. On December 27, 1955, the defendant filed a petition to vacate and set aside the decree of divorce. On June 21, 1956, the defendant filed a supplemental petition to vacate and set aside the decree of divorce granted the plaintiff. On February 1, 1957, the trial court set aside that portion of the decree providing for the division of property, and ordered the question of child support and property division to be determined by further hearing with or without additional pleadings as counsel would be advised. On March 14, 1957, the trial court awarded the custody of Eleanor Abel, minor child of the parties, to the exclusive custody of the plaintiff, and awarded each party the automobiles which were registered in each of their names. The trial court in its decree granted the plaintiff two options relating to the division of the property of the parties. It appears that in exercising one of the options the plaintiff elected to keep the restaurant, together with the fixtures, equipment, and inventory located therein, and the residence of the parties located in Bridgeport, together with all household furnishings and equipment located therein; to support the minor child, Eleanor Abel; and to pay the defendant the sum of $3,800 as follows: $2,500 in cash within 90 days from

the date of the decree, $1,000 on or before 15 months from the date of the decree, and $300 on or before 21 months from the date of the decree.

The defendant filed a motion for new trial which was overruled, and defendant perfected appeal to this court.

The defendant predicates error on the following: The trial court erred in awarding the defendant less than half of the net properties accumulated by the parties during their marriage; the trial court erred in its method of dividing the property accumulated by the parties during their marriage; and the trial court erred in its order involving attorney's fees.

The record discloses that the plaintiff and defendant were married at Bayard, Nebraska, on July 2, 1933, and that three children were born to this union, Robert Walter Abel, 20 years of age at the time the plaintiff filed her petition for divorce, Loretta Joan Woznick who was married, and Eleanor Kathrine Abel, 16 years of age when the plaintiff commenced her divorce action. At the time of the marriage, the plaintiff had no property. In the fall of 1933, the plaintiff and defendant rented a place and started farming. The defendant's father bought them furniture and gave them some farm equipment to work with. According to the defendant's testimony, they went out of the business of farming in 1944. At that time they had enough money to purchase the furniture and fixtures and lease a building in Bridgeport where they operated the Broadway Cafe. A year or so later they purchased the building. The restaurant building and the furniture and fixtures therein were all paid for prior to the time the plaintiff instituted her proceedings for divorce. The parties also owned a home in Bridgeport which was subject to a mortgage. They both worked in the restaurant to provide for the support and maintenance of their family.

This case is here for trial de novo upon the issues presented on appeal, as in other equity actions.

Inasmuch as this appeal involves only the division of

property owned by the parties, we deem the following to be applicable.

In Hoffmeyer v. Hoffmeyer, 157 Neb. 842, 62 N. W. 2d 138, it was held: "The court in determining the amount of alimony or in making a division of property in a divorce case will consider the age of the parties, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, the physical condition of each, the property owned by them and whether or not it was acquired by their joint efforts, and any other pertinent facts. * * * Upon the granting of an absolute divorce the trial court has a legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require."

This brings us to the testimony relating to the value of the property. The defendant testified that the restaurant, including the equipment and good will of the business, was worth $15,000, and that 3 years prior to the time of trial he was offered $13,500 cash for the restaurant as a unit. He placed the value of the residence property of the parties at $11,000.

The plaintiff testified that the value of the building and the lot on which the restaurant was located, on September 21, 1955, was $4,500; that the interior equipment, consisting of all the supplies, fixtures, utensils, and other equipment used therein, on that date was valued at about $2,200; and that the value of the home was $10,500.

It was stipulated that the amount due on the mortgage on the residence on September 21, 1955, was $8,409.54. It was also stipulated that the defendant did not personally make any payments on this mortgage indebtedness subsequent to the payment of March 14, 1955.

Art Erickson, president of the Bridgeport State Bank and who had lived in Bridgeport about 45 years and

been associated with the bank for about 30 years, testified that he was acquainted with the Abels and the Broadway Cafe which was being operated by Pauline Abel. He further testified that he was acquainted in a general way with real estate values in Bridgeport by reason of his long residence there and being in close touch with the financial transactions in the community. He gave his opinion of the value of the Broadway Cafe, solely as to the real estate, the lot and improvements, as of September 1955, to be of the fair and reasonable cash value of $5,000 to $6,000, and the value of the residence in September 1955, to be from $10,000 to $12,000. He further testified that residence property had advanced a little in value, but the property in question would be of about the same value at the time of this hearing as it was in 1955, and the value of the restaurant would be about the same as it was in 1955; and that the values he gave were what he believed would constitute the cash values on the market.

It was stipulated that in July 1955, chairs were purchased for the restaurant at a cost of $190.90, and that in December 1955, a heater was purchased at a cost of $319.19. The plaintiff testified that she had redecorated the restaurant at a cost of $1,200.

A witness engaged in the restaurant business testified that he endeavored to buy the Broadway Cafe as a unit and as a going concern for $12,000, but his offer was refused; and that he had an opinion that since January 1955, the Broadway Cafe, as a unit, had a value of $12,000.

A witness engaged in the real estate and insurance business in Bridgeport since 1941 appraised the restaurant building at $7,500. This did not include the equipment. He appraised the value of the residence at $11,000. This did not include any furniture or fixtures.

The evidence further disclosed that at the time of trial the plaintiff testified that one daughter was married, the son, 22 years of age, was attending Wesleyan

University, and Eleanor, 18 years of age, was attending Chadron State College. The evidence further disclosed that the plaintiff contributed to the education and support of the son at Wesleyan and the daughter at Chadron State College, and that the defendant made no contributions of any kind toward the support or education of these young people.

The plaintiff has operated the restaurant since she obtained her decree of divorce on September 21, 1955, and also maintained the residence. She has received a small amount of revenue from renting rooms in the residence. The record fails to show what would be the average yearly net income from the restaurant.

As we view the evidence relating to the value of the real and personal property owned by the parties at the time of the hearing in the instant case, we conclude that the restaurant building, the lot, and the fixtures were of a reasonable value of $8,200, and the reasonable value of the residence of the parties was $11,000. It was stipulated at the time of this hearing that there was a mortgage on the residence property in the amount of $8,409.54. It appears from the decree of the trial court in the instant case that the trial judge considered the parties had an equity of about $3,000 in the residence. We consider the reasonable value of all the property accumulated by the parties by their joint efforts at the time of this hearing, after deducting the amount of the mortgage as heretofore mentioned, would amount to $10,790.46.

The trial court awarded the defendant $3,800 as his share of the division of this property.

We take into consideration the fact that the defendant had made no contribution of any kind toward the education or support of the son and daughter who attended college.

We award the plaintiff all the furniture and household equipment in the home.

As we view the evidence at the time of the hearing in

the instant case, we conclude that the decree of the trial court should be modified to allow the defendant the sum of $5,000, to be paid by the plaintiff in installments as follows: $2,500 within 90 days from the date of the issuance of the mandate in this case; $1,000 on or before 15 months from the date of the issuance of the mandate; and the balance of $1,500 to be paid on or before 36 months from the date of the issuance of the mandate, and the plaintiff shall not be required to pay any interest on the deferred payments until after they are due and unpaid; that the plaintiff pay all costs in the district court and in this court; and that each party pay his or her own attorney's fees.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF ALICE STIDWORTHY, DECEASED.
ADA S. WESTOVER, APPELLEE, V. HELEN S. KERR ET AL., APPELLANTS.

96 N. W. 2d 421

Filed May 8, 1959. No. 34461.

1. **Wills.** A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument and same was not procured by undue influence.
2. ———. The mental capacity of a testator is tested by the state of his mind at the time he executed his will.
3. ———. When undue influence is alleged as a defense, the evidence must tend to show undue influence directly in reference to the will in question.
4. ———. Proof of undue influence is generally permitted to take a wide range but it should be confined to a date materially corresponding with execution of the will.
5. **Evidence.** A litigant should not ordinarily be permitted to cross-examine a witness on a matter foreign to the scope of his direct examination.

6. ———. Under section 25-853, R. R. S. 1943, violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.
7. **Evidence: Appeal and Error.** The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not require reversal by this court, unless it is clearly or plainly shown that the trial court abused its discretion.

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

Doyle, Morrison & Doyle, for appellants.

Chambers, Holland, Dudgeon & Hastings, for appellee.

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

CHAPPELL, J.

In this action, the last will and testament and three codicils thereto of Alice Stidworthy, deceased, were admitted to probate after a contest in the county court of Lancaster County. Therefrom contestants Helen S. Kerr and Margaret S. Coryell appealed to the district court. The petition of proponent Ada S. Westover on appeal alleged that Alice Stidworthy, a resident of Lancaster County, died in said county on or about July 9, 1956, leaving a last will and testament consisting of a will dated February 16, 1942, a codicil dated June 20, 1951, a second codicil dated March 31, 1952, and a third codicil dated November 3, 1953, each and all of which were executed in due form of law and filed in the county court July 12, 1956. Proponent alleged that at the time of the execution of each and all of said instruments Alice Stidworthy was of sound mind and disposing memory; that Ada S. Westover is executrix named in said will and is competent and qualified to act as such; that testatrix died seized of an estate in Lancaster County; and that at the time of her death she was a widow who left as her heirs at law three daughters, all of lawful age, namely Helen S. Kerr, Ada S. Westover, and Mar-

garet S. Coryell. The prayer was for admission of the will and codicils to probate, and for related relief.

The answer of contestants objected to probate of the will dated February 16, 1942, alleging that it was not the last will and testament of deceased; that the instrument was not executed in the manner provided by law; and that it was obtained by undue influence. Also, contestants objected to probate of each and all of the three codicils and alleged that testatrix lacked testamentary capacity to execute same; and that at the time of the purported execution, Ada S. Westover, a beneficiary thereof, occupied a confidential relationship with testatrix which was violated and used for the purpose of securing beneficial provisions in said codicils to herself by misrepresentation of fact and undue influence upon the mind of testatrix. Proponent's reply was a general denial.

The issues were tried to a jury in a long trial whereat evidence was adduced by the parties. At conclusion of all the evidence, proponent first moved for a directed verdict in her favor. She then made a second motion that in event the first motion was overruled, the court should withdraw from the jury any and all issues as to lawful execution of the will and codicils. She then made a third motion to withdraw all issues of undue influence. Thereupon the trial court overruled proponent's first and third motions, and sustained the second. Thereafter, the court instructed the jury that as a matter of law the will and three codicils had been executed in the manner and form required by law and submitted the issues of testamentary capacity and undue influence to the jury, all of which was done in such an all-inclusive, proper manner and form that no complaint is made thereof in this court. In that situation, we are not required to cite or discuss authorities dealing with the factors and elements required to be adduced and considered in disposing of the issues of testamentary capacity and undue influence.

Subsequently, the jury returned a verdict finding that the will and codicils were the last will and testament of Alice Stidworthy, deceased. Judgment was rendered accordingly and contestants' motion for new trial was overruled. Counsel then filed a notice of appeal for both contestants, and perfected an appeal to this court in their behalf. However, contestant Helen S. Kerr subsequently filed a motion in this court to dismiss her name from the appeal, leaving Margaret S. Coryell as the sole appellant, whereupon this court sustained the motion and dismissed the appeal as to Helen S. Kerr. The brief of contestant Margaret S. Coryell filed herein assigned and argued in substance only that the trial court erred prejudicially in the exclusion of certain evidence and in unduly restricting cross-examination of certain witnesses. We do not sustain the assignment.

There are well-established rules which have application here in disposing of Margaret's contentions. In Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568, we reaffirmed that: "A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument and same was not procured by undue influence."

The mental capacity of a testator is tested by the state of his mind at the time he executed his will. In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513. Also, when undue influence is alleged as a defense, the evidence must tend to show undue influence directly in reference to the will in question. In re Estate of Thompson, 153 Neb. 375, 44 N. W. 2d 814. Further, proof of undue influence is generally permitted to take a wide range, but it should be confined to a date ma-

terially corresponding with execution of the will. 94 C. J. S., Wills, § 248, p. 1116, § 245, p. 1107.

In Grosse v. Grosse, 166 Neb. 55, 87 N. W. 2d 900, we reaffirmed that a litigant should not ordinarily be permitted to cross-examine a witness on a matter foreign to the scope of his direct examination. See, also, Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415, wherein we stated the general rule with regard to the limitations of cross-examination, and defined the inclusive meaning and application of the general rule.

In Manley State Bank v. Spangler, 130 Neb. 196, 264 N. W. 459, quoting from Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413, we held: " 'Under section 20-853, Comp. St. 1929 (now section 25-853, R. R. S. 1943), violation of the strict rule of cross-examination will not be considered ground for reversal unless it clearly results in prejudice to the substantial rights of the party complaining.' "

Also, as stated in 5A C. J. S., Appeal and Error, § 1604, p. 88, citing numerous authorities, several of which are from this jurisdiction: "The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.

"Application of this principle has been made to rulings relating to the reception of evidence the admissibility of which turns upon its relevancy, evidence collateral to the main issue, or which bears remotely on issues involved; and to rulings relating to cumulative evidence, opinion evidence, evidence concerning a matter of common knowledge, and evidence which is otherwise competent but is claimed to have a tendency to excite undue prejudice."

In the light of the foregoing rules, we have examined the record. The evidence is voluminous, with separate exhibits made a part thereof. A reading of the record discloses that contestants were permitted on

both direct and cross-examination to go far afield into collateral matters which were incompetent, irrelevant, and immaterial, and not properly a part of this or any other will contest. In that situation we can do no more here than summarize the material relevant evidence from which the jury could have reasonably concluded as it did, and point out why the contentions of Margaret S. Coryell have no merit. In doing so, proponent Ada S. Westover will be called Ada; appellant Margaret S. Coryell will be called Margaret, and her daughter Adele Coryell will be called Adele; Helen S. Kerr will be called Helen; and Alice Stidworthy, deceased, will be called testatrix. When speaking of Margaret and Helen jointly they will be called contestants.

Testatrix was a widow from the time of her husband's death in 1931 until she died in Lincoln on July 9, 1956. Her husband, Doctor Daniel B. Stidworthy, was a physician at Homer where he lived with testatrix until the time of his death. The doctor and his family had a close and trusted friend, one Frank Buckwalter, who will be called Frank. By the time the doctor died, he and Frank as partners had accumulated and owned certain numbered farms, consisting of about 800 or 900 acres in Dakota County. Shortly after the doctor's death, testatrix moved to Lincoln where for almost 25 years she continuously lived in Ada's home until the death of testatrix. In that connection, from 1932 Ada was a widow with two young sons who lived with her until they reached maturity and attained manhood, while testatrix lived with them in a home owned by Ada.

The three daughters of testatrix were graduates of the University of Nebraska. Ada had taken postgraduate work elsewhere and held a master's degree in medical-social work. She had taught at the University of Nebraska for sometime, but was general secretary of the Family Service Association in Lincoln at and for sometime prior to this trial.

Frank generally managed and looked after the farms

owned in partnership with the doctor. Shortly after the doctor's death, the Buckwalter-Stidworthy Corporation, hereinafter called the corporation, was formed, and the partnership lands were conveyed to it. The original officers and members of the board of directors were testatrix, Margaret, and Frank, together with Selma Nelson, one of Frank's employees. There were 1,000 shares of stock issued by the corporation, of which 490 went to testatrix, 10 went to Margaret, and 500 went to Frank, including qualifying shares to his employee. Frank generally managed the corporation and reported at length to the stockholders, who usually voted by proxy. During his lifetime he also generally took care of the business affairs of testatrix.

In the meantime, Margaret's husband had borrowed money from testatrix and thus became indebted to her for $3,000, represented by a promissory note payable to her, dated December 30, 1936, and due December 30, 1946, with interest at 7 percent payable semiannually. Likewise, he became indebted to Ada for $3,000, represented by a promissory note payable to her, dated December 30, 1936, and due December 30, 1946, with interest at 7 percent, payable semiannually, for which a new note was made by him to Ada on May 25, 1948. In that connection, even at time of this trial no part of such notes had ever been paid by Margaret's husband except a small part of interest which had accrued thereon, although sometime before execution of the will of testatrix, dated February 16, 1942, C. Petrus Peterson, a lawyer, had attempted unsuccessfully to make collection thereof. Also, Margaret's husband had taken over the marketing and distribution of Three Daughters, a deodorant prescription prepared by Doctor Stidworthy during his lifetime, and Margaret's husband had failed to make any accounting therefor.

On February 16, 1942, Mr. Peterson, as attorney for testatrix, prepared her will in his office as she alone personally requested, and same was there duly executed

as required by law. As far as important here, such will gave Margaret the unpaid $3,000 note aforesaid which Margaret's husband owed testatrix, together with 10 shares of stock in the corporation then held by Margaret, plus 65 additional shares of such stock. The will also gave 166 shares of stock to Helen, and 166 shares of stock to Ada. It then gave Ada an additional 93 shares of stock "for reasons which I regard as proper and adequate and which I have explained in the letter which will be found with this will." The residue of the estate was given in equal shares to Helen, Ada, and Margaret. The appointment of Ada as executrix was then requested and all wills theretofore made were revoked. It will be noted that testatrix thus bequeathed 500 shares of stock, including 490 shares then owned by her, and 10 shares then owned by Margaret, and that testatrix gave Ada more than the others.

In that connection, Ada was not present when said will was executed, and knew nothing of its contents until it was read in the presence of Helen and Margaret after the funeral of testatrix. At the time of its execution, testatrix orally gave Mr. Peterson her reasons for making the provisions in the will. Such reasons were that she had made her home with Ada for a number of years; that in addition to the unpaid indebtedness aforesaid to herself and Ada, the Coryells had received other financial assistance from testatrix; and that she wanted to do equity between her three daughters, each of whom was equally loved by her. The evidence is overwhelming that testatrix was then of sound mind and disposing memory. In that connection, contestants did not specifically allege in their objections to probate that on February 16, 1942, testatrix lacked testamentary capacity. However, at the trial they adduced some evidence in the nature of conclusions that testatrix then did lack testamentary capacity, and the trial court submitted that issue to the jury.

In April 1949 Frank died, and his stock in the corpo-

ration passed to his brother, Clarence Buckwalter, hereinafter called Clarence, who lived in Chicago. Clarence then took over management of the corporation and trouble developed with its employees who felt that Frank should have given some of his stock to them and that Clarence was not capable of properly managing the corporation. As a matter of fact, he was gravely assaulted by one of the employees. Therefore, he decided to dispose of his stock, and in January 1950, some conversations were had by Ada, Margaret, and an accountant employed by them with regard to purchase of his stock for testatrix, but that failed for want of an acceptable offer. In that connection, contrary to contentions of Margaret, such conversations were properly excluded as incompetent, immaterial, and irrelevant as were also inquiries with regard to negotiations concerning an incomplete exhibit prepared by Margaret and given to the accountant, which document Margaret had admittedly never asked testatrix to sign, which Margaret never gave to Ada or asked her to get testatrix to sign, and which never was signed by her.

In that connection also, Clarence prepared an agreement in his own handwriting, dated March 22, 1950. It provided for a division of the farms and a dissolution of the corporation at an early date; that a deed should be given to testatrix of corporation farms Nos. 6 and 7 with right of Clarence to purchase same any time within 5 years for $30,000 before sale to any other person; and that a deed should be given to Clarence of corporation farms Nos. 8 and 2 with right of testatrix to purchase same any time within 5 years for $30,000 before selling to any other person. It then provided that the balance of the corporation assets should be divided equally after payment of debts and expenses of dissolution. Such an agreement was signed as accepted by testatrix and Clarence, and was witnessed by Ada. However, that agreement, offered in evidence by contestants, was never

consummated because other interested parties did not like such disposition of the corporate property.

Thereafter, Clarence determined to put his stock on the market, and to prevent it from passing into strange hands, Ada purchased Clarence's 500 shares of stock at an agreed price of $65 a share. Mr. Peterson, who had represented Ada in her divorce action in 1931, assisted in arranging the financing thereof, after discussing the matter in detail with testatrix, who agreed that it was desirable and necessary for Ada to acquire the stock in order to prevent it from going on the market and jeopardizing the interests of testatrix and others by a wide distribution of stock ownership. On cross-examination with regard thereto, Mr. Peterson was permitted to testify in detail exactly how such purchase was negotiated and financed by Ada. In that connection, Helen testified that in 1950 Ada stated in her presence and in the presence of testatrix and Margaret that she had bought Clarence's stock. However, Margaret testified that although she had heard of such purchase, she did not know how Ada had purchased the stock until they examined the records after the death of testatrix. Margaret was then asked: "Did you discover where she (Ada) got the money to buy that stock?" Answer: "Yes." Objection to such evidence as immaterial was made and sustained, whereupon contestants made an offer of proof to which objection was made as incompetent, immaterial, and irrelevant, and that the offer was broader than the question. Such objection was sustained. Contrary to Margaret's contention, such objection was properly sustained. The offer was so broad, comprehensive, and inclusive of almost the entire defense of contestants that the trial court was required to sustain the objection. In any event, the record otherwise discloses exactly how the purchase was financed by Ada, and there is no dispute about it. Margaret could not have been prejudiced by the sustaining of such objection.

Shortly after Ada purchased the stock aforesaid from Clarence, the corporation was reorganized, with Ada, testatrix, and Mr. Peterson as officers and directors. Mr. Peterson was given qualifying shares, and he thereafter acted as a director and counsel for the corporation. Ada then became president and manager at an agreed salary of $300 a month which she continuously received, and testatrix became an officer at a salary of $150 a month which she continuously received until the time of her death.

At the time of such reorganization, the 10 shares of stock owned by Margaret were voluntarily endorsed by her in blank and held by testatrix, who surrendered them for a new issue of stock to her for her full stock ownership, including that standing in the name of Margaret, who was not a stockholder of record after reorganization of the corporation and while Mr. Peterson had anything to do with the corporation.

In that connection, Margaret and Helen claimed that testatrix had been thereafter looking for Margaret's stock but could not find it, so on October 16, 1950, they went to Ada's home in her absence and persuaded testatrix to give them the combination to her safe, purportedly to look for Margaret's stock. It is noteworthy that Margaret always had known the combination of the safe, but she had forgotten it. However, testatrix did always admittedly remember it and she gave Margaret the combination. In any event, Margaret and Helen opened the safe and did not find Margaret's stock which had been theretofore surrendered, but they claimed to have found and clandestinely read a will of testatrix whereby each of the daughters was given 166⅔ shares of stock, and Ada's two boys and Adele were each given $1,000. However, neither Margaret nor Helen knew the date of such a will or even whether it had ever been signed and executed by testatrix. When Ada came home and learned what happened, she told them they had no business in their mother's safe or reading

her will, and purportedly said: "We are working on that." However, Ada denied that she made such quoted statement. Nevertheless, Margaret and Helen came back again a few days later, whereat testatrix again gave them the combination, but upon opening the safe they found no papers in it. The fact is that the will executed on February 16, 1942, was delivered by testatrix to Mr. Peterson personally on October 29, 1950, for safekeeping, and he so receipted for it in a memorandum in writing and on the envelope which contained the will.

The first codicil to the will was also prepared by Mr. Peterson in his office as requested by testatrix and same was duly executed as required by law on June 20, 1951, a little less than a year after Ada had purchased Clarence's stock. Such codicil recited that by her last will, testatrix had bequeathed corporation stock owned by her to her three daughters in varying amounts. It then recited that on January 2, 1951, testatrix had entered into a reciprocal agreement with Ada by which the survivor was given an option to purchase all stock in the corporation of the one first dying, not bequeathed to the survivor, at an agreed price of $65 a share. Accordingly, her executor was directed to carry said agreement into effect if testatrix died before Ada, and that if Ada exercised her option, the other legatees in her will should be paid the purchase price of the number of shares bequeathed to them respectively in lieu of stock. In all other respects, testatrix ratified and confirmed her will dated February 16, 1942.

The second codicil was also prepared by Mr. Peterson in his office as requested by testatrix after she had written and sent a letter to him saying that she wanted to sell some of her stock to Ada for $65 a share in order to give Margaret and Adele financial assistance. Such codicil was duly executed as required by law on March 31, 1952. Therein, testatrix recited that during the past year she had given financial assistance to Margaret and Adele which made it necessary for testatrix to

sell 11 shares of stock, for which she realized $65 a share. She recited that in her last will provision had been made for distribution of her stock among her three daughters, but she now directed that 11 shares sold to date and any sold in the future be deducted from the number provided in her will of February 16, 1942, as going to Margaret, leaving undisturbed the number of shares or proceeds thereof going to her other two daughters. She also recited that the letter referred to in said will explaining why the share to Ada was more than the others had been removed as then unnecessary. In all other matters testatrix confirmed her last will dated February 16, 1942, and her first codicil thereto dated June 20, 1951.

The third codicil was also prepared by Mr. Peterson in his office as requested by testatrix after she had written and sent a letter to him saying that she wanted to sell nine more shares of her stock to Ada for $65 a share in order to give Margaret that amount of money as requested by her. Such codicil was duly executed as provided by law on November 3, 1953. Therein testatrix recited that Margaret had urgently requested financial assistance in the sum of $600 for her daughter Adele's wedding. In order to render that assistance, testatrix recited that she had decided to sell nine shares of her stock to Ada at an agreed price of $65 a share. Testatrix then directed that said nine shares be deducted from the number of shares given to Margaret as provided in her will dated February 16, 1942, as modified by her second codicil dated March 31, 1952, leaving the number of shares or the proceeds thereof going to her other two daughters undisturbed. In all other matters testatrix confirmed her last will dated February 16, 1942, and her second codicil thereto dated March 31, 1952.

Mr. Peterson testified that in advising testatrix and in preparing the codicils he relied upon certain letters sent to him and signed by testatrix which appear in the record, and upon conversations which he had with testatrix

and not with Ada, who was not present when the will was prepared and executed and when the codicils were prepared.

The codicils were executed by testatrix and, as requested by testatrix, they were attested by her close friends as witnesses in Ada's home. However, Ada testified that she knew they were then transacting some business with testatrix but that she was not present in the room with them and did not know the nature thereof, and that she knew nothing of the contents of the will or the codicils until they were read in the presence of Margaret and Helen after the funeral of testatrix. That testimony is supported by some other evidence and was not contradicted by any direct evidence. Mr. Peterson also testified that he saw testatrix from time to time in his office and at her home after he drew her will and codicils and until shortly before her death. He also saw her at annual stockholders' meetings and board of directors' meetings, and testified that she remained fully mentally competent throughout the entire period.

Likewise some 16 near neighbors, close friends, and acquaintances who had seen and visited with testatrix often in her home and elsewhere during periods prior to 1942 and thereafter until shortly before her death, testified that testatrix was entirely competent mentally throughout the entire period. True, testatrix was 83 years old at the time of her death and naturally then and theretofore had some physical disabilities due primarily to advancing age, but the evidence is overwhelming that at all times during preparation and execution of her will and codicils and thereafter, at least until the last part of May 1956, she understood the nature of her acts, the extent of her property, the proposed disposition of it, and the natural objects of her bounty. As a matter of fact, the testimony is overwhelming that during such period testatrix was a handsome woman of small stature, as disclosed by three photographs of her taken as late as May 20, 1956. Oral testimony also affirmed that con-

clusion and attested that testatrix was conservative, loving withal in temperament, and learned beyond the average person during her entire lifetime until her last illness a short time before her death. Her physician, who examined her in September 1950, and a few times thereafter until her last illness, testified that testatrix was of sound mind until that time.

On the other hand, the only evidence contrary thereto was as follows: Margaret testified in substance that testatrix was not mentally sound on June 20, 1951, and March 31, 1952, and did not know or appreciate the nature or extent of her property on February 16, 1942. Helen, who lived elsewhere and only occasionally came to Lincoln, testified that testatrix was not mentally sound in 1951, 1952, or 1953, and was not mentally sound on February 16, 1942, because she did not then know the extent of her property. Another witness for contestants who lived in Springfield, Ohio, expressed no opinion of the mental capacity of testatrix during the years the will and codicils were prepared and executed, but simply said that in May 1955, testatrix had failed physically and mentally. In that connection, it will be noted that testatrix had lived in Lincoln from about 1931 until her death July 9, 1956, and she apparently knew many people there, yet contestants did not produce any such persons to say anything against her mental competency.

Selma Nelson, an employee of the corporation, was called by the contestants. She had known testatrix since 1913 and they had become close friends. After testatrix moved to Lincoln, they corresponded regularly about personal matters and affairs of the corporation and visited with each other over long distance telephone almost every Sunday until 1950, after reorganization of the corporation. However, Miss Nelson was not asked her opinion about the mental competency of testatrix, although she did say that testatrix was very opinionated

on politics and liked to discuss what was going on in the newspapers.

In that connection, Margaret complains here that the trial court erred prejudicially in refusing to permit Selma Nelson to express an opinion as to the value of the land owned by the corporation or the value of its stock. While some questions directed to her made reference to her experience in the real estate business over many years as secretary for Frank who was engaged in that business, Miss Nelson did not testify to any specific contact with, purchases, or sales of comparable land in Dakota County, or with relation to other training in or knowledge of the real estate business in order to qualify her to express an opinion. In fact, she said: "You are asking for my personal opinion, as it would be the same as anybody else, because I am not an appraiser." As a matter of fact also, contestants offered the agreement dated March 22, 1950, between Clarence and testatrix, which proposed to divide between them the real estate owned by the corporation at a total value of $60,000, and said agreement was received in evidence. When it came to the matter of Miss Nelson's opinon of the value of the corporation's stock, no proper foundation whatever was attempted. However, at all times, based on income from the farms, testatrix did not believe that the stock was worth over $50 a share, and at all times was willing to sell at that price but upon the advice and insistence of Mr. Peterson $65 a share was agreed upon and fixed as a proper value. The contention of Margaret aforesaid has no merit.

Ada and testatrix had a joint bank account most of the time here involved. In that connection, contestants offered in evidence microfilm copies of bank ledger sheets purportedly showing activity of the bank account from about May 5, 1949, through March 3, 1952, but such ledger sheets did not disclose either the source of the deposits or the payee of withdrawals. Upon objection as incompetent, immaterial, and irrelevant, the trial

court, upon examining the sheets, said: "I can't read it." It is "an illegible document as to amounts or dates and it is meaningless to the court. I wouldn't understand it." An examination of the sheets by us has verified that statement as true. After asking counsel for contestants his purpose in making the offer, a broad, all-inclusive purpose and theory was stated by him, whereupon the court, contrary to contestants' contention and theory in connection therewith, properly sustained the objection.

Margaret also complains that the trial court erred prejudicially by excluding an exhibit consisting of microfilm copies of the face of some 40 checks signed by testatrix and made payable to divers firms and persons, one of whom was Adele Coryell, between 1946 and 1952. Generally, no endorsements appear thereon to show where, or to whom, or to intelligently show when if ever they were paid. As a matter of fact, Margaret admits in her brief that the exhibit was never offered in evidence by her, but asserts that probably under the circumstances the exhibit would have been excluded if it had been offered. In that connection Margaret was asked: "Do you or any members of your family appear as payee on the check?" To which an objection was made and sustained as "highly improper and incompetent, immaterial, irrelevant, seeking to get before the jury information about an exhibit not yet offered in evidence and which the court, from previous rulings, probably will refuse, and the jury should be cautioned." Contestants then offered to prove by the answer to the aforesaid question facts which were so broad and all-inclusive of conclusions as to be entirely improper and inadmissible as an answer to such question. Thereupon an objection to the offer as irrelevant, incompetent, immaterial, and including conclusions broader than the question, was sustained. In that connection, the checks in any event would have simply been a verification of Mr. Peterson's testimony that testatrix told him she had

paid some of the Coryell family's bills as requested by Margaret for some period of time because Margaret did not want her name to appear on them. That statement had also been made in a memorandum signed by testatrix and sent to Mr. Peterson. Under the circumstances presented here, the rejection of the offer and exhibits was proper in every respect and could not have been prejudicial to contestants. In such respect, Margaret admitted that testatrix had paid her and Adele the $600 mentioned in the third codicil, and had also given them some smaller amounts at different times, but Margaret denied that she had ever made any request of testatrix to pay Coryell bills.

Margaret also complains that the trial court erred prejudicially in excluding a group of exhibits consisting of eight microfilm copies of the face of checks variously dated between May 8, 1951, and July 2, 1952, and signed by testatrix, six of which were made payable to Wynn Westover, one of Ada's sons, and two for smaller amounts which were made payable to Ada. However, generally no endorsements appear thereon to show where, or to whom, or to intelligently show when if ever they were paid. Objection that the offer of such exhibits was incompetent, immaterial, and irrelevant, was sustained. Contestants then made an offer of proof which was so broad, argumentative, and inclusive of conclusions that an objection as incompetent, immaterial, and irrelevant, and broader than the proof, and constituted a conclusion of an argumentative nature sought to be drawn from the evidence, was of necessity sustained. In that connection, apparently Margaret's theory was that proof that testatrix gave money to Ada and her sons while she had then lived with them in their home for more than 20 years, would somehow disprove statements in the will and codicils, and otherwise concerning financial assistance allegedly given the Coryell family by testatrix, who never lived with the Coryells, was never asked to live with them, and never sought or de-

sired to do so. It was never denied that testatrix had given some money to Ada and her sons while they so lived together, and it would be only natural for her to do so. Such an accounting for family funds so given was entirely incompetent, immaterial, and irrelevant, and served no useful purpose in this proceeding.

On cross-examination Ada was asked what her salary was as manager and president of the corporation since 1950. In that connection, it was admitted throughout the trial and never denied that Ada received $300 a month for such services from the time she purchased Clarence's stock and the corporation was reorganized in 1950 to date of this trial. She was also asked how much she had drawn as dividends and expense money from the corporation since 1950, and what salary she was receiving from her employer as secretary of the Family Service Association in 1950. Respective objections that the foregoing questions were improper cross-examination were sustained, and Margaret complains of those rulings as prejudicially erroneous. An examination of the record discloses that such rulings could not have been prejudicial to contestants, and in the light of authorities heretofore cited, we conclude that the trial court did not abuse its discretion in sustaining objections to the questions aforesaid.

This record discloses that the will and codicils here involved continuously carried out a consistent and definite plan from beginning to end. The trial court submitted the issues of testamentary capacity and undue influence in an all-inclusive manner and form entirely favorable to contestants. They had an entirely fair trial and were given every opportunity to present their theory of defense. We find no error in this record which could upon any theory be prejudicial to Margaret. Therefore, we conclude that the judgment should be and hereby is affirmed. All costs are taxed to contestant, Margaret S. Coryell.

AFFIRMED.

UNITED STATES COLD STORAGE CORPORATION, A CORPORATION, APPELLEE, V. JOSEPH STOLINSKI, COUNTY ASSESSOR, DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS.

96 N. W. 2d 408

Filed May 8, 1959. No. 34494.

1. **Constitutional Law: Taxation.** The Legislature has plenary power over taxation and matters incidental to such power within the limits of the Constitution.
2. ———: ———. The mandate of the Constitution that all tangible property shall be uniformly and proportionately taxed includes the right of the Legislature to enact any reasonable legislation that appears necessary in accomplishing the purposes of the Constitution.
3. **Statutes: Taxation.** Those engaged in the business of storing goods, wares, and merchandise for others constitute a proper classification for legislation where the purpose of the legislation has application to the class.
4. **Constitutional Law: Taxation.** Section 77-1226, R. S. Supp., 1957, requiring warehousemen to list all tangible property in their warehouses on assessment day and to give the name and address of the owner, together with the name, kind, quantity, and grade thereof, and file the same with the county assessor within a fixed period, is a reasonable exercise of legislative power to secure compliance with the constitutional provision that all tangible property shall be taxed uniformly and proportionately.
5. ———: ———. The act is not unconstitutional in that it places warehousemen in a different classification from other businesses, since the Legislature may properly classify persons, organizations, or corporations according to their businesses, and may apply different rules to those which belong to different classes.
6. ———: ———. A statute requiring warehousemen to furnish the tax assessor with lists of property in their warehouses without compensation therefor is not a denial of due process of law, nor a taking of private property for a public use.
7. ———: ———. An act requiring a warehouseman to furnish the tax assessor with a list of property stored in his warehouse is not violative of the constitutional prohibition against unreasonable searches and seizures.
8. **Constitutional Law.** Private rights must to a reasonable extent yield to the public necessity, and where the limitation on private rights is within the bounds of reasonableness the wisdom of the legislation is a legislative matter and not a judicial one.
9. **Commerce: Taxation.** The fact that goods shipped from a point

of origin in a foreign state to a point of destination in another foreign state are stored in transit in Nebraska does not ipso facto require a finding that such goods are in interstate commerce.

10. ———: ———. Whether or not goods being transported in interstate commerce with stop-over privileges in Nebraska come to rest and acquire a tax situs in Nebraska involves a complicated question of law and fact.
11. ———: ———. Where interstate transit is broken or interrupted in a particular state, if the break in the interstate journey is caused by the exigencies or conveniences of the chosen means of transportation, considerations of the safety of the goods during transit, or natural causes over which the owner has no control, the continuity of the transit remains unimpaired and the immunity of the goods from state or local taxation is unaffected.
12. ———: ———. If the interruption in transit occurred for purposes connected with the business convenience or profit of the taxpayer or the owner of the property, then the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from state and local taxation.
13. ———: ———. The contention that section 77-1226, R. S. Supp., 1957, impedes the free flow of and is an unlawful burden upon interstate commerce is unavailing, even if pertinent to the issue, where the evidence does not conclusively establish that the goods in question were in interstate commerce on the tax assessment date.
14. **Statutes.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment.
15. ———. The Legislature may properly legislate in regard to a class of persons, but it may not divide a class of persons and enact different rules for the government of each segment of the class.
16. **Constitutional Law: Taxation.** Section 77-1226, R. S. Supp., 1957, creates an arbitrary classification of warehousemen and grants privileges and immunities to some which it denies to others. It is violative of Article III, section 18, of the Constitution, and is therefore void.

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

Eugene F. Fitzgerald, John C. Burke, and *Arthur D. O'Leary,* for appellants.

Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

CARTER, J.

The plaintiff commenced this action to obtain a declaratory judgment holding section 77-1226, R. S. Supp., 1957, to be unconstitutional and void, and of no force and effect. The trial court held the act unconstitutional and enjoined the defendants from enforcing or attempting to enforce the act against the plaintiff. The defendants have appealed.

The plaintiff owns and operates a cold storage warehouse in Omaha. Its present plant was constructed in 1951 and 1952 at a cost of $1,750,000. It was specially designed for the volume handling of in-transit goods between points of origin and points of destination. It has a capacity of 25,000,000 pounds of cold storage products, and 90 percent of the goods handled are asserted to be in interstate commerce. The business is highly competitive with similar warehouses in adjoining and more distant states. The products stored consist mainly of frozen fruits and vegetables, frozen berries, frozen fish, and frozen meats. These commodities are perishable and must be kept under refrigeration at all times. They arrive and depart in refrigerated railroad cars and refrigerated trucks, usually on a through rate from a point of origin in a foreign state to a point of destination in a different foreign state, with stop-over privileges in transit for storage purposes.

The commodities received are handled at the warehouse by the lot method. The commodities are not commingled with other shipments, each shipment maintaining its identity from point of origin to the point to which it is consigned. Such lot shipments are not broken

up for distribution in this state. Most of them originate in the west coast states and are destined for states in the east. The evidence of the plaintiff is that about 90 percent of the products stored by the plaintiff are in interstate commerce and that they have no taxable situs in Nebraska. Plaintiff admits that about 10 percent of its business is not in interstate commerce. It contends however that its business could not exist without the interstate business, its plant in Omaha having been built specially for the purpose of handling in-transit commodities being transported in interstate commerce.

The plaintiff admits that it refused to comply with section 77-1226, R. S. Supp., 1957, and brought this action to test the validity of the act. The material facts are not in dispute, consequently the case resolves itself largely into a question of law.

Concisely stated as it applies to the plaintiff in this case, section 77-1226, R. S. Supp., 1957, provides: Every person in charge of a warehouse where goods, except used household goods, are stored, shall, on or before April 1 of each year, furnish to the county assessor a list of all such goods stored by him on March 1 of each year. In listing and reporting such goods, information shall be given as to the name, kind, quantity, and grade so far as can be ascertained.

Our Constitution provides that taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises. Art. VIII, § 1, Constitution of Nebraska. The Legislature has plenary power over taxation within the limits of the Constitution. Consumers Public Power Dist. v. City of Lincoln, *ante* p. 183, 95 N. W. 2d 357. The legislative power to tax all tangible property and franchises includes the right to adopt any reasonable regulation that may seem necessary in making taxes uniform and proportionate upon all of the assessable tangible property in the state. Lincoln Transfer Co. v. County Board of Equalization, 78 Neb. 197, 110 N. W. 724. It is plain that in the en-

actment of the statute before us the Legislature was moved by information that property subject to taxation in this state has escaped taxation by being held in storage warehouses and not reported to the assessor by the owner as the law requires. The purpose of the act is to render it impossible for any such taxable property to escape taxation. Any reasonable requirement imposed upon the warehouseman to bring about this result is not inhibited by the due process clause or the unreasonable search and seizure clauses of the state and federal Constitutions. Interstate Forwarding Co. v. Vineyard (Tex. Civ. App.), 3 S. W. 2d 947; Washington Nat. Bank v. Daily, 166 Ind. 631, 77 N. E. 53.

The pertinent question for decision is whether or not the statute is reasonable. The warehouseman, of course, has no interest in the taxability of any property in his keeping since the assessor is attempting no discovery that will directly affect the warehouseman or his property. The complaint is that the requirements are unreasonable in that they exceed the necessities of the situation and result in onerous and costly duties on the part of plaintiff in complying with its provisions.

As we have heretofore stated, the purpose of the legislation is to uncover taxable property in order that it can be subjected to its just share of taxes. We have no hesitancy in saying that a reasonable regulation to accomplish this objective does not offend constitutional provisions.

While the power to tax, and any regulations incidental thereto reasonably necessary to the exercise of that power, is lodged in the Legislature, the power is not an absolute one. It is subject to a rule of reasonableness, and where a statute exceeds the requirements of reasonableness and attaches conditions which are onerous, oppressive, and costly, the legislation cannot be sustained. The plaintiff asserts that the statute before us is such a statute. It is claimed that the act requires a disclosure enmasse or in gross of the private affairs

of the warehouseman and the owner of the stored property and violates the unreasonable search and seizure clauses of the state and federal Constitutions contained in Article I, section 7, Constitution of Nebraska, and the Fourth Amendment, Constitution of the United States. We do not think there is any merit to this contention if the requirements of the act imposed upon the warehouseman do not exceed the bounds of reasonableness. It is true that the Legislature may not require information in such a reporting statute that is needless, oppressive, or beyond the real purpose of the act. Such information required must be something more than a mere fishing expedition into a mass of records which may or may not be pertinent to the purposes of the act. Ordinarily the requirement of a report enmasse or in gross to uncover the unlawful acts of another are held to be too onerous and costly, and therefore unreasonable. Under the present statute the information sought relates itself to the goods on hand on one day of the year, the assessment date. It requires the name and address of each owner and the kind, quantity, and grade of the property so far as it can be ascertained. The mere listing of the property ordinarily indicates its kind, and the quantity and grade is usually shown on the warehouse receipt. The requirements are not unreasonable, either in the time covered or the extent of the information sought. The information required relates itself directly to the uncovering of taxable property not reported by the owner. In Lincoln Transfer Co. v. County Board of Equalization, *supra,* the court sustained the validity of a similar act. We do not think the act is unreasonable in the respects noted and was within the power of the Legislature to enact.

It is contended that the act is unreasonable in that it burdens the warehouseman with the expense of preparing the report and with an undue interference with its business operations. The evidence shows that it would

take two employees a period of three weeks to assemble the required information. There is evidence also that the records are in constant use in the business of the plaintiff during business hours, and that it would be impractical to do the work except on overtime outside of regular business hours. The cost to plaintiff in furnishing the required information is estimated to be $500 per year. It cannot be disputed that any reporting statute burdens the party concerned with some expense and interferes to some degree with the operation of his business. We cannot say, however, that a warehouse with a capacity of 25,000,000 pounds, the equivalent of 800 carloads of ordinary goods, is unreasonably burdened under the situation disclosed by the foregoing evidence. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 S. Ct. 178, 52 L. Ed. 327. The cost is usually commensurate with the volume of business transacted. Private rights must to a reasonable extent yield to the public necessity, and where the limitation on private rights is within the bounds of reasonableness the wisdom of the legislation is a legislative matter and not a judicial one.

The plaintiff asserts that the statute is against public policy in that it requires a warehouseman to violate the relation of trust and confidence existing between a warehouseman and those who store their products in the warehouse. Plaintiff also asserts that the disclosure required by the act invades the right of privacy and offends constitutional provisions prohibiting unreasonable searches and seizures. Plaintiff further asserts that the act violates the right of silence, a right correlative to the right of free speech, which is protected by the Constitution. Plaintiff claims that the act is violative of the fair play doctrine stemming from the due process clauses of the state and federal Constitutions. It claims also that the act abridges the privileges, immunities, and liberties incident to the conduct of legitimate business. It claims that the act takes private property for public

use without compensation and without due process of law, contrary to constitutional inhibitions. There is no merit to these contentions. We do not deem it necessary to deal with each of these questions separately. Each is discussed in Interstate Forwarding Co. v. Vineyard, *supra,* and we adopt the reasoning of that opinion in dealing with these questions.

The plaintiff contends that the act is in violation of the commerce clause of the Constitution of the United States in that it is an unlawful burden on interstate commerce and impedes its free flow through the State of Nebraska. In this respect it is shown that 90 percent of the goods stored are shipped from points in states other than Nebraska to points within other states, with stop-over privileges in transit. The plaintiff's manager, and other witnesses as well, testified that such goods are in interstate commerce. The statements that such goods are in interstate commerce are nothing more than conclusions of such witnesses. The facts upon which it could be determined if such goods had a taxable situs in Nebraska on March 1 are not in the record. The defendants do not admit that such goods are in interstate commerce, although they do assert that it is not material whether they are or not.

The plaintiff relies largely on Freeman v. Hewitt, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265. In that case it is said: "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. * * * This limitation on State power, * * * does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. * * * These principles of limitation on State power apply

to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. * * * The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce."

The plaintiff also cites State v. T. W. Jones Grain Co., 156 Neb. 822, 58 N. W. 2d 212; Archer-Daniels-Midland Co. v. Board of Equalization, 153 Neb. 776, 46 N. W. 2d 171; and State v. Smith, 135 Neb. 423, 281 N. W. 851. But the conclusions of law in the foregoing cases are based on findings of fact to the effect that the goods were or were not in interstate commerce at the time involved and, consequently, that they had or had not acquired a tax situs in the taxing state. Whether or not goods being transported in interstate commerce with stop-over privileges in transit acquire a tax situs at the stop-over point involves a complicated question of law and fact.

The correct rule in such cases has been stated as follows: "It is universally agreed that personal property actually in transit in interstate commerce is protected by the commerce clause of the Federal Constitution from local taxation in the states through which it passes. Where, however, the interstate transit is broken or interrupted in a particular state, the question arises whether the property may thereupon be subjected to local taxation therein. In this situation the principle has been adopted by the Supreme Court of the United States and adhered to by the lower Federal courts and the courts of the various states that if the break in the

interstate journey was caused by the exigencies or conveniences of the chosen means of transportation, considerations of the safety of the goods during transit, or natural causes over which the taxpayer has no control, the continuity of the transit remains unimpaired, and the immunity of the goods from state or local taxation is consequently unaffected; but if the interruption in the journey occurred for purposes connected with the business convenience or profit of the taxpayer or the owner of the property, then the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from local taxation." Annotation, 171 A. L. R. 284. See, also, Independent Warehouses, Inc. v. Scheele, 331 U. S. 70, 67 S. Ct. 1062, 91 L. Ed. 1346; Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131.

Whether the property involved in the present case is in interstate commerce while stored in plaintiff's warehouse, or whether it has acquired a tax situs because the interruption of its movement in interstate commerce was for the convenience of the taxpayer or owner, is a question to be determined in the first instance by the taxing authorities. The record before us is so fragmentary insofar as it relates to that question that, assuming the materiality of the evidence, we cannot say with any degree of certainty that the goods were in interstate commerce without a taxable situs in Nebraska and therefore immune from local taxation.

The plaintiff further contends that the act impedes the free flow of interstate commerce because of the following state of facts: The goods stored by the plaintiff are largely goods stored in transit under stop-over privileges under a through rate. It is immaterial to the consignor or consignee from the economic standpoint whether such goods are stored at Omaha or points outside the state. The manager of the plaintiff company testified that since the enactment of the legislation here questioned plaintiff has lost about a third of its in-transit

business. He states that shippers refuse to store goods in in-transit warehouses in this state and expose them to taxation in Nebraska when such goods can be stored without additional expense in similar warehouses in other states which have no such legislative requirements imposed on the warehousemen. The manager of a cold storage warehouse at Hastings testified that his company has lost from 30 percent to 40 percent of its business because of the threat of taxation contained in the legislation under attack. The manager of a dry storage warehouse in Lincoln testified to a heavy loss of in-transit business, particularly in the storage of sugar. He states that prior to the enactment of section 77-1226, R. S. Supp., 1957, large quantities of sugar were stored in transit and that thereafter not one bag of sugar had been stored in his warehouse. He testified that he was advised by the shippers of sugar that none would be stored in Nebraska as long as their goods were exposed to taxation by the threat of the act under consideration. Other warehousemen testified to heavy losses in in-transit business because of the legislation here questioned. It is not disputed in this record that warehousemen have suffered heavy losses in the business of storing in-transit products. It is clear from the record that shippers of goods are by-passing in-transit warehouses in this state in favor of similar warehouses in other states where the claimed exposure to and threat of taxation does not exist. The record does not dispute the claims of the plaintiff that it has suffered heavy losses in in-transit business since the enactment of section 77-1226, R. S. Supp., 1957. In fact, the evidence shows that in-transit warehouses in this state have suffered heavy losses since the enactment of the legislation here questioned.

As we have before stated, the record does not conclusively establish that the goods stored in plaintiff's warehouse are in interstate commerce. We have heretofore held in this opinion that section 77-1226, R. S. Supp.,

1957, is an aid to the taxing of all tangible property in the state uniformly and proportionately, and that such statute does not exceed the test of reasonableness in the accomplishment of this purpose. The statute being a reasonable one within the power of the Legislature to enact, the question as to whether or not the limitations upon private rights is greater or less important than the public necessity is peculiarly a legislative matter. By the enactment of the act the Legislature has determined that the public necessity exceeds the economic injury done to its citizens by the act. This court has often said that the wisdom of legislation is a legislative matter and, when enacted in compliance with constitutional requirements, the courts are powerless to intervene. We conclude that the record does not demonstrate that section 77-1226, R. S. Supp., 1957, interferes with or impedes the free flow of interstate commerce because of the exposure of the property to taxation and the consequent voluntary desire of shippers to use warehouses outside the state. It is not established that the goods in question, while held in the warehouse of the plaintiff on March 1, were in fact moving in interstate commerce, assuming that such issue was material in a suit such as we have before us.

It is contended by the plaintiff that section 77-1226, R. S. Supp., 1957, violates Article III, section 18, of the Constitution of Nebraska, and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The basis of the constitutional objection is that the act is discriminatory and amounts to special legislation.

We point out that the act provides: "Every owner, keeper, or person in actual charge of any and every storage house, warehouse, or any place where goods, wares, or merchandise of any and all kinds and description, except used household goods, are stored or kept by him, * * *." As we have hereinbefore pointed out, the purpose of the act was to uncover taxable property

stored in warehouses which had not been reported for assessment by the owners thereof, in order that the mandate of the Constitution may be carried out that all tangible property in the state shall be uniformly and proportionately assessed for taxation purposes. It is the contention of the plaintiff that by excluding used household goods, the act is discriminatory and amounts to special legislation, when measured with the purpose of the act to uncover all unreported tangible property for taxation. The act is incidental to the power of the Legislature to tax and is clearly applicable to the taxation of all tangible property. The state has a wide discretion in classifying businesses for purposes of taxation. It has been held proper to treat railroads, insurance companies, banking and money-loaning institutions, and other types of business enterprises as a proper classification for taxing purposes. The business of operating warehouses also affords a proper classification where a reasonable basis for so doing exists and such classification is not purely arbitrary. In Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738, we said: "The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment." Warehouses afford a proper basis for classification where the purpose of the legislation is common to the class such as we have here.

While the Legislature may legislate with reference to a class of persons, it may not arbitrarily divide a natural class of persons in two factions and then enact different rules for the government of each. State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835; United Community Services v. The Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576.

The Legislature in the instant case has attempted to

make a class of all warehouses storing goods except those storing used household goods. Used household goods are tangible property subject to taxation in this state. We fail to see any reason for excluding warehouses storing used household goods from the operation of the act. The exemption of such warehouses from the class appears to be wholly arbitrary. The uncovering of unreported taxable used household goods for assessment purposes is as consistent with the purpose of the act as the uncovering of any other taxable tangible property. The act creates an arbitrary classification of warehousemen upon which the act is to operate. It discriminates against some warehousemen and in favor of others. It grants special and exclusive privileges and immunities to some warehousemen which it denies to others in the same class. Exceptions contained in a legislative classification cannot be justified if the discrimination thus made has no reasonable relation to the purposes of the act in which it is found. We find no reasonable basis for excluding warehouses storing used household goods, when the general purposes of the act are considered. The act clearly violates that part of Article III, section 18, of the Constitution which provides: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted." We hold that section 77-1226, R. S. Supp., 1957, is void and unenforcible.

For the reasons stated the judgment of the district court is affirmed.

AFFIRMED.

UNITED SEEDS, INC., A CORPORATION, APPELLEE, V. ED HOYT, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE AND INSPECTION OF THE STATE OF NEBRASKA (PEARLE F. FINIGAN SUBSTITUTED IN LIEU OF ED HOYT, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE AND INSPECTION), ET AL., APPELLANTS.

96 N. W. 2d 404

Filed May 8, 1959. No. 34542.

1. **Sales.** A contractual limitation of warranty relating to quality is not unlawful and notice of limitation of warranty to the purchaser at the time of sale creates a valid contractual arrangement.
2. ———. Where a right, duty, or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or sale.
3. **Contracts.** Public policy is that principle of the law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. It is a principle under which the freedom of contract or private dealing is restricted by law for the good of the community.
4. ———. Public policy forbids the enforcement of an illegal or immoral contract, but it equally insists that those contracts which are lawful and contravene none of its rules shall be enforced, and that they shall not be set at naught or be held invalid on a suspicion of illegality.
5. **Sales: Statutes.** The Department of Agriculture and Inspection is without power under The Nebraska Seed Law to impose or enforce a prohibition against limitation of warranty of agricultural seeds.

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

Clarence S. Beck, Attorney General, and *Homer L. Kyle*, for appellants.

Marti, O'Gara, Dalton & Sheldon and *Fitzgerald, Hamer, Brown & Leahy*, for appellee.

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

YEAGER, J.

This action, as presented to this court, is one by United Seeds, Inc., a corporation, plaintiff and appellee, against Pearle F. Finigan, Director of the Department of Agriculture and Inspection of the State of Nebraska, the Department of Agriculture and Inspection of the State of Nebraska, and Russell I. Nash, Chief of the Weed and Seed Division of the Department of Agriculture and Inspection of the State of Nebraska, defendants and appellants, to have adjudged and decreed that the defendants lack power, authority, or jurisdiction to forbid, prohibit, or interfere with the use of language similar to the following: "UNITED SEEDS, INC., warrants to the extent of the purchase price that seeds or bulbs sold are as described on the container within recognized tolerances. Seller gives no other or further warranty, expressed or implied," in the labeling of agricultural seed sold, exposed, or offered for sale within the State of Nebraska, and that on final hearing a permanent injunction be granted enjoining the defendants and each of them from the issuance of stop-sale orders, from instituting prosecutions, and from any other actions against the plaintiff based solely upon or arising out of the fact that the plaintiff sells, exposes, or offers for sale seed in containers to which there is affixed tags or labels containing language similar to that which has been set forth herein.

The case was tried to the court at the conclusion of which a decree was rendered granting the relief prayed by the plaintiff. A motion for new trial was filed which motion was overruled. From the decree and the order overruling the motion for new trial the defendants have appealed. They contend that the court erred in granting the relief prayed.

The question of whether or not the decision is erroneous depends upon a proper interpretation and application of what is now section 81-2,137.01, R. R. S. 1943. This section is a part of what has been denominated "The Nebraska Seed Law." The first paragraph of the

section is as follows: "Each container of agricultural or vegetable seed, which is sold, offered for sale or exposed for sale within this state for sowing purposes, shall bear thereon or have attached thereto in a conspicuous place a printed label or tag in the English language, giving the following information: * * *."

The plaintiff is a corporation engaged in the business of selling, offering for sale, and exposing for sale within the State of Nebraska agricultural seed within the meaning of this statutory provision.

Following the quoted paragraph is the following: "(1) For agricultural seed: * * *." Following this are subparagraphs from (a) to (i) inclusive, setting forth in specific detail what the label shall contain. All of these except the one denoted as (i) relate to the qualities required of seed and description of these qualities which must appear on the label or tag. Nothing further is required herein as to these since the defendants have agreed that the plaintiff, in the conduct of its business, placed on its labels and tags all that was required by these provisions, and the plaintiff concedes the right of defendants to make these exactions. It appears well to state here also that the statute contains no other exactions which are referable to the quality of agricultural seed sold, offered, or exposed for sale.

Subparagraph (i) is as follows: "(i) The name and address of the person who labeled said seed or who sells, offers or exposes said seed for sale within this state. No tag or label shall be affixed to any package or container of agricultural seed or mixture thereof, unless the same has been approved by the Department of Agriculture and Inspection."

It is under this provision that the defendants contend that they have the right to disapprove tags or labels containing a declaration of warranty and to issue stop-sale orders when seed tags or labels contain thereon a declared limit of warranty.

It is pointed out here that the statute does not by any

language declare any right of any of the defendants to impose such a restriction upon the plaintiff or anyone similarly situated as to what shall appear on agricultural seed tags or labels. In actuality the defendants simply assume that since the Legislature said: "No tag or label shall be affixed to any package or container of agricultural seed or mixture thereof, unless the same has been approved by the Department of Agriculture and Inspection," the department has the power to do and perform the thing sought to be enjoined, even though the tag and label proposed complied with all of the positive requirements of the act.

The substantial theory of the defendants, insofar as the action here is concerned, is that limited warranties were illegal; therefore they had the right, without a grant of authority, to prevent the tender of a limited warranty by the seller to the purchaser of seed.

The theory is unsound in the first place since a contractual limitation of warranty relating to quality of seed is not unlawful, and notice of limitation of warranty to the purchaser at the time of sale creates a valid contractual arrangement. Kennedy v. Cornhusker Hybrid Co., 146 Neb. 230, 19 N. W. 2d 51, 160 A. L. R. 351. In that case this court approved the legality of limitation of warranties of the quality of seed and in that approval and as a ground therefor quoted section 69-471, R. R. S. 1943, which is a provision of the "Uniform Sales Act" as follows: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

This provision of the statute and the cited case deny the right of the defendants to defend here on the ground that the proposed declaration of limitation of liability amounted to an illegal and void contract.

The next pertinent inquiry is that of whether or not

the proposed limitation was violative of public policy and as such subject to prohibition by the department.

Public policy has been defined in varying terms but a definition which has been accepted in numerous jurisdictions is as follows: "That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. * * * The principles under which the freedom of contract or private dealings is restricted by law for the good of the community." Black's Law Dictionary (3d Ed.), p. 1374.

It may be said with certainty that the act contains no specific declaration of public policy in this connection. Does it by reasonable inference or implication contain such a declaration? We think not.

Examination discloses that the act relates solely and alone to the burdens which the department may impose upon sellers and distributors of seed prior to sale and distribution, the steps which the department may take for failure of performance of the burdens, and penalties provided in case of sale and distribution in violation of the burdens imposed. The title to the act, which was enacted as Laws of 1945, chapter 237, page 699, contemplates no other or greater burdens. There is nothing in the act or its title which specifically gives or purports to give the department any control over or voice in the rights and liabilities between a seller and purchaser of seed. Likewise there is nothing which either by inference or implication gives the department any such control. It is therefore impossible to find a source from which it could be said that there was a declaration of public policy which would permit or require the defendants to reject the declaration of limited warranty which plaintiff intended to place upon its tags or labels.

As already pointed out a contractual limitation of warranty is not contrary to law. This being true it may not be said that there is anything flowing from the contract which makes it contrary to public policy. This

court said in Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053, 4 L. R. A. N. S. 212, 121 Am. S. R. 713: "While public policy forbids the enforcement of an illegal or immoral contract, it is equally insistent that those which are lawful and contravene none of its rules be duly enforced, and not set at naught or held invalid on a bare suspicion of illegality."

There being nothing in law which prohibits a contractual limitation of warranty as to the quality of agricultural seed, nothing in the act in question which authorized the Department of Agriculture and Inspection to make or establish any rules or regulations in relation thereto, and nothing in the act or decisions of this court announcing a public policy which would permit the department to make rules with reference to contractual limitation of warranty, it must be said that the defendants were without power to impose and enforce the proposed prohibition against limitation of warranty. State ex rel. Chamberlin v. Morehead, 99 Neb. 146, 155 N. W. 879; State ex rel. Woolridge v. Morehead, 100 Neb. 864, 161 N. W. 569, L. R. A. 1917D 310.

Therefore the exactions of the defendants which the plaintiff seeks to enjoin by this action are beyond their power to make and enforce, and the approval or disapproval of that part of the proposed tags or labels containing the limitation of warranty is a matter concerning which the defendants have no jurisdiction. It follows in the light of the presentations made here by the parties that the decree of the district court should be and it is accordingly affirmed.

AFFIRMED.

ADELINE K. CAMPBELL, APPELLANT, V. LYLE M. CAMPBELL, APPELLEE.

96 N. W. 2d 417

Filed May 8, 1959. No. 34563.

1. **Appeal and Error.** This court takes judicial notice of the mandatory requirements of the statute as to the necessity and time of filing a notice of appeal, and the effect of failure to comply with them.
2. ———. This court is without jurisdiction to entertain an appeal from the rendition of a final judgment or decree by the district court unless, as provided by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court from which such appeal is being taken within 1 month after the rendition of such final judgment or decree.
3. **New Trial: Appeal and Error.** The striking of a motion for a new trial, timely filed in the district court, is the equivalent of overruling the same and finally disposing of the cause upon the merits, from which appeal may be taken to this court.
4. ———: ———. This court is without jurisdiction to entertain an appeal from the overruling of a motion for new trial by the district court unless, as provided by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court within 1 month from the denial of a motion for a new trial timely filed in the cause.
5. ———: ———. A motion for a new trial not filed within the time specified by statute is a nullity and does not enlarge the time within which a notice of appeal must be filed after the rendition of judgment in a cause.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Appeal dismissed.*

Charles Ledwith, for appellant.

Robert L. Jeffrey, 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 Lancaster County. It involves relief asked for by appellant-plaintiff Adeline K. Campbell in a petition which she filed on January 16, 1957, in a divorce proceeding where-

in, on March 10, 1950, she had been granted a divorce and awarded custody of the parties' three minor children. The petition was filed under and pursuant to the authority granted by section 42-312, R. R. S. 1943, and was for the purpose of obtaining an increase in the allowance of child support for the one minor child, a daughter then 13 years of age, who was still in appellant's custody and dependent upon her for support. The right to such increase was based on claimed changes in the circumstances of the parties since a previous order of the court had been made for that purpose on May 13, 1953.

Appellee-defendant Lyle M. Campbell, on March 4, 1957, filed an answer thereto and a cross-petition to which appellant, on April 11, 1957, filed an answer and reply. Trial was had on the issues raised by these pleadings on July 2, 1958, and, on August 13, 1958, the cause was fully submitted. Thereafter, on August 25, 1958, the trial court rendered the following decision: "On consideration of evidence and briefs, the Court finds that since the order of May 15, 1953, there has been a legal 'change of circumstances' affecting the parties herein and that plaintiff should be allowed the sum of $60.00 per month, beginning September 1, 1958, for the support of Joan Campbell until she becomes of legal age or until the further order of the court, together with the further sum of $100.00 for services of plaintiff's counsel, payable at $10.00 per month, and defendant should pay the costs herein."

On August 29, 1958, appellant filed a motion for new trial asking: "* * * the court for an order vacating the decision of the court of August 25, 1958 and the order entered pursuant thereto, and granting the plaintiff a new trial * * *." On September 2, 1958, the trial court, on its own motion, erroneously struck appellant's motion for new trial from the record, doing so on the basis that no final judgment had been entered (rendered).

On September 25, 1958, appellant filed another motion for new trial asking, "* * * the court for an order vacating the decision of the court of August 25, 1958 and the order entered pursuant thereto, and granting the plaintiff a new trial * * *." This motion the court overruled on October 11, 1958. Thereupon, on October 11, 1958, appellant refiled the same motion for new trial. It was again overruled on October 28, 1958. Appellant filed a notice of appeal in the district court on November 7, 1958.

"A judgment rendered or final order made by the district court may be reversed, vacated or modified by the Supreme Court for errors appearing on the record." § 25-1911, R. R. S. 1943. The judgment here sought to be modified was rendered by the trial court on August 25, 1958. See Ames v. Parrott, 61 Neb. 847, 86 N. W. 503, 87 Am. S. R. 536. "This court takes judicial notice of the mandatory requirements of the statute as to the necessity and time of filing a notice of appeal, and the effect of failure to comply with them." Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894.

Section 25-1912, R. R. S. 1943, provides, insofar as here material, that: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code, shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, * * *." " 'The period of time provided for by section 25-1912, R. R. S. 1943, within which to perfect an appeal from a judgment or decree rendered in the district court, com-

mences to run from the date of the rendition thereof, if there is no motion for a new trial filed in the case,' * * *." Ash v. City of Omaha, 152 Neb. 699, 42 N. W. 2d 648. "Trial court has no inherent power, directly or indirectly, to extend time for taking appeal." Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98, 89 A. L. R. 932. "The legislature having power to limit the time within which an appeal must be taken, it is essential to the jurisdiction of this court that it be taken within that time limit." Morrill County v. Bliss, *supra.*

This court is without jurisdiction to entertain an appeal from the rendition of a final judgment or decree by the district court unless, as provided by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court from which such appeal is being taken within 1 month after the rendition of such final judgment or decree. See, Frenchman-Cambridge Irr. Dist. v. Ferguson, 154 Neb. 20, 46 N. W. 2d 692; Molczyk v. Molczyk, 154 Neb. 163, 47 N. W. 2d 405. Here the notice of appeal was not filed until November 7, 1958, and thus clearly not within time to perfect an appeal from the final judgment rendered on August 25, 1958.

Section 25-1143, R. R. S. 1943, provides, insofar as here material, that: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, * * *." "The time for filing a motion for new trial begins to run from the time the decision was rendered, and not from the date it was filed or entered on the journal of the court." Molczyk v. Molczyk, *supra.*

"The striking of a motion for new trial, timely filed in the district court, is the equivalent of overruling the same and finally disposing of the cause upon the merits, from which appeal may be taken to this court, * * *." Lynch v. City of Omaha, 153 Neb. 147, 43 N. W. 2d 589.

Here the motion for new trial filed on August 29, 1958, was within time but the appellant did not appeal from

the court's ruling of September 2, 1958, within the 1 month provided by section 25-1912, R. R. S. 1943, for that purpose. In view thereof this court is without jurisdiction to entertain the appeal. See, Frenchman-Cambridge Irr. Dist. v. Ferguson, *supra;* Molczyk v. Molczyk, *supra;* Powell v. Van Donselaar, *supra.* As stated in Powell v. Van Donselaar, *supra:* "This court cannot have jurisdiction of an appeal from the district court, unless as required by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court, and the docket fee is deposited with the clerk within 1 month after rendition of the judgment or within 1 month from the denial of a motion for a new trial timely filed in the cause."

As to the motion for new trial filed on September 25, 1958, and refiled on October 11, 1958, the following has application: "A motion for a new trial that is not filed within the time specified by statute is a nullity and of no force and effect." Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558. See, also, Frenchman-Cambridge Irr. Dist. v. Ferguson, *supra;* Nebraska Nat. Bank v. Pennock, 59 Neb. 61, 80 N. W. 255; Powell v. Van Donselaar, *supra.* As stated in Powell v. Van Donselaar, *supra:* "A motion for a new trial not filed within the time specified by statute is a nullity and does not enlarge the time within which a notice of appeal must be filed after the rendition of judgment in a cause."

In view of the foregoing this court is without jurisdiction to entertain this appeal and it is, therefore, dismissed.

APPEAL DISMISSED.

ODE GOURLEY, APPELLANT, V. CITY OF GRAND ISLAND, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

96 N. W. 2d 309

Filed May 8, 1959. No. 34571.

1. **Workmen's Compensation.** 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.
2. ———. Where an employee who suffered an accident arising out of and in the course of his employment requests and receives medical services and medicines furnished by the employer, it constitutes the receipt of compensation within the meaning of section 48-133, R. R. S. 1943, and dispenses with the necessity of making a claim for compensation within 6 months after the occurrence of the injury.
3. ———. Where an employer furnishes medical, surgical, and hospital services to an employee the payments therefor constitute payment of compensation within the meaning of the Workmen's Compensation Act.
4. ———. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
5. ———. Where the evidence shows that certain hospital and nurse expenses have been incurred by the injured employee, a prima facie case is made out, and in the absence of any showing that the expenses so incurred were unreasonable, such proof will be held to be sufficient.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

Cunningham & Cunningham, for appellant.

Carl E. Willard, for appellee.

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

SIMMONS, C. J.

This is an action arising under the Nebraska Workmen's Compensation Act. The action was tried before

one member of the compensation court. Compensation was denied. Plaintiff appealed to the district court, where trial de novo was had, resulting in a judgment of dismissal. Plaintiff appeals.

We reverse the judgment of the trial court and remand the cause with directions to render judgment in accord with findings herein made.

The cause is here under the procedure that requires trial de novo in this court.

The issues here are narrowed down to these questions:

1. Did plaintiff prove an accident and injury so as to sustain a claim under the compensation act?

2. Is plaintiff's claim barred by sections 48-133 or 48-137, R. R. S. 1943?

3. And contingent on the answers to the first two questions, has plaintiff established a right to compensation and, if so, in what amount?

Except as to one fact question there is no particular dispute in the evidence. We determine that fact question later herein.

Plaintiff was employed by the defendant as an operator in its disposal plant. He had been so employed for some time. His monthly wage was $250. His regular hours for work were from 12 midnight to 8 a.m.

On July 18, 1956, he had worked his regular shift. He was then ordered to work 4 additional hours in a pit shoveling sludge. While so employed he slipped and fell and injured his hip. He changed clothes and returned to work. He suffered pain. He worked 3 hours and then refused to continue. He notified the superintendent. The superintendent was "very angry" because plaintiff was not working. Plaintiff went to the mayor and notified him of his accident and was ordered to go to the city physician, which he did. He was given "sick leave" of one day on an application blank which recited that his condition resulted from his employment by the city. The superintendent approved the application. He was told by the physician to return

to work, use a hot water bottle, and take pills which the city physician provided.

Thereafter he consulted the city physician from time to time, and was given additional pills which plaintiff continued to take. His hip and back got worse.

A fellow employee corroborated the fact of the fall to the extent of testifying to seeing the plaintiff's clothes and hands covered with sludge, his leaving the work and returning with clean clothes, and resuming work. Plaintiff's wife testified that when she returned home at 6 p.m. that day that plaintiff's hip was inflamed and later became black and blue. The city physician was not called as a witness.

The rule is: 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. Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805.

We deem the evidence ample to prove the happening of the accident on July 18, 1956.

On October 5, 1956, the city physician referred plaintiff to another physician for X-rays. X-rays were taken. He was then referred to another doctor on December 17, 1956, who recommended that plaintiff be given sick leave "for deep gluteal bursitis." This recommendation was made to the defendant. This doctor was not called to testify.

The defendant granted plaintiff sick leave with pay. He did not work from December 19, 1956, to January 2, 1957.

When his "sick leave was up" plaintiff again reported to the city physician and was told to return to work and take it easy. He was again given "pills" and told to take them. He was not discharged as a patient by the city physician.

This brings us to the point where the statutory defense may be determined.

The rule is: Where an employee who suffered an

accident arising out of and in the course of his employment requests and receives medical services and medicines furnished by the employer, it constitutes the receipt of compensation within the meaning of section 48-133, R. R. S. 1943, and dispenses with the necessity of making a claim for compensation within 6 months after the occurrence of the injury. Gilbert v. Metropolitan Utilities Dist., 156 Neb. 750, 57 N. W. 2d 770.

Defendant contends that this action is barred by section 48-137, R. R. S. 1943, which provides in part: "In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 48-173. * * * Where, however, payments of compensation have been made in any case, such limitation shall not take effect until the expiration of one year from the time of making of the last payment."

This action was commenced in the compensation court by the filing of a petition on December 11, 1957.

We have held: "Where an employer furnishes medical, surgical, and hospital services to an employee, * * * the payments therefor constitute payment of compensation within the meaning of the employers' liability act." Baade v. Omaha Flour Mills Co., 118 Neb. 445, 225 N. W. 117.

Under the conditions existing here the defendant had furnished the plaintiff medical services and medicines. He was then working or on sick leave with pay. He was being paid the compensation which at that time he was in a position to demand. It accordingly must be held that plaintiff was paid compensation up to January 2, 1957. This is sufficient to toll the running of the one year statutory provision under its express terms.

We accordingly find that the defense of the statutes is not sustained.

There remains the question of whether plaintiff has produced evidence sufficient to sustain an award of compensation and, if so, in what amount.

Plaintiff returned to work and continued in his employment until he was discharged on September 1, 1957.

Plaintiff testified that on August 7, 1957, he slipped on a stairway in the course of his employment, and fell, striking his affected hip on a railing; and that orally he reported this fall to the superintendent the next morning. That he did report it is corroborated by the testimony of a fellow employee. Plaintiff's wife testified that when he returned home that day the hip was inflamed and later became black and blue, showing the effect of a bruise.

Defendant's superintendent denied that the plaintiff reported the accident; that if plaintiff did, the superintendent did not hear of it; and that no written report was made. In any event no action was taken by the defendant on it. Defendant also stresses the fact that plaintiff did not tell the orthopedic surgeon, who was consulted later, of the second accident, when giving a history of his case. The surgeon testified that it sometimes happened that patients overlooked telling a complete history.

We find that plaintiff has sustained the burden of proving the accident on August 7, 1957, within the scope of the rule that: In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. Crable v. Great Western Sugar Co., *supra*.

Plaintiff continued to work with increased difficulty following the second accident because of pain in the hip and back, with loss of sleep, etc. He was discharged on September 1, 1957, when found "dozing" or "sleeping" on the job. Thereafter plaintiff sought and secured work of a heavy nature which he was not able to per-

form. He was not able to work that winter or spring. He then had no employment except odd jobs that he could do subject to his physical limitations.

On August 1, 1958, plaintiff secured employment in "St. Luke's Home" at Kearney, Nebraska, washing dishes and doing maintenance work, such as "fixing faucets and stools." He was so employed at the time of trial. His wages were between $30 and $35 a week. He continues to suffer disability.

Plaintiff offered the medical testimony of two doctors. Defendant offered no medical evidence.

Earlier herein we pointed out that the city physician referred the plaintiff to a doctor for X-rays in October 1956, and that he was given sick leave and obeyed instructions as to treatment.

On November 21, 1956, plaintiff consulted Dr. DeMay. He found tenderness in the right hip joint and the right sacroiliac region. He placed plaintiff on medication. The doctor saw plaintiff on November 24, November 30, and December 8, 1956. He was then referred to Dr. House. Dr. House recommended sick leave and treatment for deep gluteal bursitis as earlier stated in this opinion. Dr. DeMay was again consulted on September 23, 1957, by the plaintiff. On September 26, 1957, Dr. DeMay placed him in a hospital for physiotherapy. He was placed in traction. He was in the hospital from September 26 to October 12, 1957. At that time plaintiff had marked tenderness and soreness in the area. Dr. DeMay was consulted on October 15 and 18, 1957, after plaintiff's dismissal from the hospital.

Plaintiff consulted Dr. Yost, an orthopedic surgeon on November 18, 1957, and was examined and additional X-rays were taken. He examined earlier X-rays and again saw plaintiff on December 10, 1957. The surgeon found the left hip to be normal. The right hip was involved. The plaintiff had an inability to straighten the hip to a neutral position, the contracture being approximately 10 degrees. He found tenderness and pain

on the rotation of the hip. He prescribed the use of a corset, walking with a cane, rest, and the use of aspirin.

On May 28, 1958, Dr. DeMay again examined the plaintiff. On June 13, 1958, Dr. Yost again examined the patient.

Dr. DeMay gave it as his opinion that plaintiff had a disability which limited heavy manual labor and was a 20 to 25 percent permanent partial disability sustained as a result of the injury which related back to the accident of July 1956 and that injury probably aggravated a pre-existing osteoarthritis, as "equivocal" evidence of osteoarthritis appeared in the initial X-ray photographs. He testified that it was a "minimal possibility" that osteoarthritis could have been aggravated by the injury, and that a pre-existing osteoarthritis would not give the degree of disability which plaintiff had. He further testified that there had been at no time complaint of pain in the left hip and that osteoarthritis was usually bilateral.

Dr. Yost estimated the disability to the right hip at 20 percent on both a functional and an anatomical base. He found plaintiff's left hip free from arthritic condition on the first examination. He found evidence of osteoarthritis in the right hip, and gave the opinion that the injury of July 1956, aggravated a pre-existing condition which, absent the injury, might not have manifested itself for years to come. Both doctors agreed that the disability is progressive in nature and may worsen and is permanent.

It may here be pointed out that neither medical witness relied on the accident of August 7, 1957, as a factor in reaching his conclusion.

We have then a case where the evidence shows without dispute that plaintiff was a strong, healthy man, without a disability prior to the accident and resulting injury of July 18, 1956. Thereafter he had a disability, gradually increasing in amount, that is progressive and permanent. We have the evidence, without dispute, of

the expert witnesses giving it as their opinions that the disability is the result of the accident. At best, from the defendant's standpoint, there is a suggestion of a pre-existing osteoarthritis condition, but no evidence that condition was or would have become disabling. The evidence negatives such a conclusion.

We accordingly hold that plaintiff has suffered a compensable disability resulting from an accident arising out of and in the course of his employment. On September 26, 1957, he was unable to work. He was hospitalized that day and remained in the hospital until October 12, 1957. Thereafter he was not able to work until in April or May when he was able to perform occasional yard work. He became steadily employed, as earlier stated, on August 1, 1958. There is no showing in the record that he was able to do continuous work prior to that time. Accordingly we hold that he was temporarily totally disabled from September 26, 1957, to August 1, 1958, that being a period of 44 weeks.

He is entitled to receive compensation for that period as provided in subdivision (1) of section 48-121, R. S. Supp., 1955, which at the time this accident happened provided for compensation at the rate of 66⅔ percent of the wages received at the time of the injury but not more than $30 per week nor less than $20 per week. See Laws 1955, c. 186, § 1, p. 527.

Plaintiff's wage at the time of the injury was $250 a month, or $58.33 a week. Sixty-six and two-thirds percent of that amount exceeds the statutory maximum. Hence plaintiff is entitled to receive the maximum allowed of $30 a week for 44 weeks, or a total of $1,320.

Beginning August 1, 1958, we find that plaintiff had a permanent partial disability of 20 percent for which he is entitled to receive compensation.

Under the provisions of subdivision (2) of section 48-121, R. S. Supp., 1955, plaintiff is entitled to receive compensation at the rate of 66⅔ percent of the difference between the wages received at the time of the in-

jury and the earning power of the employee thereafter but not to exceed 300 weeks for both temporary total and permanent partial disability.

Under the rule stated in Turner v. Beatrice Foods Co., 165 Neb. 338, 85 N. W. 2d 721, we accept the figure of $35 per week as plaintiff's earning power, that being the figure less favorable to plaintiff who offered the alternative evidence. The difference between $58.33 and $35 is $23.33. Sixty-six and two-thirds percent of that amount is $15.55. Plaintiff is entitled to receive that amount for the period beginning August 1, 1958, and thereafter for a period of 256 weeks.

Section 48-120, R. R. S. 1943, provides in part: "The employer shall be liable for reasonable medical and hospital services and medicines as and when needed, subject to the approval of the compensation court, not, however, to exceed the regular charge made for such service in similar cases; * * *."

The rule is: Where the evidence shows that certain hospital and nurse expenses have been incurred by the injured employee, a prima facie case is made out, and in the absence of any showing that the expenses so incurred were unreasonable, such proof will be held to be sufficient. Crable v. Great Western Sugar Co., *supra*.

There was admitted without objection the following expense items of the plaintiff covering medical, hospital, and other like expenses in connection with this matter: St. Francis Hospital, Grand Island, Nebraska, $294.60; Orthopedic Brace Co., $19.50; Dr. John G. Yost, $18; and Dr. Richard F. DeMay, $155.

Defendant is held liable for the payment of the above amounts.

The judgment of the trial court is reversed and the cause is remanded with directions to render a decree in accord with the findings made in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HELEN S. JOHNSON, APPELLANT, V. SCHOOL DISTRICT NO. 3 OF CLAY COUNTY, NEBRASKA, APPELLEE.

96 N. W. 2d 623

Filed May 22, 1959. No. 34553.

1. **Appeal and Error.** Requests for admissions and the answers thereto cannot be considered by this court unless contained in a bill of exceptions.
2. ———. In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.
3. **Pleading.** Admissions of fact contained in the pleadings are treated as established and do not require support in the evidence.
4. **Trial: Judgments.** A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective.
5. **Pleading.** Where defendant admits the material facts in plaintiff's petition and pleads a waiver, an estoppel, or matters in avoidance as a defense thereto, such material facts will be treated as true, though the answer also contains a general denial.
6. **Schools and School Districts.** Under a contract between a school district and a teacher providing that it may be terminated only by mutual agreement or by operation of law, a school district will be deemed to have contractually delegated its right to terminate the contract for any of the reasons stated in section 79-1234, R. R. S. 1943, to the State Board of Education.
7. ———. A contract between a school district and a school teacher providing that the teacher holds, or will hold, at the beginning of the term of the contract, a valid certificate properly registered in the office of the county superintendent, is a binding contract, voidable by the school district during the period the teacher fails to comply with statutory requirements.

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

Madgett & Hunter, for appellant.

S. W. Moger and *J. T. Massie,* for appellee.

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

CARTER, J.

Plaintiff commenced this action against the defendant to recover $1,050, the balance alleged to be due under a written contract of employment as a teacher. The trial court held the contract void and dismissed the action. The plaintiff has appealed.

Plaintiff contends primarily that the trial court erred in overruling her motion for a summary judgment and in sustaining a motion to dismiss plaintiff's cause of action at the close of plaintiff's evidence on the trial of the case.

There is no bill of exceptions filed in this case. The plaintiff asserts that the pleadings and the answers to requests for admissions appearing in the transcript show that there is no question of fact to be determined and that she is entitled to a judgment as a matter of law. The requests for admissions and the answers thereto are evidence which this court can consider only if preserved in a bill of exceptions. Consequently, the pleadings are all that are before us in considering the correctness of the court's ruling on the motion for summary judgment. A motion for summary judgment may not be used as a substitute for a motion to dismiss, a demurrer, or a motion for judgment on the pleadings. Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543. We shall not consider, therefore, the alleged error of the trial court in overruling plaintiff's motion for summary judgment. Under the state of the record the issues raised on the appeal will be determined on consideration of the correctness of the court's ruling in dismissing the cause of action at the close of plaintiff's evidence. There being no bill of exceptions, the issue in that respect is whether or not the pleadings sustain the judgment. Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137; Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82.

The only question to be determined, therefore, is whether or not the pleadings sustain the judgment of the

district court. The petition alleges plaintiff was at all times herein mentioned legally qualified to teach school in Nebraska by virtue of a valid certificate issued by the Superintendent of Public Instruction of the State of Nebraska. It alleges also that on or about October 20, 1954, plaintiff and defendant entered into an agreement in writing, which agreement is attached to and made a part of the petition. It alleges that by the terms of the agreement plaintiff agreed to teach school in the defendant district for a period of 7 months, commencing on or about November 1, 1954. The compensation for such service was fixed by the contract at $1,470, payable at the rate of $210 per month. The petition further alleges that plaintiff entered into the performance of her duties on November 1, 1954, and continued to perform her duties under the contract until January 26, 1955, on which date the school board of such district terminated and cancelled the agreement, and discharged the plaintiff illegally and without cause. It is alleged that plaintiff was paid $420 for her services and that there remains due and unpaid under the terms of the agreement the sum of $1,050 for which she prays judgment. The contract-attached to the petition states among other things that plaintiff is a legally qualified teacher who holds, or will hold at the beginning of the term of this contract, a third-grade elementary certificate in force and valid in said county for the entire period of the contract. The contract further provides that it may be terminated only by mutual agreement or by operation of law, and that there shall be no penalty for such release from this contract.

The defendant admits by its answer that it entered into the contract attached to the plaintiff's petition. The defendant denies that plaintiff was legally qualified to teach school in the public schools of Nebraska. The answer admits that the school board terminated and cancelled the written agreement because of her incompetency, insubordination, neglect of duty, and general

improper conduct during and outside of school hours. The answer also alleges that plaintiff failed to teach school in a proper and efficient manner and thereby breached her contract with the school district; and that she was fully paid all salaries due her during the time she was employed by said school district. The answer denies all other allegations contained in plaintiff's petition.

The plaintiff by her reply admits that she was paid for her services from November 1, 1954, to January 26, 1955, and alleges that defendant was estopped from discharging plaintiff or terminating or cancelling the written contract for any reason except by mutual agreement or by operation of law. Plaintiff alleges also that the school district ratified and confirmed the contract by its action subsequent to its execution and by its answer filed in the present suit. All other allegations of defendant's answer were denied.

The contention of the defendant is that the contract was void because the plaintiff did not hold a teacher's certificate at the time she entered into the contract. The defendant relies on our holdings in Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932; Zevin v. School Dist. No. 11, 144 Neb. 100, 12 N. W. 2d 634; and Kuhl v. School Dist. No. 76, 155 Neb. 357, 51 N. W. 2d 746. At the time the situation in those cases arose the applicable statute provided that each holder of a teacher's certificate shall, before contracting to teach, register the same in the office of the county superintendent of the county in which he is contracting to teach. § 79-1338, R. S. 1943. In 1949, however, the Legislature passed an act recodifying the school laws of this state. Laws 1949, c. 256, p. 689. The pertinent parts of this act now provide: A contract for the employment of a teacher shall be in writing on a form recommended by the Superintendent of Public Instruction. § 79-1248, R. R. S. 1943. Such contract shall contain a provision whereby the employed person affirms

that he holds or will hold, at the beginning of the term of the contract, a valid certificate properly registered in the office of the county superintendent. § 79-1250, R. R. S. 1943. The holder of a teacher's certificate shall, before beginning to teach, register the same in the office of the county superintendent of the county in which he is contracting to teach, and no certificate to teach nor contract for a school shall be valid until the certificate is so registered. § 79-1239, R. R. S. 1943. A teacher violating the certificate and registration provisions of the statutes shall not recover any money for services while teaching during the time that such contract and certificate are invalid. § 79-1240, R. R. S. 1943.

It is plain from the foregoing that a teacher may enter into a valid contract with a school district who does not then have a teacher's certificate. In other words, such a contract is not void because a teacher does not then hold a teacher's certificate. She may properly contract to have such a certificate and to register it with the county superintendent at the beginning of the term of the contract. The contract in the instant case is clearly within the purview of the statutes on the subject.

There is a contradiction of terms in the cited statutes. The use of the terms "valid" and "invalid" in sections 79-1239 and 79-1240, R. R. S. 1943, gives rise to this assertion. The Legislature clearly meant that such contracts should be effective or ineffective rather than valid or invalid. Such contracts under the cited sections of the statutes are valid when entered into and are voidable when statutory requirements are not met. The effect of existing statutes is that a teacher must have a certificate registered with the county superintendent before she begins to teach. If the teacher does not have such certificate on file the contract is voidable and may be terminated by the school district. If the contract is not terminated during the time the

teacher is in default in not having a teacher's certificate registered with the county superintendent before beginning to teach, the statute provides that such teacher shall not recover any money for teaching during the period of such default. In other words, if the contract is not terminated by the proper authority during the period of the default, and the teacher subsequently meets the requirements of the statute as to holding and registering her certificate, the contract is valid, even though the teacher is precluded from recovering compensation during the period of the default.

In the instant case the defendant admitted entering into the contract with the plaintiff; admitted paying her until January 26, 1955; and alleged affirmatively that the contract was terminated and cancelled because of incompetency, insubordination, neglect of duty, and general improper conduct during and outside of school hours. Under our holdings involving a similar contract in Greer v. Chelewski, 162 Neb. 450, 76 N. W. 2d 438, the power to terminate the contract for such reasons is lodged with the then Superintendent of Public Instruction, now the State Board of Education. See, also, Schlueter v. School Dist. No. 42, *ante* p. 443, 96 N. W. 2d 303. Consequently, the school district officers were without authority to terminate its contract with the plaintiff for the reasons stated, and the affirmative defense alleged is not a defense to the action. See § 79-1234, R. R. S. 1943.

The defendant asserts that the general denial contained in the answer raises issues of fact and precludes a determination of the issues raised by the appeal on the pleadings. It has long been the rule in this state that where defendant admits the material facts in plaintiff's petition and pleads a waiver, an estoppel, or matters in avoidance as a defense thereto, such material facts will be treated as true, though the answer also contains a general denial. Dwelling House Ins. Co. v. Brewster, 43 Neb. 528, 61 N. W. 746; Nason

v. Nason, 79 Neb. 582, 113 N. W. 139; Hueftle v. The Farmers Elevator, 145 Neb. 424, 16 N. W. 2d 855; Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224. Under the foregoing rule the plaintiff's allegations of fact contained in her petition stand conclusively admitted and require no evidentiary proof. Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768. The contract being valid and not terminated by mutual agreement or by operation of law in accordance with its terms, the ruling on the motion to dismiss made at the close of plaintiff's evidence was erroneous, particularly since the affirmative defense alleged in defendant's answer was not a defense as a matter of law.

We conclude that the judgment of dismissal is not sustained by the pleadings. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ANTON SVEHLA, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

96 N. W. 2d 649

Filed May 22, 1959. No. 34561.

1. **Criminal Law: Indictments and Informations.** A trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant.
2. **Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.
3. **Incest.** Section 28-906, R. R. S. 1943, provides in part that if a father shall licentiously cohabit with his own daughter, the father shall upon conviction be punished by confinement in the penitentiary.
4. ———. A definition of sexual intercourse is: Sexual or carnal

connection; coition. The term "sexual intercourse" necessarily includes penetration.

5. ———. The legislative intent, in the use of the words "licentiously cohabit," contemplates one or more acts of sexual intercourse of a father with his own daughter.

6. ———. Where the crime of incest is charged, the State is required to prove beyond a reasonable doubt that such offense was committed within 3 years prior to the date of the filing of the information.

7. **Criminal Law.** By statute, a plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto.

8. ———. By statute, to any plea in abatement the county attorney may demur if it is not sufficient in substance, or he may reply setting forth any facts which may show that there is no defect in the record as charged in the plea.

9. ———. Where a defendant filed a plea in abatement, had it tried before the court on the same day, made no objection that the State had failed to file a demurrer or reply thereto, and brought the matter up for the first time in his motion for new trial, he waived the provision of the statute to the effect that the county attorney may demur or reply to the facts which defendant claims constitute a defect in the record.

10. **Criminal Law: Indictments and Informations.** The district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused has his preliminary examination.

11. **Criminal Law: Evidence.** The receiving, over objection, of evidence of an immaterial fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party.

12. ———: ———. In a criminal prosecution, mere errors in rulings on evidence or in giving or refusing instructions, if without prejudice to accused, are not grounds for reversing a conviction.

13. **Constitutional Law: Criminal Law.** The question of whether or not the defendant has had a speedy trial is to be determined by what is fair and reasonable under the facts and circumstances in each case.

14. ———: ———. The Legislature of our state has interpreted the Constitution on the matter of a speedy trial by fixing what, in certain cases and under certain conditions, is to be regarded as a maximum time within which a defendant must

be tried. The interpretation of this constitutional provision is for the court, but since the time fixed by the Legislature is not unreasonable, we adopt it as our own. But the Legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court.

15. **Criminal Law.** In the absence of statute, a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination.

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

ERROR to the district court for Madison County: FAY H. POLLOCK, JUDGE. *Affirmed.*

James F. Brogan, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

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

MESSMORE, J.

The plaintiff in error, Anton Svehla, hereinafter referred to as defendant, was charged with the crime of incest. He was convicted and sentenced to be confined in the State Penitentiary. He brings the cause here by petition in error to have the conviction and sentence vacated.

The original information was received by the sheriff of Madison County on April 8, 1958, served on the defendant April 9, 1958, and filed with the clerk of the district court on April 9, 1958. On September 5, 1958,

a hearing was had before the trial court. The county attorney requested leave of court to endorse upon the information the names of certain witnesses. At the time the original information was filed, it contained no endorsement of names of witnesses to be called by the State. The defendant predicates error on the part of the trial court in permitting the county attorney to endorse the names of all of the witnesses for the State on the information on September 5, 1958.

The defendant contends that the names of all of the witnesses for the State known to the State at the time of the filing of an information must be endorsed thereon.

Section 29-1602, R. R. S. 1943, provides: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. He shall subscribe his name thereto and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

"The names of witnesses upon which the state relies to prove the charge against one accused of crime should be indorsed upon the information at as early a day as practicable after the discovery of such witnesses, and in all cases before the cause is called for trial, and reasonable time after such indorsement should be allowed to enable the defendant to prepare for trial." Wilson v. State, 87 Neb. 638, 128 N. W. 38.

In Phillips v. State, 157 Neb. 419, 59 N. W. 2d 598, 58 A. L. R. 2d 1141, this court held: "A trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant." See, also, McCartney v. State, 129 Neb. 716, 262 N. W.

679; Barnts v. State, 116 Neb. 363, 217 N. W. 591; Brunke v. State, 105 Neb. 343, 180 N. W. 560; People v. La Panne, 255 Mich. 38, 237 N. W. 38; People v. McCrea, 303 Mich. 213, 6 N. W. 2d 489.

The witnesses whose names were endorsed on the information on September 5, 1958, were the six children of the defendant, his mother, the sheriff of Madison County, and the assistant chief of police of the city of Norfolk. This case was set for trial at 9 a.m., on September 22, 1958. The defendant and his counsel knew and were aware for nearly 2½ weeks before trial who the witnesses for the State would be.

The defendant filed an application for a continuance, which was overruled.

"An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby." Phillips v. State, *supra.*

We conclude that under the circumstances there was reasonable time to allow the defendant and his counsel to investigate the witnesses and prepare for trial. We find no prejudicial error as contended for by the defendant.

The record discloses that the defendant was arrested on March 3, 1958. Prior to his arrest, he lived 1 mile north and 3½ miles east of Meadow Grove on a rented place. He had lived there about 5½ years. He was engaged in the business of buying and selling junk.

The defendant testified that his wife had died in Grand Island about 10 years ago. They had been married 12 years when she passed away. His family consisted of six children, Anton, Jr., called Tony, 18; Edward, nearly 16; Frankie, 14; Mildred, 16; Vivian, 19; and Johnnie, 12 years of age.

There appears in evidence a plat showing the rooms in the house. There are also photographs showing the

interior of the house and the location of the rooms therein.

Vivian testified that she was 19 years of age and the daughter of the defendant. She further testified that there were two beds in the dining room; that she slept in one bed and her brother Johnnie in the other; that her bed was in the northwest corner and Johnnie's bed in the southwest corner of the room; that Mildred slept in a room that leads to the front room, which would be the room in the northwest corner of the house, next to the closet; that the defendant slept in the room north of the dining room, a short distance from where she slept; and that the other three boys slept in the room immediately north of the kitchen. She further testified that she knew what was meant by sexual intercourse and had had experience in such act, but denied that she ever had sexual intercourse with her father. She further testified that she quit going to school after attending high school for 2 weeks; that she had slept with Mildred; and that after the death of her mother she more or less took over the household duties and took care of the younger children.

Mildred testified that she was living at Geneva; and that she had run away from Assumption Academy. She further testified that Vivian quit sleeping with her and slept in her father's bedroom with him; that this would usually take place twice a week; that sometimes her father would go to dances on Wednesday and Saturday nights; that when he came home he would awaken Vivian and she would usually go into his room; that sometimes Vivian would stay in her father's room all night and other times just for a little while; and that sometimes she heard unusual sounds coming from her father's bedroom while Vivian was there, like Vivian was crying. She further testified that she knew what sexual intercourse was and had experienced it before she went to Geneva. She further testified that on one occasion she was sent out of the house, and as she was

coming back into the house she stopped on the porch, looked through a window, and could see Vivian and her father engaged in sexual intercourse. She was alone on this occasion. She believed this took place in July or August 1957.

Edward testified that he was living at Boys Town. He had lived at home with his brothers and sisters. After his father would leave in the evening, he would get up and leave the bedroom by jumping through a window, and go in to town. He did this because the door to the bedroom he slept in was padlocked. Sometimes he would be awake when his father arrived home, and he could hear Vivian and his father talking. This usually happened on Wednesday and Saturday nights. Sometimes he heard them talking in the kitchen and other times in his father's bedroom. He further testified that he understood what caused the birth of babies; that on one occasion he was standing on the porch looking through a window with Tony, Mildred, Frankie, and Johnnie, and he saw his father and Vivian on Vivian's bed in the dining room; and that he could only see a part of their legs and their feet, not quite past the knees. This occurred less than half a year before his father was placed in jail.

Johnnie testified that he was 12 years old and had been living at Boys Town for about 3½ months; that the nights Vivian did not sleep in her bed, she would sleep with his father; that when his father came home after being out, his father would awaken Vivian and she would go with him into his room and they would close the door; that he could hear the bed squeaking; that he saw his father on top of Vivian in the bed; and that this was early in the morning and he saw them through the keyhole. On cross-examination he testified that he looked through the keyhole of the door about once a month, at about 1 o'clock in the morning, and that he could see into the room.

The defendant testified that he never had sexual re-

lations of any kind with Vivian, nor did he fondle her or attempt to have intercourse with her; that he had a normal affection for her; that she had never been in bed with him; that he had on occasions gone to dances on Wednesday nights, but Saturday night was his night out, and he usually went to Kings at Norfolk; that he did lock the boys in their bedroom on the nights he went out because Tony, Edward, and Frankie were involved in stealing from the neighbors; and that Vivian kept her clothes in a closet off his bedroom and would go into his bedroom to get her clothes.

Ervin Warnecke, assistant chief of police of Norfolk, testified that on the first occasion he went to the defendant's home he went with the sheriff to search the home; that he examined the defendant's bedroom; that he picked up an encyclopedia of sex, four magazines that would be considered "racy", and an empty contraceptive box under the mattress on the defendant's bed. On cross-examination he testified that magazines of this type could be purchased at newsstands in Norfolk.

The defendant assigns as error that the verdict is contrary to the evidence, the instructions, and the law.

The defendant argues that in the prosecution for incest, the State must establish, as a necessary element of the offense, that there was actual penetration of the female involved, by the male; that in this case there is no evidence of the actual penetration of the female, Vivian Svehla, by the defendant; that the defendant requested the trial court to instruct the jury that penetration must be established in order to prove the crime of incest; and that the court refused to so instruct the jury.

The defendant was charged under section 28-906, R. R. S. 1943, which provides in part: "If a father shall licentiously cohabit with his own daughter, the father shall upon conviction be punished by confinement in the penitentiary * * *."

The defendant cites 2 Wharton's Criminal Law and

Procedure, § 725, p. 536, which states, in part, as follows: "By the general rule, the offense of incest in so far as it relates to intercourse requires a penetration of the female by the male." The following cases are cited in support thereof: State v. McCall, 245 Iowa 991, 63 N. W. 2d 874; Signs v. State, 35 Okl. Cr. 340, 250 P. 938. See, also, 27 Am. Jur., Incest, § 2, p. 288.

In State v. McCall, *supra,* the defendant contended the court erred in overruling his motion for directed verdict, based upon the insufficiency of the evidence. The court said: "One complaint is there was no proof of penetration of the female organ, which is essential to conviction of incest. State v. Judd, 132 Iowa 296, 301, 302, 109 N. W. 892, 11 Ann. Cas. 91; 42 C. J. S., Incest, section 5; 27 Am. Jur., Incest, section 2. This contention is not well founded. Letha was a bright girl, age fifteen years. * * * She testified she understood the meaning of the term sexual intercourse, and that defendant had sexual intercourse with her * * *. The meaning of this term is clear and is common knowledge. A dictionary definition is: sexual or carnal connection; coition. The term itself necessarily includes penetration. State v. Frazier, 54 Kan. 719, 39 P. 819; Hunley v. Commonwealth, 217 Ky. 675, 290 S. W. 511, 514; Shepherd v. State, 111 Tex. Cr. 4, 10 S. W. 2d 730; State v. Haston, 64 Ariz. 72, 166 P. 2d 141, 143, 144; State v. Diamond, 50 Nev. 433, 264 P. 697. The testimony above-noted, without more, was sufficient to make the question of penetration one of fact for the jury."

In Mathews v. State, 115 Neb. 158, 211 N. W. 942, referring to what was then section 9763, Comp. St. 1922, relating to incest, the defendant was charged with having licentiously cohabited with his own daughter. The court said: "The legislative intent, in the use of the words 'licentiously cohabit,' contemplates one or more acts of sexual intercourse of a father 'with his own daughter.'" This rule applies to what is now section 28-906, R. R. S. 1943.

It is true Vivian denied that she ever had intercourse with her father. We refer to Mildred's testimony heretofore set out, that she knew what sexual intercourse was. On cross-examination she was asked: "Now you say you saw this act of intercourse between your father and Vivian during the summer." Her answer was "Yes." The record discloses that the defendant did not inquire into Mildred's knowledge of penetration.

With reference to the defendant's requested instruction that the jury be instructed that penetration of the female was one of the essential elements of the crime of incest, the court did instruct the jury that the term "licentiously cohabit" contemplates one or more acts of sexual intercourse between the father and his own daughter.

Considering the language in the above cases, if the jury found that the defendant committed one or more acts of sexual intercourse with his daughter Vivian, it would follow that penetration existed. We conclude that the defendant's contention cannot be sustained.

The defendant contends that in a prosecution for incest, if the State elects to base the prosecution on an offense alleged to have been committed on a particular date, it is bound by such election, and that evidence of prior similar acts can only be introduced for the purpose of showing the disposition or inclination of the defendant to commit the crime on the date charged.

The defendant asserts that the original information filed in this case charged Anton Svehla with incest "for the past several years, * * * and the present year of 1958." The State elected to stand on the date set forth in the amended information which the court granted the State permission to file. The amended information charged the defendant with the commission of the crime of incest "on or about the 23rd day of February, 1958." The defendant asserts that the State introduced no evidence whatever to establish the crime

of incest on the defendant's part on February 23, 1958, or anywhere near that date.

It is true the State did not establish that the crime of incest was committed on February 23, 1958.

In Yeoman v. State, 21 Neb. 171, 31 N. W. 669, it is said: "On the trial of the case the court charged the jury that it was not necessary that the offense be proven to have been committed on the date alleged in the indictment, but that it would be sufficient if proven to have been committed within three years prior to the finding of the indictment. The instruction was Held, To be correct." This case involved the crime of fornication. The same rule applies to the filing of an information.

Instruction No. 6 given by the trial court states in part: "Insofar as the time of the alleged offense is concerned, it is sufficient if you find that the evidence establishes beyond a reasonable doubt that such offense was committed on some day or time, but in any event it must have been committed, if such you find, within three years prior to the date charged in the information; * * *." While the instruction is technically erroneous, it does not constitute prejudicial error, and under the evidence the jury could not have been misled.

There is no prejudicial error in the instruction. The time of the commission of the offense, as fixed by Mildred Svehla, was in July or August 1957, which was well within the proper period of time as stated in Yeoman v. State, *supra*.

The defendant asserts that the jury had to disregard the court's instruction No. 5 to find the defendant guilty, and in that regard the verdict is contrary to the evidence and to the instructions.

Instruction No. 5 set forth the essential elements of the offense. In part (c) thereof the court stated: "That said defendant did so on or about the 23rd day of February, 1958." We believe that the part of instruction No. 6 set out above explains the words "on or

about" given in instruction No. 5, and is a proper instruction under the law; and that instructions Nos. 5 and 6 are not in conflict. The State was not required to establish a licentious act on February 23, 1958, but only such an act within 3 years from the date of filing the amended information. We find no prejudicial error as contended for by the defendant.

The defendant contends that upon filing of a plea in abatement in a criminal case, issues must be joined and pleadings must be filed by the State in response to the plea in abatement.

Section 29-1809, R. R. S. 1943, provides: "A plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto."

Section 29-1814, R. R. S. 1943, provides: "To any plea in abatement the county attorney may demur if it is not sufficient in substance, or he may reply setting forth any facts which may show that there is no defect in the record as charged in the plea."

The defendant filed his plea in abatement on September 19, 1958, and proceeded to try it before the court on the same day. The defendant made no objection that the State had failed to file a demurrer or reply, and brought the matter up for the first time in his motion for new trial. Under the circumstances presented by the record, we conclude that the defendant has failed to show prejudicial error as contended for by him.

The defendant contends that an information which is defective on its face must be quashed upon proper motion made, and that likewise, an amended information is subject to a motion to quash when the court has given leave only to amend by interlineation.

The court overruled the defendant's motion to quash the amended information. The original information was filed April 9, 1958. On September 5, 1958, the defendant filed his motion to quash the information and also filed a plea in bar. On September 8, 1958, the defendant

filed a motion to compel the State to elect on which count it would proceed, and to specify the date on which the alleged crime was committed. On September 9, 1958, the defendant was allowed to withdraw his plea of not guilty to the original information in order to present his motion to quash the information, his plea in bar, and to present his motion to compel the State to elect and to specify the statute under which the State charged the defendant with the crime. The court sustained the motion requiring the State to specify the statute under which the defendant was charged with the crime.

The defendant refers to the judge's notes which state, in part: "September 9, 1958. * * * County Attorney granted leave to amend the information instanter by interlineation to more definitely allege the time of the offense charged, and to specify the particular statute under which defendant is charged, as Section 28-906 R. R. S."

The journal entry states in part: "4. Upon application by the County Attorney orally made in open court the State of Nebraska is granted leave to file an amended information for the purpose of more definitely alleging the time of the offense charged and for the further purpose of specifying the particular statute under which the Defendant has been charged."

The judge adequately explained in the record the conflict between the notes and the journal entry above set forth.

The record made in open court in the presence of the parties reveals the following: "THE COURT: The State is granted leave to amend the information instanter by interlination (sic) or in the alternative, to file an amended information."

The State filed an amended information more definitely setting forth the date of the offense charged.

The defendant next argues that the original information was dated April 8, 1958; that the return shows the

sheriff received it on the same date; and that the record shows the information was filed April 9, 1958, and served on April 9, 1958.

Section 29-1802, R. R. S. 1943, provides in part: "Within twenty-four hours after the filing of an indictment for felony, * * * the clerk shall make and deliver to the sheriff, the defendant or his counsel a copy of the indictment, and the sheriff on receiving such copy shall serve the same upon the defendant."

Section 29-1604, R. R. S. 1943, provides in part: "The provisions of the criminal code in relation to indictments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, * * * shall in the same manner and to the same extent, as nearly as may be, apply to informations, and all prosecutions and proceedings thereon."

In Losieau v. State, 157 Neb. 115, 58 N. W. 2d 824, this court said: "The district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused has his preliminary examination." See, also, Razee v. State, 73 Neb. 732, 103 N. W. 438; Wilson v. State, 120 Neb. 468, 233 N. W. 461; Hoctor v. State, 141 Neb. 329, 3 N. W. 2d 558.

In addition, the defendant was arraigned on the amended information, stood mute, and a plea of not guilty was entered on his behalf. We fail to find that the defendant was in any manner prejudiced by the circumstances disclosed by the record as above set forth.

The defendant contends that the reception into evidence of the empty contraceptive container, a book on sex, and four magazines heretofore referred to, constituted prejudicial error for the reason that the evidence failed to establish that these items were the property

of the defendant, or had any connection with the case, therefore the only purpose of introducing this evidence would be to inflame and arouse the prejudice and passion of the jury. The defendant objected to the foundation, to the competency, and to the relevancy of these exhibits when they were introduced.

In Aller v. State, 114 Neb. 59, 205 N. W. 939, this court said: "The receiving, over objection, of evidence of an immaterial fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party." See, also, Carrall v. State, 53 Neb. 431, 73 N. W. 939.

In 24 C. J. S., Criminal Law, § 1913, p. 927, it is said: "While prejudicial error relating to evidence is a ground for reversal, rulings as to evidence, although technically erroneous, will not constitute a ground for reversal of a conviction where no prejudice results to accused, as where the verdict could not have been affected; nor are erroneous rulings prejudicial where the verdict could not have been affected, or where evidence of the guilt of the accused left no room for reasonable doubt, and the errors were trivial, or did not weaken the properly admitted testimony nor affect the legality of the trial; nor are errors relating to evidence prejudicial where they are rendered harmless by subsequent events, or where accused could have remedied the error."

In Cook v. State, 111 Neb. 590, 197 N. W. 421, the court said: "In a criminal prosecution, mere errors in rulings on evidence or in giving or refusing instructions, if without prejudice to accused, are not grounds for reversing a conviction."

The record discloses that the magazines received in evidence could be bought at any newsstand in Norfolk. It appears that these exhibits might be immaterial or irrelevant to the crime charged, however, in the light of all of the evidence and the authorities above cited, we believe that the reception of these items into evi-

dence did not constitute prejudicial error.

The defendant contends he was denied his right to a speedy trial in violation of Article I, section 3, of the Constitution of Nebraska, and Article XIV, section 1, of the Constitution of the United States.

The record discloses that the defendant was represented by counsel 3 days after he had been arraigned before the magistrate. He was represented by his present counsel, at least since May 2, 1958, when he was arraigned on the original information in the district court, at which time the defendant was advised of his constitutional rights, and he advised the court that he understood his rights and the nature of the charge against him, and entered his plea of not guilty.

The question of whether or not the defendant has had a speedy trial is to be determined by what is fair and reasonable under the facts and circumstances in each particular case. See Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

In Shepherd v. United States, 163 F. 2d 974, it is said: "The constitutional guarantee of a 'speedy trial' is intended to prevent the oppression of a citizen by delaying criminal prosecution for an indefinite time and to prevent delays in administration of justice by requiring judicial tribunals to proceed with reasonable dispatch in trial of criminal prosecutions. * * * A 'speedy trial', generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary, vexatious and oppressive delays. * * * The right of accused to discharge for failure to receive a speedy trial is a personal right which may be waived, and it ordinarily is waived if accused fails to assert his right by making a demand for trial, by resisting a continuance, by going to trial without objection that time limit had passed, or by failing to make some effort to secure a speedy trial. * * * The right of a speedy trial is relative and depends upon circumstances and is not denied where delay is satisfactorily explained by government and defendant

was brought to trial as soon as was reasonably possible."

We fail to find in the record any protest or objection made on the part of the defendant until he filed his plea in abatement on September 19, 1958. This plea in abatement refers to a "speedy trial." We fail to find in the record any request by the defendant for an immediate trial.

Section 29-1202, R. R. S. 1943, provides: "If any person indicted for any offense and committed to prison shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found, he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner." The same rule applies to a person charged with a crime in an information.

In Maher v. State, *supra,* this court said: "The legislature of our state has interpreted the Constitution on the matter of a speedy trial by fixing what, in certain cases and under certain conditions, is to be regarded as a maximum time within which a defendant must be tried. The interpretation of this constitutional provision is for the court, but since the time fixed by the legislature is not unreasonable, we adopt it as our own. * * * But the legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases."

We conclude that the defendant's contention cannot be sustained.

The defendant makes some point that he was denied counsel when he was arraigned before the justice of the peace, waived his preliminary hearing, and was ordered to appear before the district court for Madison County to answer to the complaint filed against him. These proceedings occurred on April 1, 1958.

"In the absence of statute, a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination." Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666.

Under the circumstances as disclosed by the record and the authorities above cited, we conclude that the defendant's contention cannot be sustained.

The defendant contends that the county attorney was guilty of misconduct for the reason that he attempted to use evidence which he knew, or should have known, was inadmissible, and the attempted use thereof was calculated only to mislead or prejudice the jury.

In this connection, the defendant asserts that the county attorney called Vivian Svehla to testify as a witness for the State, and she testified that she had not had any sexual relations with her father, the defendant. The defendant asserts the county attorney was not surprised by this testimony, that he knew, or should have known, that he could not impeach his own witness unless he was surprised by the testimony given by her. While Vivian Svehla denied ever having sexual intercourse with her father, the county attorney produced a document signed by Vivian, to which the defendant objected as being an attempt to impeach the witness. The defendant was given leave to cross-examine this witness as to the foundation. Her testimony on cross-examination was to the effect that she had repudiated whatever was contained in the exhibit or document relating to sexual intercourse with her father made by her and given to the county attorney. The court refused to receive the document or exhibit in evidence.

In Moore v. State, 147 Neb. 390, 23 N. W. 2d 552, the court said: "The applicable rule is that it is always permissible for a party to ask his own witness whether he had made prior statements inconsistent with his testimony and such an inquiry is not objectionable, although the incidental effect of it is to impeach the witness. Such an examination is a proper one for the purpose of

showing that the testimony of the witness operated as a surprise, or to test his recollection, refresh his memory, induce him to change his testimony, draw out an explanation of his apparent inconsistency, or to show the circumstances which induced the party to call him, and that such party had been placed at a disadvantage by unexpected evidence. 70 C. J., Witnesses, § 1225, p. 1025. Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265."

We conclude that there was no prejudicial error as contended for by the defendant.

Other assignments of error are without merit and need not be discussed.

The time served by the defendant since his arrest is to be applied to the sentence imposed upon him by the trial court.

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

AFFIRMED.

CHARLEY W. PETERSON, APPELLANT, V. J. L. GEORGE, CHIEF, NEBRASKA BUREAU OF ANIMAL HUSBANDRY, ET AL., APPELLEES.

96 N. W. 2d 627

Filed May 22, 1959. No. 34587.

1. **Appeal and Error.** 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.
2. ———. 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.
3. ———. 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.

4. **Officers.** Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi judicial officer, and, when so acting, he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without willfulness, malice, or corruption.

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

Francis D. Lee and *Doyle, Morrison & Doyle,* for appellant.

Clarence S. Beck, Attorney General, *Homer L. Kyle,* and *Chambers, Holland, Dudgeon & Hastings,* 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 Holt County. It involves an action brought by Charley W. Peterson, a farmer and rancher residing in Holt County, Nebraska, against J. L. George, a former State Veterinarian and Chief of the Nebraska Bureau of Animal Industry, Lee A. Wilcox, an employee of the State of Nebraska, acting under the direction, control, and supervision of J. L. George as Chief of the Nebraska Bureau of Animal Industry, and the Employers Mutual Casualty Company of Des Moines, Iowa, the state veterinarian's official bondsman. The action was brought for the purpose of recovering damages which plaintiff alleged he suffered because of certain acts performed by George and Wilcox in the execution of their official duties.

Plaintiff alleged that insofar as here material he was at all times the owner of 224 head of Angus cows and 2 Angus bulls located in his pastures in South Da-

kota, which cattle were in good health and not affected by brucellosis; that on December 12, 1956, he had these cattle examined by James Tate, an approved and accredited veterinarian of South Dakota, who, based on such inspection, did, on December 14, 1956, issue an official health certificate upon these cattle at Gettysburg, South Dakota; that on December 18, 1956, plaintiff caused these cattle to be transported from his pastures in South Dakota to a licensed auction market at Atkinson in Holt County, Nebraska, such auction market being operated by E. C. Weller, doing business as the Atkinson Livestock Market; that J. L. George, as State Veterinarian, Bureau of Animal Industry, acting through Lee A. Wilcox, thereupon caused a "Notice of Quarantine" to be served upon E. C. Weller, doing business as Atkinson Livestock Market, but directed to plaintiff; that as a result of this notice the plaintiff's cattle were restrained in quarantine at the Atkinson Livestock Market until March 27, 1957, when 224 cows and 1 bull were released to the plaintiff; and that the act of quarantining said cattle was done without legal authority and was done negligently, wrongfully, and maliciously.

The damages claimed by the plaintiff because of his cattle being quarantined consist of the cost of feeding said cattle while being held, the value of two head thereof that died while being held, and for damages to plaintiff's reputation as a stock breeder caused thereby.

The defendants George and Wilcox filed an answer generally denying plaintiff's causes of action but specifically alleging that: "* * * the cows and bulls described in Paragraph 5 of the First Cause of Action of Plaintiff's petition were transported from the State of South Dakota into the State of Nebraska contrary to the provisions of the laws of Nebraska and of the rules and regulations duly adopted by the Department of Agriculture and Inspection of the State of Nebraska, in that they had not been properly tested for Bang's

disease within thirty days prior to their shipment into the State of Nebraska, and were shipped into the State of Nebraska in violation of the laws of that state and of the rules and regulations of the Department of Agriculture and Inspection; that in placing said livestock in quarantine and testing them and in all other acts concerning said livestock, the said answering defendants and each of them were performing only the duties imposed on them by law as officers and agents of the State of Nebraska."

The defendant the Employers Mutual Casualty Company filed a separate answer generally denying plaintiff's causes of action, but specifically alleging: "* * * the cows and bulls described in paragraph five of the first cause of action were transported from the State of South Dakota into the State of Nebraska contrary to the provisions of the laws of Nebraska and the rules and regulations duly adopted by the Department of Agriculture and Inspection of the State of Nebraska, in that they had not been properly tested for Bang's disease within thirty days prior to their shipment into the State of Nebraska, and were shipped into the State of Nebraska in violation of the laws of that state and of the rules and regulations of the Department of Agriculture and Inspection; that in placing said livestock in quarantine and testing them and in all other acts concerning said livestock, the defendants J. L. George and Lee A. Wilcox were performing only the duties imposed on them by law as officers and agents of the State of Nebraska."

Thereafter all three defendants joined in a motion for summary judgment. This motion came on for hearing on November 11, 1958. The judgment rendered pursuant thereto states that: "* * * this matter came on to be heard on the motion of the said defendants for summary judgment and affidavit of John L. George and attached exhibits in support thereof and affidavits of James Tate and of Charley W. Peterson and at-

tached exhibits for counter showing on behalf of the plaintiff, * * *." The trial court found: "That there is no genuine issue as to any material fact involved in this controversy; that the defendant George did cause the said cattle of plaintiff to be placed in quarantine as alleged by plaintiff but that in doing so said defendant was acting within the scope of his authority as State Veterinarian of Nebraska and acting without malice and in the performance of duties imposed upon him by law; that any damages which plaintiff may have suffered by reason of the acts alleged to have been done by defendants, or any of them, were not caused by any wrongful or unlawful act or conduct on the part of said defendants, or any of them; that the motion of defendants for summary judgment should be sustained and that judgment should be entered herein in favor of said defendants." The defendants' motion for summary judgment was sustained and judgment rendered for the defendants.

Plaintiff filed a motion for new trial and perfected this appeal from the overruling thereof.

"A party against whom a claim * * * is asserted * * * may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." § 25-1331, R. R. S. 1943.

Section 25-1332, R. R. S. 1943, provides, insofar as here material, that: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

"A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered." Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259. See, also, Illian v. McManaman, 156 Neb. 12, 54

N. W. 2d 244; Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396.

"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, 165 Neb. 664, 86 N. W. 2d 789. See, also, Mueller v. Shacklett, 156 Neb. 881, 58 N. W. 2d 344; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

As stated in Illian v. McManaman, *supra:* "* * * In considering such a motion as in a motion for a directed verdict, the court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits." See, also, Miller v. Aitken, *supra.*

"Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged." Miller v. Aitken, *supra.*

Here there is no bill of exceptions. In view of that fact the following from Spidel Farm Supply, Inc. v. Line, *supra,* has application: "At the hearing of the motion for summary judgment affidavits were presented by the parties and considered by the court. * * * 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." See, also, Palmer v. Capitol Life Ins. Co., *supra.* As stated in Palmer v. Capitol Life Ins. Co., *supra,* by quoting from Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312: "In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of the evidence produced in the trial court. It follows that any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions."

Under certain conditions and circumstances there was statutory authority which not only authorized, but directed, the Department of Agriculture and Inspection, under which authority George was operating, to do what was here done. See §§ 54-701, 54-719, and 54-766,

R. R. S. 1943. In view of the record as presented we must presume the evidence adduced at the hearing on motion for summary judgment conclusively established a situation to which these statutes had application and which authorized George to do what he did and that he did it in the manner as therein set forth.

As we said in Allen v. Miller, 142 Neb. 469, 6 N. W. 2d 594, by quoting from 22 R. C. L. 485, § 163: "Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption." The foregoing has application here. See, also, Harmer v. Petersen, 151 Neb. 412, 37 N. W. 2d 511; 67 C. J. S., Officers, § 125, p. 417, § 127(a), p. 420.

In view of the foregoing we affirm the judgment of the trial court.

AFFIRMED.

WILLIS BAER, APPELLEE, V. OTTO SCHAAP, DOING BUSINESS AS SPEEDWAY SCAFFOLD COMPANY, APPELLANT, IMPLEADED WITH PARSONS CONSTRUCTION CO., A CORPORATION, APPELLEE.

97 N. W. 2d 207

Filed June 5, 1959. No. 34497.

1. **Trial.** In determining the question of whether or not a motion for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom.

2. **Negligence.** Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.
3. **Trial.** Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined.
4. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
5. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.
6. **Negligence: Trial.** If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except insofar as the same may appear in evidence adduced for plaintiff.
7. **Bailments: Negligence.** A supplier or bailor of a scaffold, who knows or has reason to know that it is likely to be dangerous when used and which is rented as safe for use in good faith reliance upon the supplier's professions or representations, is subject to liability to the bailee or others, whom the supplier or bailor should expect to work upon the scaffold, for damages proximately caused by the failure to exercise reasonable and due care to supply the scaffold in a condition safe for use.
8. ———: ———. Under the provisions of section 48-425, R. R. S. 1943, when a scaffold is constructed by a supplier or bailor and rented to a bailee to be used in repairing a building, the scaffold must be safe, suitable, and proper for the purpose for which it is used. Generally, the bailor is liable if it does not meet that requirement.
9. **Actions.** If a statute commands or prohibits certain things, the person for whose benefit the statute was enacted has a remedy under the statute. It is not necessary to the maintenance of such an action that the statute in terms expressly imposes a civil liability.
10. **Negligence.** Statutes requiring protective devices, such as scaffolding statutes, impose a mandatory and affirmative duty upon the supplier of such property. A failure to perform a mandatory duty so enjoined is negligence per se, and if any

person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation, a case is made.

11. **Appeal and Error.** If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.
12. **Negligence: Trial.** Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury.
13. **Damages: Trial.** 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, mistake, or some means not apparent in the record, or that it is clear that the jury disregarded the evidence or controlling rules of law.

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

Webb, Kelley, Green & Byam, for appellant.

Rice & Adams and *Schrempp & Lathrop,* for appellee Baer.

O'Dowd & Swift and *Crossman, Barton & Quinlan,* for appellee Parsons Constr. Co.

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

MESSMORE, J.

This is an action at law brought in the district court for Douglas County by Willis Baer, hereafter referred to as the plaintiff, against Otto Schaap, doing business as Speedway Scaffold Company, hereafter referred to as the defendant, and Parsons Construction Company, hereafter referred to as Parsons. The Parsons Construction Company made payments to the plaintiff under the provisions of the Nebraska Workmen's Compensation Act for injuries he sustained while in the course

of his employment and was made a defendant in this action as required by the provisions of that act. The purpose of this action was to recover damages from the defendant for injuries sustained by the plaintiff when he fell from a scaffold constructed by the defendant. The case was tried to a jury, resulting in a verdict for the plaintiff in the amount of $20,000. The defendant moved for dismissal of the plaintiff's petition and for a directed verdict at the close of the plaintiff's evidence and at the close of all of the evidence. These motions were overruled. The defendant filed a motion for judgment notwithstanding the verdict and for a new trial. Both of these motions were overruled, and the defendant perfected appeal to this court.

The plaintiff's petition alleged that he was a bricklayer; that on or about September 14, 1954, he was employed by Parsons as a construction foreman in charge of certain alterations to be made on a building located on the southeast corner of the intersection of Seventeenth and Farnam Streets in Omaha; that pursuant to a contract with Parsons, the defendant, through his agents, servants, and employees, had erected, set in place, and rented to Parsons certain scaffolding around the outside of the building so that the plaintiff and his crew, and all employees of Parsons, might have access to the upper portion of the building; that the scaffolding thus erected by the defendant was erected in such a careless and negligent manner that one of the planks thereon gave way and thereby dropped the plaintiff to the sidewalk below, a distance of approximately 40 feet; that as a direct and proximate result of such negligence and carelessness the plaintiff suffered severe injuries; and that the scaffolding erected as aforesaid was not erected in a safe, suitable, and proper manner as required by section 48-425, R. R. S. 1943.

The amended answer of the defendant denied that he was guilty of any negligence, and alleged that on or about August 23, 1954, pursuant to an order of and

rental agreement with Parsons, and subject to the usual rental conditions existing between the defendant and Parsons, this defendant caused a steel scaffold to be erected around the building specified, in accordance with the specifications of Parsons; that the scaffolding was erected in a safe, suitable, and proper manner; that after the scaffolding was completely erected it was inspected and accepted by Parsons; that Parsons assumed and thereafter maintained control, supervision, and maintenance of the scaffolding for the duration of the particular construction in which Parsons was engaged; that the plaintiff was the foreman of and in general supervision over the contruction job being done by Parsons from and after August 23, 1954, and up to and including September 14, 1954; that the scaffolding was in the possession and control of the plaintiff; and that if any dangerous or defective condition existed, the plaintiff knew, or should have known, of its existence and thereby assumed any risk incident to the use of the scaffold. The defendant further alleged that after the scaffolding was completely erected by him and inspected and accepted by Parsons, alterations were made to the scaffolding by employees of Parsons working under the supervision of the plaintiff.

The plaintiff's reply to the amended answer of the defendant denied each and every allegation contained therein.

The defendant assigns as error the following: The trial court erred in denying defendant's motions to dismiss the plaintiff's petition and in denying the defendant's motions for directed verdict, also defendant's motion for judgment notwithstanding the verdict; the verdict and judgment were not supported by the evidence; the trial court erred in giving instruction No. 8 on its own motion; the trial court denied the defendant his right to have the jury instructed upon his theory of the case by refusing defendant's requested instructions Nos. 4, 8, and 9; and the verdict and judgment

were excessive, not supported by the evidence, and, in part, based upon instruction No. 15 given by the trial court, which instruction was erroneous.

The record discloses that the plaintiff had been engaged in general construction work for 30 years; that he had been a journeyman bricklayer since 1948; that he was 46 years of age at the time of the accident; that he had been a foreman for about a year or a year and a half with supervisory duties; and that he was acting in such capacity at the time of the accident while working for Parsons on the Patterson Building at Seventeenth and Farnam Streets in Omaha. The scaffolding around the building was erected before August 23, 1954, and when Parsons took over the job on August 24 or 25, the scaffolding was complete and ready for the plaintiff to go to work. Parsons had contracted to perform a portion of a remodeling job on the Patterson Building. This work consisted of replacing the cornice at the top of the 3-story building. Parsons ordered the necessary scaffolding to be erected by the defendant. The order was written by the defendant on a standard rental form and mailed to Parsons, but it was not signed by Parsons or anyone in authority for the corporation. The defendant erected a steel scaffold for Parsons and floored it with wooden planks.

It might be said at this point that the plaintiff does not contend that there was any defect in the steel scaffolding or that any plank in the flooring broke. The case has to do with the wooden planks that were used for flooring on the scaffolding.

When the scaffolding was erected to the proper height, planks were laid on the top of the frame to provide the flooring. In order to bring the scaffolding closer to the building on the north side, side brackets were attached to all top frames except the first three, between the scaffold and the building and extending straight toward the building. These side brackets were triangular in shape and approximately 21½ inches in

length across the top. The flooring was five planks in width, and one plank on the side bracket. These planks were 10 or 12 inches in width, and laid on the scaffold frames. A 16-foot plank was laid across three forms, or two spaces which were 14 feet in length. Two spaces were skipped and another 16-foot plank was laid across the next two spaces. A 14-foot plank was laid across the space skipped and on top of the 16-foot planks at either end, and overlapped the 16-foot planks a foot at each end. Nails were then driven through the planks where they overlapped to keep them from slipping.

The general foreman on the job for Parsons was Henry Chris Sorenson who made an inspection of the scaffolding and found 5 to 10 percent of the planks were unnailed. He and an employee undertook to nail the unnailed planks. This witness testified that after the scaffold had been inspected and accepted, Parsons added one plank on the side brackets along the north side of the building to provide a rest for a protective plywood wall. One side of this protective wall rested upon and was nailed to the flooring on the side brackets of the scaffold and the other side laid against and was supported by the building. A piece of wood was nailed to each plank in the flooring of the scaffold and side brackets where the planks overlapped and cleats were nailed to the underside of the flooring. The flooring and the protective plywood were covered with tarpaulin. This work was done by employees of Parsons under the supervision of Sorenson. This installation and the subsequent removal of the canvas and plywood did not change the structure of the scaffolding. Sorenson also testified that he replaced a defective plank on the other side of the scaffold from where the plaintiff fell.

On September 14, 1954, the plaintiff and his crew of workmen had almost completed the work for which the scaffold was required. By 1 o'clock that afternoon they had removed all of the tarpaulin, the pro-

tective plywood wall, and a portion of the safety rail on the outer side of the scaffold. Sometime between 2 and 3 o'clock on September 14, 1954, the plaintiff was standing upon the scaffold on the north side of the building on the plank in the flooring next to the building. The plank upon which he was standing was not covered, but was open to view. The plaintiff was washing the brick wall of the building with water, using a stone and brush. Dale Gosch, one of the workmen, was standing on the roof right above the plaintiff handing him material. He was approximately 3 feet from the plaintiff, and looking right at him when he fell. A plank suddenly "upended," dropping the plaintiff to the sidewalk below. The plank did not break, and no part of the steel scaffold was broken prior to the accident. The plank was 14 feet in length, and there were no nails in it. The plaintiff struck a canopy at a level lower than the floor of the scaffold. The plank fell between the scaffold and the building, and struck the building. The end of the plank which raised nearly struck the witness Gosch. Gosch testified that the plank which fell was from the main floor of the scaffolding and was one of the planks between the uprights of the scaffold.

Charles Cato, a workman on the job, testified that he arrived at the point where the plaintiff fell about the time the rescue squad arrived. This witness went up onto the scaffold to retrieve the plank which was teetering on the scaffold. He inspected the plank and found that it had no nails or nail holes in it. He further testified that this plank would barely reach across 3 supports on the scaffold, and that when it was placed across three supports it had only to slip an inch or so either way to upend.

The witness Edward Connolly testified that he was a salesman for the defendant and had experience in the erection of tubular steel scaffolding; that he was familiar with the manner in which such scaffolding

should be erected; and that planking should be laid across the frames and nailed if work on the scaffold was to be done for any length of time as planks have a tendency to "work," and the nailing would keep the planks from sliding back and forth so one end could drop. This witness further testified that in the interest of good safety it would be advisable to wire the end planks and nail all the others; and that in this particular scaffolding the planks laid for flooring were 14 and 16 feet in length, except for a few planks used only at the northwest corner of the building.

There is evidence to the effect that Parsons had safety rules in effect governing the use of scaffolds. There is no evidence to disclose that safety books or rules were given to the plaintiff, nor were they directed to his attention. It appears there were some safety slogans attached to the tool boxes on the job. Also, some reference is made to the custom of bricklayer foremen making daily inspections of scaffolds. The plaintiff testified that this was in accordance with the by-laws of bricklayers. Just what is meant by this statement is not clear from the record. The plaintiff made no inspection of the scaffold flooring between August 24, 1954, and the date of his injury, September 14, 1954. At various times during the progress of this construction work, other employees of Parsons used this scaffolding. The plaintiff testified that in his trade, at times, he erected low scaffolds; that he inspected the scaffolds as he felt responsible for the men working under him; also that he felt he had a right to rely upon the scaffolding furnished by the defendant.

There are certain well-established rules of law applicable to this case.

In determining the question of whether or not a motion for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every con-

troverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom. See Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59.

Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances. See Bohmont v. Moore, 138 Neb. 784, 295 N. W. 419, 133 A. L. R. 270.

"Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court. * * * It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. * * * It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong." Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

"If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except insofar as the same may appear in evidence adduced for plaintiff." Meyer v. Platte Valley Constr. Co., 147 Neb. 860, 25 N. W. 2d 412. See, also, Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175.

The plaintiff's petition charged the defendant with having violated his common-law duty by not using due care

in the erection of the scaffold, that is, the defendant was charged with negligence in the erection of the scaffold. In this connection we deem the following to be applicable.

The case of Tegler v. Farmers Union Gas & Oil Co., 124 Neb. 336, 246 N. W. 721, was an action for damages for alleged negligence which caused the death of the plaintiff's 4-year-old daughter against the defendant, a dealer engaged in buying and selling gasoline, kerosene, and other oils. This court said: "This is a tort action. 'It is a general rule that no cause of action in tort can arise from the breach of a duty existing by virtue of contract, except as between the parties thereto. Privity of contract is essential to the right of action. 20 R. C. L. 49, sec. 44.' 42 A. L. R. 1249, stating the foregoing rule and the reasons therefor in the annotation, and suggesting a rule affording a basis for liability, not inconsistent with the present trend of the courts to liberalize rules of liability for negligent acts which result in injuries to third parties. Briefly sketched, that enlarged rule suggests a duty of inspection and the use of ordinary care to see that a manufactured article, which, if defective, is imminently dangerous to persons the manufacturer knows will come in contact therewith, is not put upon the market in that condition. There was not privity of contract or of dealing between the parties hereto, but plaintiff has brought himself by his pleadings under the liberalized rule above suggested that, if the kerosene was actually inherently or imminently dangerous by reason of its content, then defendant would be liable for negligence to the plaintiff, if such negligence was the proximate cause of the injury."

The latest case touching upon this subject is Driekosen v. Black, Sivalls & Bryson, Inc., 158 Neb. 531, 64 N. W. 2d 88. This case concerned a suit against a supplier and installer of a propane gas system installed in the plaintiff's home. An explosion occurred re-

lating to such installation, resulting in damages. The plaintiff sought to recover damages from the manufacturer or installer of the gas system. We can see no difference between a bailor furnishing scaffolding and a manufacturer or installer of propane gas equipment, both of which are imminently dangerous if manufactured, installed, or erected in an unsafe manner, and both would fall into the same class of dangerous instrumentalities. With this in mind, we conclude that certain language in the above-cited case would be applicable to the instant case.

In the above-cited case, the court said: "As stated in 46 Am. Jur., Sales, § 817, p. 943: 'Moreover, where the seller of an article reasonably must know that if it is defective it will be imminently dangerous to persons likely to come in contact therewith, a duty rests upon him to use ordinary care to ascertain the condition of the article and see that it is safe, especially where, by representation or warranties that the article is safe, he induces the sale. If he fails to exercise ordinary care to ascertain the safety of the article, so that he actually sells it in an imminently dangerous condition, he is liable for injuries to third persons who he knows will come in contact with the article.' See, also, 46 Am. Jur., Sales, § 803, p. 928." See, also, Annotation, 164 A. L. R. 569.

The relationship between a supplier engaged in the business of erecting scaffolds for rental, and a construction company which rented one of the scaffolds from him for use in its business, is one of bailment. In other words, the defendant in the instant case is the bailor and Parsons is the bailee. See 8 C. J. S., Bailments, § 1, p. 222.

The rule announced in 6 Am. Jur., Bailments, § 317, p. 416, reads as follows: "Although there is authority in support of the view that the bailor of such an instrumentality for gratuitous use is responsible only for injuries from defects of which he is aware, and can-

not be made liable for not communicating anything he did not in fact know, whether he ought to have known it or not, yet if the bailment is a lucrative one, the obligation by which his liability to third persons is tested may include a duty to exercise reasonable diligence or ordinary care to see that the instrumentality is in a reasonably safe condition to avoid injuries to such persons, and it has even been held that he is required, in the exercise of such diligence, to inspect the machine to the end that such danger may not arise, and to make such simple and available tests as to its condition as the intended use would suggest to sensible and right-minded persons. Of course, even under this view, the bailor is not to be held responsible as a guarantor of the absolute integrity of the machine he lets." See, also, Rumsey v. Schollman Bros. Co., 156 Neb. 251, 55 N. W. 2d 668.

Restatement, Torts, § 388, p. 1039, reads as follows: "The words 'those whom the supplier should expect to use the chattel' and the words 'a person for whose use it is supplied' include not only the person to whom the chattel is turned over by the supplier but also all those who are members of a class whom the supplier should expect to use it or occupy it or share in its use with the consent of such person, irrespective of whether the supplier has any particular person in mind." See, also, MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F 696, Ann. Cas. 1916C 440.

Under the foregoing authorities we conclude that the bailor of a scaffold for hire would be liable to an employee of the bailee who could have been expected to use the scaffold, if he has failed to exercise reasonable care to make the scaffold safe for the use for which it was supplied.

In this connection, the court instructed the jury on the degrees of negligence applicable to this case.

The plaintiff's petition alleges that there is a statutory duty imposed upon the defendant by section 48-

425, R. R. S. 1943. This statute provides in part: "All scaffolds, * * * supports or other mechanical contrivances used in the erection, repairing, alteration, removal or painting of any house, building, * * * or other structure, shall be erected and constructed in a safe, suitable and proper manner."

For a comprehensive review of the history of the legislation relating to what is now section 48-425, R. R. S. 1943, we make reference to Johnson v. Weborg, 142 Neb. 516, 7 N. W. 2d 65. In that case the plaintiff sought to recover damages for personal injuries caused by a fall from the roof of a barn upon which he was working for the defendant. The holding in the case is to the effect that a scaffold must be safe, suitable, and proper for the purpose for which it is used, and the employer is liable if it does not meet this requirement. The court said: "In construing legislation of the class herein considered, this court has long followed the rule that a failure to perform a mandatory duty enjoined by statute is negligence per se, and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation a case is made. Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 217 N. W. 952, and cases there cited."

The case of Butera v. Mardis Co., 99 Neb. 815, 157 N. W. 1024, was decided in 1916, before the amendment to the statute in 1919. An injured workman sued his employer and the owner of the real estate. The question before the court was the sufficiency of the evidence and the constitutionality of the provision holding the owner of the real estate liable. Reference was made to sections 3602 and 3612, Rev. St. 1913. Section 3602, Rev. St. 1913, is similar to section 48-425, R. R. S. 1943. It was held that: "* * * the intention of the statute is that the employer is to be an 'insurer as to furnishing such a place as it requires.'" The court said: "The employee may confidently rely upon the performance of this duty by his employer, * * *." In Johnson v.

Weborg, *supra,* it was pointed out that statutes such as ours appeared to have originated in New York.

In Winterson v. Pantel Realty Co., 135 Neb. 472, 282 N. W. 393, this court said: "'Statutes requiring protective devices * * * scaffolding statutes, * * * and other statutes of like nature, impose a mandatory and affirmative duty upon the owners of such property, * * * the courts generally hold that a failure to perform a mandatory duty so enjoined is negligence per se, and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation, a case is made.'"

What the defendant seeks to show in the instant case is that section 48-425, R. R. S. 1943, has no applicability for the reason that the burden of this statute is laid upon employers only.

Referring to section 48-425, R. R. S. 1943, it states in part: "*All scaffolds,* * * * supports or other mechanical contrivances used in the erection, repairing, alteration, * * * of any house, building, * * * shall be erected and constructed in a safe, suitable and proper manner." (Emphasis supplied.)

In Johnson v. Weborg, *supra,* this court said, with reference to the reenactment of this act in 1919, quoting from Strahl v. Miller, 97 Neb. 820, 151 N. W. 952, Ann. Cas. 1917A 141: "'The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide.'"

Referring to a few of the New York cases, in Duggan v. National Constructors & Engineers, Inc., 223 App. Div. 163, 228 N. Y. S. 126, the plaintiff, an employee of a subcontractor engaged on a building under construction in the erection of the iron work, was injured when a ladder collapsed and he fell. The subcontractor engaged in doing the concrete work, who made the ladder, was liable for the injuries suffered, since it appeared that the ladder was used not only by his employees but also by

employees generally, and especially by the employees engaged in the erection of the iron work. The court said: "* * * a person who constructs a scaffold or erects a ladder to be used in the performance of labor in the erection of a building has a duty incapable of delegation, not merely to his own employees, but to all others making use of the structure for that purpose, to make such instruments of performance safe. * * * We think, therefore, that the question as to whether or not the ladder was properly constructed or whether it provided a safe and suitable means for performance of the work should have been submitted to the jury, * * *."

In Quigley v. Thatcher, 207 N. Y. 66, 100 N. E. 596, the case involved an employee of a subcontractor who sued the general contractor for injuries received when he fell from a defective scaffold erected by the general contractor. The court said: "* * * section 18 of the Labor Law (Cons. Laws, ch. 31), which provides: 'A person employing or directing another * * * in the erection, repairing, altering or painting of a house, building * * * shall not furnish * * * scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged.' * * * this statute is one for the protection of workmen from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed, and under such interpretation we think that a contractor may by course of events become liable to a sub-contractor and his employees for the safety of a scaffold although originally and expressly he assumed no such responsibility."

Section 48-425, R. R. S. 1943, is not limited in its scope to an employer or landowner, but may include a supplier or bailor, who erects and rents a scaffold to a bailee, and the employees of the bailee who are required, during the progress of their work, to use the scaffold.

In the light of the authorities above cited, a mandatory duty is imposed upon the bailor to furnish the proper materials and to see to it that the scaffold is constructed in such a manner as to give proper protection to the life and limb of a person employed to work upon and use the scaffold. If the bailor fails to comply with such duty and negligently erects a scaffold, and an employee of the bailee is injured while working upon the same in the course of his employment, the bailor would be liable within the contemplation of section 48-425, R. R. S. 1943.

The defendant predicates error upon the giving of instruction No. 8 which defendant claims is drawn from the language of section 48-425, R. R. S. 1943, and is based upon an application of that statute to the defendant. The defendant asserts that the statute does not impose a burden upon one situated as is the defendant for the benefit of one situated as is the plaintiff; that the statute does not apply to the defendant; and that the instruction is in error, which would call for a reversal of this case.

As we read instruction No. 8, the trial court made some reference to section 48-425, R. R. S. 1943. The court did instruct the jury on the common-law duty of due care and the essential elements relating thereto. The instruction did not impose a mandatory duty upon the defendant in any respect as provided by statute, but defined the common-law duty of a supplier or bailor. We fail to find any prejudicial error in the giving of instruction No. 8.

If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217.

We conclude that the defendant's contention is without merit.

The defendant contends that the plaintiff's petition is insufficient to constitute a cause of action.

This court in Behrens v. Gottula, 160 Neb. 103, 69 N. W. 2d 384, held: "Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent under the general allegation of negligence to offer evidence of any fact which contributed to the injury." See, also, Union P. Ry. Co. v. Vincent, 58 Neb. 171, 78 N. W. 457.

We conclude that the defendant's contention is without merit.

The defendant contends that the trial court denied him his right to have the jury instructed upon his theory of the case, which he contends was supported by evidence, when the court refused the defendant's tendered instructions Nos. 4, 8, and 9.

We have examined these instructions and find requested instruction No. 4 to be applicable to the instant case if the defendant has no statutory duty under section 48-425, R. R. S. 1943.

Tendered instructions Nos. 8 and 9, refused by the trial court, are alleged to be correct statements of the law based upon the decisions in Ring v. Duey, 162 Neb. 423, 76 N. W. 2d 433, and Wright v. Salvation Army, 125 Neb. 216, 249 N. W. 549. The defendant asserts that there was evidence that the plank which fell with the plaintiff was exposed to his full view, that is, the alleged defects, consisting as they do only in the placement of the plank and the absence of nails, could be seen.

The first above-cited case has no applicability to the instant case. It involves the proposition that when a person, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than

slight in degree, as a matter of law, and precludes recovery.

The other case relied upon, Wright v. Salvation Army, *supra,* held: "One who walks into an open elevator shaft, on premises with which he is familiar, without looking to see whether the elevator had been moved, is guilty of gross contributory negligence and cannot recover for injuries thereby sustained."

In this connection, from the evidence there was nothing to indicate to the plaintiff that an inspection of each plank should be made by him. The defect which caused the accident was not an open and patent danger. In Johnson v. Weborg, *supra,* this court said: "* * * we hold that plaintiff had a right to rely upon the safe condition of the scaffold provided for him."

The defendant contends that the verdict and judgment are excessive, not supported by the evidence, contrary thereto, and, in part, based upon instruction No. 15 given by the trial court upon its own motion.

We have examined the evidence relating to the injuries sustained by the plaintiff as a result of his falling from the scaffold. The plaintiff suffered a compressed fracture of a vertebra, compressing it to approximately one-third its normal size, and had a permanent disability of his body as a whole of 10 to 15 percent. He was hospitalized for 17 days and returned to light work in the latter part of October 1954. The plaintiff suffered a heart attack which caused him to abandon his regular type of work, and he took work as a taxicab driver.

The defendant asserts that the trial court, in instruction No. 15, instructed the jury with reference to future loss of earnings as an element of damages, and that this instruction was misleading for the reason that it can be concluded that the verdict included an award for the future loss of earnings, which was contrary to the evidence.

With reference to instruction No. 15, the court told the jury: "* * * if the evidence shows with reasonable

certainty the extent of any depletion in his earning power for the future you will consider that too and allow for the same, * * *. No evidence has been offered that the heart attack suffered by plaintiff was proximately caused by or resulted from plaintiff's fall from the scaffold, and, therefore, plaintiff's heart condition and any disability resulting from it may not be considered by you in determining the measure of damages in this case."

In Arnold v. Lance, 166 Neb. 834, 90 N. W. 2d 814, this court held: "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, mistake, or some means not apparent in the record, or that it is clear that the jury disregarded the evidence or controlling rules of law."

We conclude that there was no prejudicial error in instruction No. 15 given by the trial court, and see no reason to set aside the verdict as being excessive.

From the evidence heretofore set out, we conclude that a jury question was presented as to whether or not the defendant was negligent as contended for by the plaintiff.

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

AFFIRMED.

CARTER, YEAGER, and BOSLAUGH, JJ., dissenting.

The Parsons Construction Company contracted to replace the cornice and supporting firewall on the north and west sides of the Patterson Building in Omaha. Parsons contracted with the defendant Schaap, doing business as the Speedway Scaffold Company, to furnish and erect a steel scaffold from which this work could be done. The scaffold was erected on or before August 23, 1954, and turned over to Parsons for use. On September 14, 1954, the plaintiff fell from the scaffold due to the upending of a plank upon which he was standing while at work. The question to be determined on this appeal

is whether or not the evidence is sufficient to support a judgment based on a finding that Speedway furnished and negligently installed the plank which upended and caused the accident.

The evidence is undisputed that Speedway properly constructed the steel or iron portions of the scaffold. The main platform of the scaffold was planked with five planks 10 and 12 inches in width. Between the main platform and the building brackets were attached having a width of 21½ inches on which one additional 10 or 12 inch plank was laid. All planks overlapped on the ends and were spiked together, although some issue was raised on this which we will hereafter discuss.

The evidence of the witness Connolly, who erected the scaffold for Speedway, is that he personally spiked every plank. The testimony of the witness Sorenson, the general superintendent for Parsons, is that he found about 5 percent of the planks not spiked and that he caused these to be spiked before employees of Parsons were permitted to use the scaffold. As an additional precaution he spiked some of the planks from the under side and added some cleats to insure safety in the use of the scaffold. Sorenson testified that the scaffold was erected in an excellent manner, although he took further steps to insure safety in its use.

The evidence further shows that Parsons caused long strips of ¾ inch plywood to be leaned against the wall of the building which were toe-nailed to the inside plank of the main platform put in by Speedway to prevent debris falling through to the sidewalk below. Parsons also set up plywood, four feet in height, around the outside of the scaffold platform to prevent workmen from falling from the scaffold, in addition to the guard posts and chains erected by Speedway. The platform and plywood were then covered with canvas. After this was done the employees of Parsons used the scaffold from August 23, 1954, to September 14, 1954, without mishap in rebuilding the cornice and firewall on the building.

During this period Speedway did not inspect nor was it required to inspect the scaffold.

On the morning of September 14, 1954, the employees of Parsons removed the canvas, the plywood guard around the platform, and the plywood over the space next to the building. In the afternoon the plaintiff was engaged in washing the lime and mortar stains off the newly constructed firewall. While standing on the plank nearest the building in the performance of this work, the plank upended and he fell through the space nearest the building to the sidewalk below and was injured. It is not disputed that the plank which upended had no nail holes in it and had not, therefore, been spiked. The question at issue, reduced to its simplest form, is whether there is any evidence that the plank was one furnished and negligently installed by Speedway sufficient to take that issue to the jury.

The plaintiff testified he was standing on the plank closest to the building and that he fell through the space nearest the building. After his fall he observed the space through which he fell and stated that it was the space next to the building. The witness Cato stated that the brackets were completely covered with planks which means that planks had been added after Speedway had turned the scaffold over to Parsons. The witness Gosch testified that it was the inside board of the main platform which upended. His statement is clearly explainable by his evidence that there were no brackets on the scaffold, a statement which is in conflict with the evidence of every other witness having any knowledge of the facts. His evidence is in direct conflict with that of plaintiff, Cato, Sorenson, and Connolly as to where the upended plank came from. His conclusion rested on a completely false premise, a situation which produced a false conclusion.

The witness Connolly states that he made a record of all materials used in the erection of the scaffold which he supervised. He dismantled the scaffold short-

ly after the accident and he testified that every plank he installed was in place and properly spiked. No witness testified that any plank installed by Speedway was missing from its proper place after the accident.

The witness Sorenson who was Parsons' general superintendent testified that he inspected the scaffold immediately after the accident. He found no plank installed by Speedway out of its proper place. He testified that Speedway covered the main platform its full width with five planks which were 10 and 12 inches in width and placed one plank on the brackets, all of which were properly in place after the accident. He testified also that he examined the plank which had upended, that it contained no nail holes, and that it was covered with paint and plaster lime. He recognized the plank which had upended as a used one that he had taken from Parsons' material yard for use in anchoring the Parsons' derrick on the roof of the Patterson Building. He was positive that the plank was not one installed by Speedway. Sorenson testified that Speedway placed but one plank on the brackets. At the time he supervised the installation of the plywood over the space next to the building, the number of planks on the brackets varied from one to two in through there. This clearly shows that some planks had been added after the scaffold had been turned over to Parsons.

We submit that there is not a scintilla of evidence that the plank which upended belonged to or was negligently installed by Speedway. We point out that after the scaffold was erected it was turned over to Parsons. Speedway is not shown to have been under any obligation to inspect or maintain the scaffold after it passed under the control of Parsons. Parsons inspected and took additional safety precautions before its employees were permitted to use it. For more than 3 weeks Parsons' employees had been using the scaffold in the performance of their work. Parsons not only had added plywood and canvas to the scaffold as before

stated, but it had dismantled its contributions to the safety of the scaffold. The scaffold had been inspected, changed with additions, and exclusively controlled by Parsons for more than 3 weeks before the accident. The maintenance of the scaffold was assumed by Parsons and in the absence of proof that the plank which upended was furnished and negligently installed by Speedway, negligence by Speedway cannot be presumed. In our opinion, the plaintiff has failed to sustain his allegations of negligence by Speedway, and that the verdict and judgment have no support in the evidence.

A jury will not be permitted to return a verdict when there is no evidence sufficient to support it. It has long been the rule in this state that when the verdict is clearly wrong because of a want of support in the evidence, the verdict and judgment thereon cannot stand. See Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410, and cases therein cited. It seems clear to us that the motion of Speedway for a directed verdict made at the close of all the evidence should have been sustained. We think the judgment of the district court should be reversed.

ARTHUR H. LANGE, APPELLANT, V. KANSAS HIDE & WOOL COMPANY ET AL., APPELLEES.

97 N. W. 2d 246

Filed June 5, 1959. No. 34515.

1. **Appeal and Error.** A question not presented and ruled on by the trial court will not be considered on appeal. Neither does a motion, which was never presented and ruled on below, present anything for review.
2. **Trial: Judgments.** The court examines the evidence on motion for summary judgment, not to decide any issue of fact, but to discover if a real issue of fact exists.
3. **Appeal and Error.** In the absence of a bill of exceptions, no

question will be considered, a determination of which requires an examination of the evidence produced in the district court.

4. ———. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.
5. ———. If there is no bill of exceptions, it is presumed in this court that an issue of fact raised by pleading was sustained by evidence and that it was correctly decided by the district court.
6. ———. 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.
7. ———. 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, and the same rule applies to requests for admissions and answers thereto, if any.
8. **Trial: Judgments.** A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective.
9. ———: ———. The summary judgment is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged.

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

Hotz & Hotz and *Samuel J. Hunter*, for appellant.

White, Lipp & Simon, for appellees.

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

CHAPPELL, J.

Plaintiff, Arthur H. Lange, filed this action July 7, 1955, against defendants, Kansas Hide & Wool Company, a corporation, and Jack Goldstein, its alleged general manager, seeking to recover $1,862.30 pursuant to an alleged written contract entered into September 27, 1950, by plaintiff and Jack Goldstein, whereby plaintiff agreed to sell and defendant corporation agreed to

buy one carload of No. 1 cast iron for $35 per net ton, to be shipped f.o.b. Ord, Nebraska, by straight bill of lading, with time of delivery immediately to John Deere Planter Works, Moline, Illinois, car number to be sent as soon as the car was spotted and loaded.

For brevity, defendant Kansas Hide & Wool Company will be called defendant; Jack Goldstein will be called Goldstein; when speaking of both, they will be called defendants; and John Deere Planter Works will be called Planters.

Plaintiff's petition alleged that he shipped Reading Car No. 21697 to Planters in pursuance of said contract, which car timely left Ansley, Nebraska, consigned to Planters; that it was delivered to Planters, who on November 21, 1950, paid defendant or Goldstein in its behalf therefor; and that said defendants and each of them, although liable to plaintiff for the contract price of the car and interest thereon from November 21, 1950, in the total sum of $1,862.30, have failed and neglected to pay same as demanded by plaintiff. A copy of said contract was attached to and made a part of plaintiff's petition.

Thereafter, defendants' motion to make plaintiff's petition more definite and certain was overruled, and defendants answered by filing a general denial. Thereafter, without objection, defendants were permitted to file an amended answer, which, after denying generally, admitted that on September 27, 1950, defendant ordered one carload of No. 1 cast iron as alleged. Defendants alleged, however, that notwithstanding plaintiff's agreement to ship immediately, he failed to do so; that after numerous demands for performance, plaintiff notified defendant on or about October 16, 1950, that shipment of said order would be made by Chicago, Burlington & Quincy Railroad Company in car No. SLSF 61254; and that on October 16, 1950, plaintiff drew a sight draft upon defendant for $1,000, which was honored by said defendants in reliance upon such shipment of

car No. SLSF 61254. Defendants then alleged that on October 26, 1950, defendant requested bill of lading as evidence of weights contained in said car so as to permit billing, whereupon on October 28, 1950, in reply to such request, plaintiff notified defendant that he had diverted car No. SLSF 61254 to others, but plaintiff forwarded therewith a bill of lading on another car which plaintiff advised defendants had already been unloaded at Planters. However, defendants alleged that Planters refused to recognize any interest or right of defendant in and to the said unloaded shipment, and has never paid defendants or either of them any sum whatever for or on account of any shipment made by plaintiff pursuant to the September 27, 1950, contract; and that defendant immediately demanded payment from plaintiff of said funds drawn as aforesaid by plaintiff under the order of September 27, 1950, together with other amounts due on account from plaintiff to defendant, aggregating $1,646.03. A copy of such account and demand was attached to and made a part of defendants' amended answer. Defendants then alleged that on November 16, 1950, after repeated demands for such payment had been made, plaintiff delivered to defendant his check for $1,646.03, but such check was dishonored for insufficient funds, whereupon defendants were required to employ counsel who ultimately collected said claim from plaintiff in February 1951.

On November 26, 1956, defendants filed a five-paragraph request for admissions with four exhibits attached thereto, and a receipt for service of a copy thereof was acknowledged by plaintiff's counsel on the same date. However, said request for admissions was never answered in any manner by plaintiff.

On February 19, 1957, defendants filed a motion for summary judgment, supported by filed affidavits of defendant Goldstein and Ray R. Simon, one of defendants' attorneys, with documents attached thereto, and the admissions of plaintiff and the pleadings filed by

the parties, together with an analysis thereof included in said motion. The motion was thereupon noticed for hearing on March 1, 1957; and a copy of said motion, with affidavits and documents attached, was served upon plaintiff's counsel, who on February 19, 1957, acknowledged receipt thereof.

Thereafter, on February 21, 1957, plaintiff filed a motion to strike certain portions of defendants' amended answer which had been on file since October 31, 1956, and said motion was noticed for hearing on March 1, 1957. Receipt of a copy of said notice and motion was acknowledged by defendants' counsel on February 21, 1957. In that connection, plaintiff's notice also said in part: "You are further notified that, if agreeable to the Court, the plaintiff will consent to your Motion for Summary Judgment being first heard, followed by a hearing on the plaintiff's Motion to Strike."

On March 1, 1957, a hearing was had on defendants' motion for summary judgment, and, arguments of counsel having been presented thereon, said motion was submitted to the court and taken under advisement.

Thereafter, on March 7, 1957, or 6 days after defendants' motion for summary judgment had been argued and submitted, plaintiff filed a motion for leave to amend his petition and file a reply instanter. Such motion contained an extensive recital of factual allegations and argument with documents attached, and was positively verified by plaintiff. In that connection, paragraphs Nos. 15 and 17 of the motion said: "That accompanying this duly verified motion for leave to amend and file verified reply, the plaintiff prays the court to consider, in passing upon the motion for summary judgment, the contents of this motion and the contents of the reply when ordered filed, together with the motion to strike from defendant's answer. * * * Plaintiff, consequently moves the court to consider all of the foregoing verified motion in defense of the motion for summary judgment and the defendants 'Memorandum'

submitted to the court on March 6, 1957 in support of their summary judgment proceedings." Endorsed on the motion was: "Copy hereof duly mailed to attorneys for defendants on 3/7/57, Copy likewise mailed Court."

On March 21, 1957, the trial court rendered judgment which recited that motion for summary judgment having been theretofore submitted upon arguments of counsel, and the court having considered the filed pleadings and affidavits, and being fully advised, finds that no genuine issue exists as to any material fact, and that defendants were entitled to judgment as a matter of law. Defendants' motion for summary judgment was sustained, and judgment was rendered in favor of defendants and each of them, with costs taxed to plaintiff.

On April 1, 1957, plaintiff filed a motion for new trial, the title of which included requests for an order permitting amendment of his petition and filing of a reply, and an order sustaining plaintiff's motion to strike parts of defendants' answer. Plaintiff also filed an affidavit of plaintiff which purportedly supported his motion. In that connection, there is no contention that the facts recited therein were newly discovered evidence, and they were clearly available to plaintiff at all times both before and at the time of hearing on defendants' motion for summary judgment and the rendition of judgment thereon.

Hearing on plaintiff's motion for new trial, after same had been duly noticed, was had on July 11, 1958, and same was argued and submitted. At such hearing, the order recites that plaintiff offered in evidence a letter dated January 25, 1955, from Planters to plaintiff's attorney, and plaintiff's affidavit aforesaid to which defendants' objection was sustained. Thereupon, plaintiff's motion for new trial was overruled, and plaintiff's request filed March 7, 1957, to amend his petition and file reply, which motion had never theretofore been

presented for ruling thereon, was denied because it was made 6 days after summary judgment had been argued and submitted without objection, rather than as required by sections 25-1332 and 25-1335, R. R. S. 1943.

Thereafter, plaintiff appealed, assigning in substance that the trial court erred as follows: (1) In rendering summary judgment for defendants; (2) in overruling plaintiff's motion for new trial and denying him the right to amend his petition and file a reply; and (3) in failing to rule on plaintiff's motion to strike parts of defendants' answer. We do not sustain the assignments.

It should be first pointed out that there is no bill of exceptions before this court which contains anything except the two documents purportedly offered by plaintiff at the hearing on his motion for new trial. In such purported bill of exceptions, the court reporter certified that on August 21, 1958, in the presence of plaintiff's attorney, but with no one appearing for defendants, and after two documents had been marked by the reporter as exhibits Nos. 1 and 2, the trial court dictated the following: "During the Argument on a Motion for New Trial made July 11, 1958, the Plaintiff offered in evidence, without the reporter being present, a letter from Deere & Company (Planters), dated January 25, 1955, which letter is marked Exhibit 1; and the affidavit of Arthur H. Lange, filed April 1, 1957, which * * * is marked Exhibit 2; to both of which exhibits the Defendants objected in detail, and such objection was sustained."

It will be noted that such proceedings took place retrospectively in the absence of and without notice to defendants' counsel more than 40 days after plaintiff's motion for new trial had been argued, submitted, and overruled, and that only such two exhibits and no other evidence appears in the bill of exceptions, which was settled by the court subject to some nine written meritorious objections thereto by defendants.

In that connection, plaintiff argued in his brief here that exhibits Nos. 1 and 2 aforesaid, so offered at the hearing on his motion for new trial, are before this court for consideration despite the fact that objections thereto were properly sustained at the hearing on motion for new trial. Also, such ruling is not assigned as error in plaintiff's brief, and their exclusion was clearly not a plain error unassigned. Therefore, we will not give such exhibits further consideration. See Plumb v. Burnham, 151 Neb. 129, 36 N. W. 2d 612, which supports that conclusion. The net effect then is that we have no bill of exceptions in this case which has any factual bearing upon the validity of the summary judgment.

With regard to plaintiff's motion filed February 21, 1957, to strike parts of defendants' amended answer, it will be remembered that in the notice of hearing thereon, plaintiff said: "You are further notified that, if agreeable to the Court, the plaintiff will consent to your Motion for Summary Judgment being first heard, followed by a hearing on the plaintiff's Motion to Strike." In that situation, such motion, although noticed for hearing on March 1, 1957, is not shown by the record to have ever been presented to the trial court for ruling thereon. Also, admittedly no ruling was ever made thereon by the trial court either before or after hearing on defendants' motion for summary judgment heard March 1, 1957, and rendition of such judgment on March 21, 1957. Therefore, plaintiff's assignment that the trial court erred in failing to rule on said motion to strike will not be considered on this appeal.

In Underwriters Acceptance Corp. v. Dunkin, 152 Neb. 550, 41 N. W. 2d 855, we reaffirmed that: "A question not presented and ruled on by the trial court will not be considered on appeal. Neither does a motion, which was never presented and ruled on below, present anything for review."

Further, in view of the language of the notice heretofore quoted, it appears that if defendants' motion for

summary judgment was sustained, the motion to strike would not be reached for ruling, and that is exactly what happened, as requested by plaintiff. Under the circumstances presented in this record, it appears that in any event plaintiff waived any ruling on his motion to strike.

Plaintiff assigns that the trial court erred in failing to sustain his motion filed March 7, 1957, some 6 days after defendants' motion for summary judgment had been voluntarily argued and submitted, for leave to amend his petition and file a reply instanter, which motion was in fact a counter affidavit positively verified. It read in part: "That accompanying this duly verified motion for leave to amend and file verified reply, the plaintiff prays the court to consider, in passing upon the motion for summary judgment, the contents of this motion and the contents of the reply when ordered filed, together with the motion to strike from defendants' answer. * * * Plaintiff, consequently moves the court to consider all of the foregoing verified motion in defense of the motion for summary judgment and the defendants 'Memorandum' submitted to the court on March 6, 1957 in support of their summary judgment proceedings." The assignment has no merit.

In that connection, plaintiff argues that such motion containing factual allegations was among the pleadings entitled to consideration in rendering summary judgment. While the trial court may have so considered such counter affidavit within the sphere of pleadings for that purpose, and probably did as requested by plaintiff, it is not a part of any bill of exceptions and, as hereinafter observed, it is entitled to no consideration here. An affidavit masquerading as a motion should be and is treated as an affidavit. Plaintiff requested in his motion that the court consider the facts recited therein in its determination of defendants' motion for summary judgment. If the court did so, as plaintiff claims and as he requested, then plaintiff was not preju-

diced by a lack of ruling upon the motion because the amended petition and reply would have contained the identical allegations, and would have been given the same consideration for summary judgment purposes as the motion per se was in fact given. As a matter of fact, also, the record does not disclose that said motion ever was presented to the court for ruling thereon prior to rendition of summary judgment, and plaintiff's brief here admits that prior to rendition of the summary judgment: "No ruling ever made on appellant's motion for leave to amend petition instanter, and file reply; * * *."

We turn then to plaintiff's assignment that the trial court erred in rendering summary judgment for defendants. The assignment has no merit. In that connection, the trial court in rendering summary judgment had before it the filed pleadings, affidavits, and defendants' request for admissions, none of which were answered by plaintiff as required, and we have no bill of exceptions containing said affidavits or request for admissions. Yet, plaintiff argues that the facts adduced before the trial court in the hearing on defendants' motion for summary judgment and thereafter were insufficient to support the summary judgment rendered by the court. In any event, plaintiff also argues that the pleadings filed herein were factually insufficient to support the judgment, but, contrary to plaintiff's contention, defendants did not admit in their amended answer or any other pleading the material facts alleged in plaintiff's petition, and defendants did not plead a waiver or estoppel or matters in avoidance as a defense thereto.

In Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396, this court held: "The court examines the evidence on motion for summary judgment, not to decide any issue of fact, but to discover if a real issue of fact exists.

"In the absence of a bill of exceptions, no question will be considered, a determination of which requires

an examination of the evidence produced in the district court.

"Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions.

"If there is no bill of exceptions, it is presumed in this court that an issue of fact raised by pleading was sustained by evidence and that it was correctly decided by the district court."

Also, in Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N. W. 2d 789, this court reaffirmed that: "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.

"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." The same rule applies to requests for admissions and answers thereto, if any.

Further, in Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543, we held that: "A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective.

"The summary judgment is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged." Such rules are applicable and controlling here.

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

AFFIRMED.

ELDON G. MILLS, APPELLANT, V. AETNA INSURANCE COMPANY, A CORPORATION, APPELLEE.

96 N. W. 2d 721

Filed June 5, 1959. No. 34521.

1. **Trial.** Where, upon a jury trial, defendant at conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff, and he is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom.
2. **Appeal and Error.** This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties.
3. **Insurance.** An insurance policy is a contract, and where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, it will be enforced as it is made.
4. ———. In construing terms used in a policy of insurance, they are generally to be taken in their plain and popular sense.
5. ———. In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof.
6. ———. The parties to a contract of insurance may contract for any lawful coverage. An insurance company has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations not inconsistent with public policy or statute.
7. **Words and Phrases.** The word "occur" is an ordinary one without technical import. It carries to the mind a sense of origin, beginning, not of mere existence or of continuation, and in its generally accepted and most popular sense the word "occur" means to happen.
8. **Insurance.** Provision in an insurance policy or certificate of insurance that no coverage is afforded unless the accidental bodily injury or disease occurs during the period for which the insured is covered, means accidental bodily injury or disease and disability caused thereby, which first occurs and manifests itself during the period mentioned.

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

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellant.

Baylor, Evnen & Baylor and *Warren K. Urbom,* for appellee.

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

CHAPPELL, J.

Plaintiff, Eldon G. Mills, a captain in the United States Air Force, brought this action against defendant, Aetna Insurance Company, seeking to recover lost incentive flight pay allegedly due and unpaid under the provisions of a certificate of insurance issued to plaintiff and underwritten by defendant in a group contract of accident and health insurance issued and delivered by defendant to Air Force Association of which plaintiff was a member.

Plaintiff's petition, filed December 24, 1957, alleged that on and prior to October 10, 1956, defendant issued a group contract of accident and health insurance No. G 96 to Air Force Association of which plaintiff was a member, and that on October 8, 1956, plaintiff applied for, paid the required premium on, and received a certificate of insurance issued by defendant under said group contract. A true copy of said certificate, marked exhibit A, was attached to and made a part of plaintiff's petition, which then alleged that said certificate was in full force and effect and that plaintiff had fully performed all provisions thereof. It was thereafter alleged that during November 1956, plaintiff became disabled by disease, which ever since has prevented him from performing his duties and receiving incentive flight pay as referred to in the certificate, and that he has lost incentive flight pay in the amount of $205 a month which he would otherwise have received. Plaintiff alleged that upon occurrence of said disability, he notified defendant thereof and made proof of claim and loss as required by said policy, but that defendant has failed, neglected, and refused to pay plaintiff any sum whatever or recognize any liability therefor. Plaintiff

then alleged that on March 20, 1957, defendant denied any liability upon the ground that plaintiff's disability had its origin in April 1956; that plaintiff's disease which grounded him did not occur during the period covered by his policy as required therein, which position barred and precluded defendant from asserting any other defense; and that defendant thereupon offered to return to plaintiff the premium paid by him, but upon receipt thereof plaintiff returned same to defendant.

For answer, defendant admitted that it issued a group contract of insurance as alleged; that on October 8, 1956, plaintiff applied for a certificate of insurance; and that thereafter defendant issued same to plaintiff. The answer admitted that on or about March 20, 1957, and at other times, defendant offered to return the premium paid by plaintiff for said contract of insurance and certificate, but said offer was refused. Defendant then denied generally except as thus admitted, and alleged that said contract of insurance and certificate contained the following provision: "'No coverage is afforded unless the accidental bodily injury or disease occurs during the period for which the individual member is covered,'" which provision was continuously in full force and effect on and after October 8, 1956. Defendant then alleged that the disease, if any, by reason of which plaintiff is or at any time since October 8, 1956, has been disabled so as to prevent him from performing duties entitling him to incentive flight pay, originated and manifested itself prior to October 8, 1956, and did not occur during the period for which plaintiff was covered by said contract and policy of insurance if he ever was so covered at any time, and did not occur on or after October 8, 1956. Plaintiff's reply was in the nature of a general denial.

Upon trial to a jury, and at conclusion of plaintiff's evidence, defendant moved for dismissal upon the grounds that the evidence failed to show that plaintiff was entitled to recover under the insurance contract

or certificate; that the evidence showed that the condition which caused plaintiff's disability and prevented him from performing duties entitling him to incentive flight pay had its origin prior to the effective date of the policy or certificate; that the evidence showed that plaintiff's bodily injury or disease, if any occurred, originated and manifested itself to plaintiff prior to the effective date of the policy or certificate; that the evidence failed to show that any accidental bodily injury or disease occurred during the period for which plaintiff was covered by the policy or certificate; and that the evidence failed to show that plaintiff suffered from any bodily injury or disease which was the cause of his being prevented from performing duties entitling him to incentive flight pay. Such motion was overruled, and at conclusion of all the evidence, same was renewed in identical language, but added thereto was the ground that the evidence failed: "* * * to show the whole contract between the parties." Thereupon the court said: "The court, on consideration of the motion of the defendant to dismiss the case at the close of all the evidence, finds that such motion should be sustained for the reasons stated in support of said motion, and the case is therefore dismissed." Judgment of dismissal was accordingly rendered.

Thereafter, plaintiff's motion for new trial was filed, but same was overruled primarily upon the ground that under the pleadings and issues tendered thereby, proof of the group insurance contract or policy was essential to plaintiff's said cause of action, and that failure of proof thereof rendered the evidence insufficient to sustain plaintiff's alleged cause of action on the issues tendered by said petition.

Therefrom, plaintiff appealed to this court, assigning and arguing in substance that: (1) The trial court erred in sustaining defendant's motion to dismiss and overruling plaintiff's motion for new trial on the ground that plaintiff had not established a contract with de-

fendant; and (2) that the trial court erred in any event in refusing to submit the issues to the jury upon the ground that the factual evidence adduced was insufficient to support a verdict and judgment for plaintiff.

We conclude that the second assignment has no merit because, as hereinafter observed, the admitted and undisputed evidence conclusively established that plaintiff's disease and disability therefrom occurred, originated, and manifested itself prior to the effective date of his policy or certificate, and did not occur during the period for which he was covered thereby. In the light of that conclusion, the admissions and allegations in defendant's answer, and its consistent position taken throughout the trial that defendant was not liable because of an admittedly single identical provision aforesaid contained in both the group contract and plaintiff's certificate, we conclude, in disposing of plaintiff's first assignment, assuming for purpose of argument only, that the trial court gave one wrong reason for its conclusion, that the dismissal and overruling of plaintiff's motion for new trial was correct in any event. It is elementary that if a judgment is correct, a wrong reason given therefor is not controlling in any respect. Also, we have held that: "Where a certain theory on any issue is relied upon by the parties at the trial as the proper one, it will be adhered to on appeal whether it is correct or not." Gillan v. Equitable Life Assurance Society, 143 Neb. 647, 10 N. W. 2d 693, 148 A. L. R. 496. See, also, Sorter v. Citizens Fund Mutual Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276. Further, we have held that: "This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties." O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123. Under the circumstances presented here, the first assignment requires no further discussion.

Concededly, plaintiff never sustained any accidental bodily injury and the primary question presented and

argued in the briefs filed herein is whether plaintiff's bodily disease and disability therefrom occurred and manifested itself during the period covered by the policy and certificate involved. We conclude that it did not. We determine that question in the light of the elementary rule that where, upon a jury trial, defendant at conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff, and he is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. Cutrell v. John Hancock Mutual Life Ins. Co., 145 Neb. 550, 17 N. W. 2d 465. Other applicable rules will be hereafter discussed.

At the outset, it should be pointed out that "Application for Protection of Flight Pay Income" admittedly filled out by plaintiff and mailed to defendant, together with a premium check for $24.60 on October 8, 1956, contained plaintiff's name, rank, serial number, service (USAF, ANG, etc.), mailing address, amount of annual flight pay, $2,460, and said: "I certify that I am currently receiving incentive flight pay." Thereafter followed plaintiff's signature and date, October 8, 1956. The annual premium charge was one percent of the represented annual flight pay.

In a couple of weeks, plaintiff was issued and received from defendant a certificate of insurance which on its face designated plaintiff as the "Insured Person" and fixed his "Insured Period 10-8-56 to 10-8-57 * * * Amount of Annual Flight Pay $2460.00 Premium $24.60." The body of said certificate provided, as far as important here, the following: "THIS IS TO CERTIFY that under and subject to the terms and conditions of Group Contract of Accident and Health Insurance No. G 96, issued and delivered to AIR FORCE ASSOCIATION, WASHINGTON, D. C. by AETNA INSURANCE COMPANY * * * the Member whose name appears on this

certificate shall be insured thereunder for the insured period prescribed against loss of Incentive Pay for Hazardous Flight Duty Performed, in accordance with current Service Regulations, but not exceeding an amount based upon the 'Amount of Annual Flight Pay' shown on the Member's certificate of insurance, hereinafter called Incentive Pay, due to accidental bodily injuries or disease, as follows: * * * If such injuries or disease shall disable the Member so as to prevent him from performing duties entitling the Member to receive Incentive Pay, the Company will pay monthly indemnity periodically, equal to the Incentive Pay applicable to his 'Pay Grade' and 'Years of Service' in accordance with current rates of 'Incentive Pay for Hazardous Duty' as set forth in current Service Regulations, in an amount equal to 1/12 of the 'Amount of Annual Flight Pay' shown on the Member's certificate of insurance, for the period of such continuous disability, but for not exceeding twenty-four months. * * * No coverage is afforded unless the accidental bodily injury or disease occurs during the period for which the individual member is covered."

Webster's New International Dictionary (2d Ed.), p. 1684, defines the ordinary and reasonable meaning of "occur" as: "To meet one's eye; to be found or met with; to present itself; to appear; hence, to befall in due course; to happen; * * *." We so defined the term "occur" in State ex rel. Curyea v. Wells, 92 Neb. 337, 138 N. W. 165, 41 L. R. A. N. S. 1088, and so applied it in Smith v. United States Fidelity & Guaranty Co., 142 Neb. 321, 6 N. W. 2d 81. The latter opinion also held: "An insurance policy is a contract, and where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, it will be enforced as it is made.

" 'In construing terms used in a policy of insurance, they are to be taken in their plain and popular sense.' Hamilton v. Mutual Benefit Health & Accident Ass'n, 133 Neb. 464, 275 N. W. 863.

"In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof.

"The parties to a contract of insurance may contract for any lawful coverage. An insurance company has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations not inconsistent with public policy, or statute." See, also, Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874; Mutual Benefit Health & Accident Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780; Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396.

Black's Law Dictionary (3d Ed.), p. 1281, citing authorities, defines "occur" as: "To happen. * * * To arise; begin."

In 67 C. J. S., Occur, p. 84, citing State ex rel. Curyea v. Wells, *supra,* and numerous other authorities, "occur" is defined as: "A word said to be an ordinary one and without technical import. It carries to the mind a sense of origin, beginning, not of mere existence or of continuation; and in its generally accepted and most popular sense the word 'occur' means to happen. It is also defined as meaning to appear; to be found; to be met with; to meet one's eyes; to present itself; to befall; to take place; to begin; to arise."

Creighton v. Metropolitan Life Ins. Co., 181 Misc. 847, 42 N. Y. S. 2d 213, is as much in point with the case at bar as any case cited or which we have been able to find. It was an action to recover disability benefits under a policy of insurance which provided for recovery thereof if plaintiff became disabled " 'as the result of bodily injury or disease occurring after the issuance of said policy.' " The question presented for determination involved an interpretation and application of the word "occurring" as so used in the policy. In that connection, the court, citing numerous authorities, concluded that the word "occur" in its generally

accepted and most popular sense means " 'to happen,' " and carried " 'to the mind a sense of origin, beginning, not of mere existence nor of continuation.' " It follows that: " 'A disease does not occur or originate within the meaning of the policy until it becomes a disease in the general acceptation of that term.' " Recovery in that case was denied because plaintiff's disease and disability did not occur or originate after issuance of the policy. In that respect such opinion distinguished Reiser v. Metropolitan Life Ins. Co., 262 App. Div. 171, 28 N. Y. S. 2d 283, wherein plaintiff's condition was unknown prior to issuance of the policy and the first manifestation of the disease and disability occurred some 10 years after the issuance of the policy.

In From v. General American Life Ins. Co., 132 Neb. 731, 273 N. W. 36, this court, citing authorities, said: "Provision in an insurance policy for payment of disability benefits when insured has become totally and permanently disabled, and which further provides that the original cause of the disability must have occurred or been contracted after the first annual premium has been paid on the policy, covers a disability caused by a disease first manifesting itself after the period mentioned." See, also, Uribe v. Woods Bros. Constr. Co., 124 Neb. 243, 246 N. W. 233.

As stated in 45 C. J. S., Insurance, § 753, p. 781, citing authorities: "The parties may limit the coverage of the policy to certain particular accidents and risks or causes of loss, and may expressly except other risks or causes of loss therefrom." Also, as said in § 776, p. 810, citing authorities: "The words 'bodily infirmity or disease,' as used in a provision exempting insurer from liability for injuries caused thereby, refer only to an ailment or disease of a settled character, or one so considerable or significant that it would be characterized as such in the common speech of men, or some physical disturbance to which insured is subject, and of which the attack which caused his injury is in some

measure a recurrence." Further, as said in § 893, p. 971, citing authorities: "Policy provisions precluding recovery for disease or disability originating before a prescribed time have been held to be valid, and such a condition is of the essence of the contract and its fulfillment is a prerequisite to recovery, as where liability is limited to cases where illness begins after issuance of the policy, or at or after a specified period from the date of the policy."

The case at bar is not one comparable with those cited in 29 Am. Jur., Insurance, § 835, p. 636, and 45 C. J. S., Insurance, § 725, p. 721, wherein the insurer issued a policy without requiring any application, or omitted in an application to make inquiry as to a ground of forfeiture or nonliability provided for in the policy, and thereby waived its right to insist on a breach at time of issuance of the policy.

In the case at bar, plaintiff was required to make an application and certify therein that he was "currently receiving incentive flight pay," which was not a matter of mere opinion or judgment but was a factual representation peculiarly within his own knowledge, and a condition which was the very essence of the contract and the basis upon which defendant relied and was induced to issue the policy and assume the risk. As a matter of fact, as hereinafter observed, plaintiff was not receiving incentive flight pay as certified by him on October 8, 1956, and he never did thereafter receive it or qualify therefor.

In the light of authorities heretofore stated, we have examined the record. As summarized, it discloses the following undisputed relevant and material evidence: Plaintiff was a captain in the United States Air Force. He served in the infantry from December 1940 until the middle of 1942. He then transferred to the air corps and served as a pilot of B17 bombers until January 1946, during which period he flew several combat missions. Thereafter he was a civilian until March

1953, when he entered the United States Air Force. He was ultimately transferred to Lincoln Air Force Base in September 1954, to fly B47 bombers as a pilot. He has lived in Lincoln since that time, and on April 1, 1956, he was an aircraft commander, the officer who actively flys the plane and is in command thereof. Incentive flight pay is the extra money which all air force personnel are paid for actually flying at least 4 hours a month. Based on his rank and service, plaintiff would receive $205 a month incentive flight pay, which could be accumulated over a 3-months' period, if he qualified therefor by meeting such actual flying requirements.

On April 1, 1956, until about 1 p. m., plaintiff had flying status and was theretofore earning incentive flight pay, but he was removed from flying status as of that date until June 27, 1956, for physical disability caused by paroxysmal tachycardia of unknown origin. In that connection, on April 1, 1956, plaintiff had been on leave 2 days, and while playing golf in Fort Dodge, Iowa, plaintiff had a sudden feeling like a severe case of acute indigestion. He had a terrific pressure right in the center of his chest. It was hard to get his breath. There was a great amount of sweating. He had such a rapid heart beat that he actually thought his heart was going to jump out of his body. He grayed out and had a tingling sensation in his arm, but he did not become unconscious. Such attack or seizure lasted very severely for about one-half hour, then eased off, but left him very weak for several hours thereafter.

A family physician in Fort Dodge was called and plaintiff was removed to Lutheran Hospital there. He stayed in such hospital 5 or 6 days while medical tests were made to determine whether or not he had any impairment of heart function or what was the cause of the attack. In such respect, plaintiff knew of no diagnosis that he had an organic defect, but he knew they suspected that he had paroxysmal auricular tachycardia.

The fact is that the original diagnosis in Fort Dodge was paroxysmal tachycardia of unknown origin. After leaving the Lutheran Hospital, plaintiff returned to Lincoln on April 6 or 7, 1956, where he reported to his superiors, and reported his attack or seizure to the medical officer of the Lincoln Air Force Base. That same day he was placed in the base hospital where further medical tests were made as suggested by plaintiff's family physician to determine if possible what caused plaintiff's attack April 1, 1956. There they suspected cardiac or gastro-intestinal disease, and found none, but found that plaintiff had paroxysmal tachycardia, which may generally be caused or precipitated by functional or organic pathology.

In that connection, on April 23, 1956, and again on April 30, 1956, the commanding officer of the hospital at Lincoln Air Force Base examined plaintiff and made a like diagnosis. On the latter date, plaintiff told such officer that: "* * * he was desirous of getting out of the B47 program." Also, an interval history appearing in a medical report of plaintiff's condition, dated June 1, 1956, recited that plaintiff had lost 15 pounds in weight in the past 5 months, and that he had excessive worry after his illness on April 1, 1956. In that situation, plaintiff, having had no other such attacks, was restored to flying status on June 27, 1956, and he performed his duties and earned flight pay until about September 6, 1956, when he had another such attack or seizure which lasted 15 minutes to one-half hour while on a high flying mission.

Plaintiff reported such attack to the medical officer at the Lincoln Air Force Base on September 10, 1956, and appeared on sick call September 14, 1956, so he was again removed from flying status and admitted to the Lincoln Air Force Base Hospital on September 17, 1956, where his condition was again diagnosed as tachycardia, paroxysmal, cause undetermined. Thereafter, on September 19, 1956, plaintiff was transferred to

Sheppard Air Force Base Hospital in Texas for further evaluation. There his medical summary, dated September 27, 1956, was made and returned to Lincoln Air Force Base after an examination of plaintiff. It recited the history of plaintiff's attack or seizure on April 1, 1956; the diagnosis at the Fort Dodge hospital that plaintiff probably had paroxysmal auricular tachycardia; and the like attack or seizure which plaintiff had on September 6, 1956, while on a high flying mission. The diagnosis there after examination was suspected paroxysmal auricular tachycardia, transient, and the report said: "He is to be returned to his base with the same diagnosis he came in with." It will be noted that plaintiff admittedly never had any accidental bodily injury, and that his alleged ground of recovery was that he had a disease and disability caused thereby which could, as we view it, have been none other than paroxysmal auricular tachycardia which occurred and manifested itself prior to the period for which plaintiff was covered by the policy.

In that connection, by order dated October 10, 1956, plaintiff was restored to flying status as of October 8, 1956, the very day upon which he made application for the policy. In that application he certified: "I am currently receiving incentive flight pay," which admittedly was not true, the fact being that he was not then receiving such pay, and that he never flew again after September 6, 1956, or after October 8, 1956. Plaintiff was officially notified that as of November 17, 1956, he was separated from flying status due to physical disqualification, and on December 10, 1956, after an examination, it was recommended that: "* * * subject officer (plaintiff) be permantly (sic) removed from flying status" because of "Diagnosis * * * Tachycardia, paroxysmal, cause unknown," and he was so removed. However, it is conclusive that such recommendation and order was admittedly made and based upon nothing that occurred after October 8, 1956. Plaintiff testified

that after receiving his certificate he had several attacks similar to those in April and September, 1956. However, plaintiff admitted that he had the same kind of attacks before October 8, 1956, and thereafter, as he had on April 1, 1956; that there never was anything different in such attacks from that which he had on April 1, 1956; that there was nothing new in his physical condition in any sense that occurred after October 8, 1956, to account for his grounding on November 17, 1956, and December 10, 1956; that it all occurred before October 8, 1956, and not afterward; and that no new examinations were made of him between October 8, 1956, and December 10, 1956. Plaintiff testified that no examinations were made of him between October 8, 1956, and November 17, 1956, when he was suspended from flying, but that a medical examination was made on December 10, 1956, after an attack in November 1956, which resulted in the same diagnosis previously made, and it was recommended that he should be permanently grounded for disability, based on nothing different than a diagnosis of paroxysmal auricular tachycardia, as it always had been since April 1, 1956. In that connection, the commanding officer of the hospital at the Lincoln Air Force Base testified that he had custody of all plaintiff's medical records, which did not indicate that plaintiff had had any attack between September 12, 1956, and December 10, 1956, although complaints thereof may have been informally made. He testified that on December 10, 1956, plaintiff's condition was again diagnosed as "tachycardia, paroxysmal, cause undetermined," but which could have been caused or precipitated by functional or organic pathology, and that no new or different condition or situation arose after September 27, 1956, which caused plaintiff to be grounded. He also testified that the disabling effects of plaintiff's condition are that such attacks may recur and that plaintiff's repeated attacks are abnormal, disabling, and not compatible with flying safety, which

caused his temporary and permanent groundings, based solely on his history and diagnosis between April 1, 1956, and September 27, 1956, the date of the report made by Sheppard Air Force Base Hospital, and nothing that occurred thereafter.

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.

MESSMORE, J., participating on briefs.

MANUEL SCHANHOLS, APPELLANT, V. SCOTTSBLUFF BEAN AND ELEVATOR COMPANY, A CORPORATION, APPELLEE.
97 N. W. 2d 220

Filed June 5, 1959. No. 34598.

1. **Workmen's Compensation.** A workmen's compensation case is triable de novo in the Supreme Court, and to entitle the plaintiff to a recovery he must sustain the burden of proving by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment.
2. ———. An accident within the meaning of the Workmen's Compensation Act shall be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
3. ———. A compensation award cannot be based on possibilities or probabilities but must be based on sufficient evidence that the plaintiff incurred a disability arising out of and in the course of his employment.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Wright, Simmons & Harris, for appellant.

Wiles, Adcock & Russell, Robert W. Haney, and *Benjamin M. Wall,* for appellee.

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

YEAGER, J.

This is an action wherein Manuel Schanhols, plaintiff and appellant, seeks to recover workmen's compensation on account of an alleged accident and injury sustained by him while in the employ of Scottsbluff Bean and Elevator Company, a corporation, defendant and appellee. The action was originally instituted in the workmen's compensation court. In that court a trial was had which resulted in a finding and adjudication that the plaintiff had failed to sustain the burden of proving that he had suffered an accident as defined by the Nebraska Workmen's Compensation Act. From this adjudication the plaintiff appealed to the district court. A trial was had and the district court likewise found and adjudicated that he had failed to prove that he had sustained an accident as defined by the Workmen's Compensation Act. A motion for new trial was duly filed and overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The sole question presented for determination on the appeal is that of whether or not the plaintiff sustained the burden of proving that, as alleged, he suffered an accident arising out of and in the course of his employment by the defendant, as defined by the Nebraska Workmen's Compensation Act.

The case is triable de novo here, and to entitle the plaintiff to a recovery he must sustain the burden of proving by a preponderance of the evidence that he did suffer an accident arising out of and in the course of his employment. See, Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522; Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Pittenger v. Safeway Stores, Inc., 166 Neb. 858, 91 N. W. 2d 31.

An accident, within the meaning of the Nebraska Workmen's Compensation Act, is defined by statute as follows: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated

by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151, R. R. S. 1943.

Specifically then to entitle the plaintiff to recover, the evidence must disclose preponderantly that the incident, as related to plaintiff and his employment, must have been an unexpected or unforeseen event. The event must have happened suddenly and violently. It could have happened with or without human fault. It must have produced at the time objective symptoms of an injury.

In order to ascertain whether or not the plaintiff suffered an accident within the meaning of the law it becomes necessary to examine the evidence which is descriptive of the occurrence which is the basis of the action.

The descriptive evidence in the record is fragmentary, incomplete, and uncertain; hence accuracy of description cannot be attained. From it however sufficient may be found to make reasonably clear the evidentiary features which are controlling in the determination of whether or not there was an accident.

The record discloses that in August 1957 the plaintiff became an employee of the defendant. The defendant operated an elevator wherein, among other things, it dealt in and processed beans. It had an elevator in Scottsbluff, Nebraska. On January 27, 1958, the plaintiff was warehouse foreman. On that date beans were being removed from storage in the elevator. The beans had been stored in a pit in the elevator structure. The pit is not described as to dimensions or otherwise except that it extended downward below what apparently was the main floor probably 6 to 8 feet. In the bottom of the pit were trap doors. This extension downward was into a room or pit described at one place as about 7 or 8 feet by about 5 feet, and at another as 12 to 15 feet by 6 feet. Apparently the floor

of the bean pit was a short distance above the floor of this other room or pit. This room was entered through an opening from above of about the size of 2 by 2 feet somewhere near the southeast corner of the floor space above the room. It was entered by extending a movable metal ladder to the floor below. A conveyor belt extended under the trap doors of the bean pit and thence south and outward to a point somewhere near the south side of the room. It appears that there was a gradual increase in elevation of the conveyor belt from the point where it left the pit to its outer end. At the outer end of the belt there was a chute which extended and opened into what is denominated a leg. This leg was probably an enclosed tube. It apparently extended both upward and downward from the chute. Somewhere in the room, probably near the southeast corner, was a motor to which was attached a chain. The conveyor was operated by this motor. The motor was controlled by a switch on the upper floor.

The manner of starting removal of beans was by starting the motor and opening a trap door under the pit. This would permit the beans to drop onto the conveyor and be carried thereon to the chute and over the chute into the leg where they would fall downward. Thereafter they were elevated through the leg to bins above from which they were loaded out.

Ordinarily when beans were being removed as these were the plaintiff and another employee attended the operation. One had his place on the floor above and the other below in the room which has been described. On one previous occasion the plaintiff alone was in attendance. One of the duties of the man below was to shovel back onto the conveyor beans which might leak out or fall therefrom. Also at times dirt in the beans, instead of going over the chute into the leg, would accumulate at the chute and thus prevent the beans from dropping into the leg. This happening was

of frequent occurrence and was nothing unusual or unexpected. When this happened it became necessary for a man in the room, with a broom provided for that purpose, to sweep out the dirt so that the beans could move over the chute into the leg. If only one man was present and if he was on the higher level it became his duty to descend by the metal ladder into the room, secure the broom, and sweep away the dirt.

According to the substance of the testimony given by plaintiff at the trial in the compensation court, on the date in question, dirt piled up and the plaintiff, as he had done on several other occasions and in the same manner, descended the ladder in a hurry to sweep it away. After he got down the ladder he went over the motor, picked up the broom, and turned to shovel in beans. When he did this an "awful pain" hit him in the back. He then crawled up out of the hole and shut off the motor. Plaintiff said he had passed over the motor and his feet were on the floor when the pain struck him. Later at the same trial he said that he fell after he had the pain and he was pretty sure this was after he left the ladder and was on the floor after going over the motor. He had proceeded to perform the same operation in the same manner dozens of times.

On the trial in the district court the plaintiff testified that he descended the ladder about as he stated before the compensation court. He went down the ladder, reached for and got the broom, turned, felt the pain, and fell on the chute. He said that the operation in the room was the same whether one or two men were working, the only difference being that if two were working there was not the need to be in as much of a hurry. He described the course of events after leaving the ladder as follows: "Well, I just jumped over all of the works in one operation, jumped over the motor and grabbed the broom and turned and started shoveling them in." He said that he was across the motor before he felt any pain. He said that he had done

this same thing "Quite a few times, maybe six, seven, eight, I don't know, maybe more."

In a narrative statement signed by the plaintiff dated February 17, 1958, the following appears: "I went down the ladder and got off the ladder and was standing on the cement floor. I did not feel anything wrong as I went down the ladder and after I had both feet on the floor I suddenly felt a pain just like somebody hit me with a sledge-hammer. This pain was low in the small of my back. I was not carrying anything down the ladder, and was just going to reach for the broom when I felt the pain. The broom was setting in the corner by the chute just an arms reach from where I was. I reached over for the broom with my left hand and then I felt this pain for the first time, that is when it hit me." Further in this statement he said he did not stumble, the floor was not slippery, and he did not lose his balance before the pain hit him.

Applying the rules for the determination of whether or not there has been an accident to the evidence, it appears proper to propound and respond to certain questions. The first of these is, was there proof of an unexpected or unforeseen event which culminated in injury to the plaintiff? The answer must be a negative one. As pointed out, it is disclosed that this stoppage of passage of beans over the chute was not unexpected or unforeseen. It happened, as he well knew, on numerous occasions before, and one of the duties of plaintiff was to watch for and in the event of such occasions to take corrective measures by the means and in the manner employed in this instance.

Is there any evidence of suddenness or violence? The evidence discloses that urgency under the circumstances existed but no more than was true on other such occasions. The only evidence of violence was the speed at which plaintiff descended the ladder and passed over the motor. There is no evidence of departure from usual custom in this connection. He was down the

ladder, over the motor, and had turned and reached for or picked up the broom before he felt any pain. If the thing which caused plaintiff's injury flowed from what happened there it happened with suddenness. There is however an absence of proof as to the cause. This leaves the record without legal proof of violence. Any other conclusion would have to rest on possibilities, probabilities, and conjecture. An award in a workmen's compensation case may not so rest. "A compensation award cannot be based on possibilities or probabilities but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment." Anderson v. Cowger, *supra.* See, also, Meester v. Schultz, 151 Neb. 614, 38 N. W. 2d 739; Beam v. Goodyear Tire & Rubber Co., 152 Neb. 663, 42 N. W. 2d 293; Ruderman v. Foreman Bros., 157 Neb. 605, 60 N. W. 2d 658. It must be said therefore that within the meaning of the Workmen's Compensation Act the record fails to contain proof of an accident.

The plaintiff has called attention to the following cases which he contends are comparable in point of fact in which this court held that there was proof of an accident: Tucker v. Paxton & Gallagher Co., *supra;* Anderson v. Cowger, *supra;* Pittenger v. Safeway Stores, Inc., *supra.*

These cases are not comparable. In each there was evidence to meet the requirements of the statutory definition of an accident. In Tucker v. Paxton & Gallagher Co., *supra,* the employee was handling a paper sack containing coffee cans. It suddenly "broke or tore" and he grabbed the bag to keep it from falling apart in consequence of which he suffered pain and was injured.

In Anderson v. Cowger, *supra,* the plaintiff was blinded by snow which was being carried in the air by a wind of a velocity of 40 to 50 miles an hour. He hit a snowbank and was thereby jarred. He smelled gas

fumes, and because he could not open a door of the car he crawled out of a door window. He waded 30 to 50 yards and got into the cab of a snowplow.

In Pittenger v. Safeway Stores, Inc., *supra,* the plaintiff, in the ordinary course of handling merchandise, was placing a carton containing 24 No. 2½ cans on a stack of cartons and in the act of getting ready to push or pushing up the carton his right hand slipped and he lost control of the carton. He attempted to recover control of the falling carton.

In each of these instances the evidence disclosed, as pointed out, there was an unexpected and unforeseen event which happened suddenly and violently. The same may not be said of the evidence in the case here.

For the reasons set out herein the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF OZA P. GRENIER, DECEASED.
ESTHER BRAY, APPELLEE, V. MARY E. SEDLAK, APPELLANT.
97 N. W. 2d 225

Filed June 12, 1959. No. 34569.

1. **Wills.** A legacy is specific, when it is the intention of the testator that the legatee should have the very thing bequeathed, and not merely a corresponding amount in value.
2. ———. The distinction between specific and general legacies is that the former single out the particular thing which the testator intends the donee to have, no regard being had to its value, while the latter are payable out of the general assets, the chief element of the gift being its value.
3. ———. Debts and expenses of administration, as a general rule, are payable primarily out of the personal estate of the testator, and real estate will not be charged with their payment unless the intention to do so is expressly declared or clearly inferable from the dispositions of the will. The chief criterion is the intention of the testator, which may appear either ex-

pressly or by implication from the language and dispositions of the will.

4. ———. Generally speaking, and in the absence of an expression of a contrary intent, where the assets of an estate are insufficient to pay all obligations and legacies, there will be an abatement in the following order: (1) Residuary estate, (2) other general legacies pro rata, (3) specific bequests or devises.

5. ———. By statute, section 30-230, R. R. S. 1943, if a testator makes provision in his will for the payment of his debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, or so far as the same may be sufficient.

6. ———. A well-recognized rule in the interpretation of wills is that the court will give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with established rules of law.

7. ———. Section 30-405, R. R. S. 1943, is applicable where a testator has not provided otherwise in his will.

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

Ellenberger & Pipher, for appellant.

Mark J. Ryan and *John A. Young,* for appellee.

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

SIMMONS, C. J.

This case involves the construction of a will. The specific question presented is whether the debts and costs of administration are to paid out of personal property or out of residuary real estate.

The county court held that they were payable out of the residuary estate. On appeal the district court made the same finding and judgment.

We affirm the judgment of the trial court.

The will of the testator provided: "1. I do give and bequeath to my daughter Esther Bray all of my personal property, of whatsoever kind or character and wherever the same may be found or located at the time of my death.

"2. I do further give, devise and bequeath to my said daughter Esther Bray the life use, estate and benefit in and to the Southeast Quarter of Section 29, Township 24, North, Range 9, Thurston County, Nebraska, and the Northeast Quarter of Section 32, Township 24, North, Range 9, East of the 6th P.M. in Burt County, Nebraska.

"3. I do give, devise and bequeath to my daughter Mary Sedlak the life use, estate and benefit in and to the following described real (sic), to-wit:

"The South Half of the Northwest Quarter of Section 19; The South east Quarter of the Southwest Quarter of Section 29 and the Southwest Quarter of the Southwest Quarter of Section 28, all in Township 24, North, Range 9, East of the 6th P.M. in Thurston, County, Nebraska.

"4. I do give, devise and bequeath to the children of my said daughter Esther Bray all the real estate hereinbefore described in paragraphs 2 and 3 above, subject only to the life use and benefit of my daughters Esther and Mary as stated above.

"5. All the rest, residue and remainder of my estate I do give, devise and bequeath in equal shares to my daughters Esther Bray and Mary Sedlak, provided however that if my said daughter Mary Sedlak should not survive me, then any and all provisions contained in this will for her benefit and all devises and bequests made herein for her shall be construed and shall be effective as devises and bequests for my daughter Esther Bray so that the life estate provided for my daughter Mary Sedlak in paragraph 3 herein would become a life estate for my daughter Esther and the entire residue of my estate as described in this paragraph (5) shall then, if my said daughter Mary should not survive me, pass to my said daughter Esther Bray."

There is no fact dispute here.

The testator was a resident of Lyons, Burt County. Esther Bray, named in the will, was his younger daugh-

ter, married and a resident of Lyons. She is the appellee here and will herein be referred to as Esther. Esther is the mother of three minor children.

Mary Sedlak, named in the will, is the elder daughter of testator. She is married and a resident of Oregon. She will be referred to herein as Mary. She has no children. She is the appellant here.

The testator at the time of his death was the owner of a considerable amount of personal property, the value of which is more than sufficient to pay all debts and costs of administration.

The testator at the time of his death was also the owner of the real estate specifically described in the will and undivided interests in real estate which he inherited from a brother and from testator's wife, both of whom predeceased testator a few months. The residue mentioned in paragraph 5 of the will is real estate. It consisted of that interest in real estate which he received by inheritance from the estates of his brother and his wife. The "residue real estate" is more than sufficient in value to pay all debts and costs of administration.

The will makes no provision for the payment of debts or costs of administration. Section 30-232, R. R. S. 1943, provides: "The estate, real or personal, given by will to any devisees or legatees, shall be held liable to the payment of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies, except that specific devises and legacies, and the persons to whom they shall be made, may be exempted, if it shall appear to the court necessary in order to carry into effect the intention of the testator and if there shall be other sufficient estate."

It is the position of Esther that the bequest of "all of my personal property" is a specific bequest and that the property so bequeathed is exempt from the payment of debts and costs of administration, that being the

intention of the testator and there being other sufficient estate.

Section 30-405, R. R. S. 1943, provides: "The personal estate of the deceased which shall come into the hands of the executor or administrator, shall be first chargeable with the payment of the debts and expenses; and if the goods, chattels, rights and credits in the hands of the executor or administrator shall not be sufficient to pay the debts of the deceased, and the expenses of administration, the whole of his real estate, except as otherwise expressly provided by law, or so much thereof as may be necessary, may be sold for that purpose by the executor or administrator, after obtaining license therefor in the manner provided by law."

It is the position of Mary that section 30-405, R. R. S. 1943, controls; that the bequest to Esther in paragraph 1 is a general bequest; and that the debts and expenses of administration must be paid out of the personal estate.

This then presents the question: Is the bequest in paragraph 1 of the will a specific or general bequest?

In In re Estate of Lewis, 148 Neb. 592, 28 N. W. 2d 427, we held: " 'A specific legacy is a bequest of a specific thing or fund that can be separated out of all the rest of the testator's estate of the same kind, so as to individualize it, and enable it to be delivered to the legatee as the particular thing or fund bequeathed.' * * * A legacy is specific, when it is the intention of the testator that the legatee should have the very thing bequeathed, and not merely a corresponding amount in value. * * * 'A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from other things of like kind.' "

The second of the three rules just quoted points at the reason for the rules. It is that the testator intends

that the legatee should have the "very thing bequeathed" and not a corresponding amount in value.

Here we think it clear that the testator intended that the very things bequeathed—all of his personal property—should become the property of his daughter, Esther. He was not concerned with value but the thing itself.

The rule now being considered could well have been taken from 96 C. J. S., Wills, § 1125, p. 878. See, also, 57 Am. Jur., Wills, § 1410, p. 943.

The basis of the distinction between specific and general legacies is stated in a footnote in 96 C. J. S., Wills, § 1125, p. 879, as follows: "The distinction between specific and general legacies is that the former single out the particular thing which the testator intends the donee to have, no regard being had to its value, while the latter are payable out of the general assets, the chief element of the gift being its value." As stated in the text, a specific legacy "may be satisfied only by a delivery to the legatee of the particular thing, or things, bequeathed."

The rule could well have been taken also from 3 Woerner (3d Ed.), American Law of Administration, § 444, p. 1510, where the text states: "The distinction between *specific* and *general* legacies is, that the former single out the particular or specific thing which the testator intends the donee to have, no regard being had to its value; while the latter are payable out of the general assets, the chief element of the gift being its quantity or value."

In 4 Pomeroy's Equity Jurisprudence (5th Ed.), § 1132, p. 361, the distinction is stated in this wise: "They (general legacies) are, therefore, rather gifts of *amounts* than of things or pieces of property specially described and identified." See, also, Baker v. Baker, 319 Ill. 320, 150 N. E. 284, 42 A. L. R. 1514.

The Supreme Court of Ohio has recently stated the rule that: "A specific legacy differs from a general one

in that it is not intended by the testator to be paid out of his estate generally but is to be paid solely by delivering to the beneficiary the specific thing given by the will, as distinguished from a designated value." In re Estate of Mellott, 162 Ohio St. 113, 121 N. E. 2d 7.

We reach the conclusion under the above rules and the intent of the testator as gleaned from the four corners of the will as hereinafter set forth that the only way the bequest of paragraph 1 may be satisfied is by delivery to Esther of the specific thing, to wit, all of the personal property, and that the bequest is specific and not general.

It is recognized that there are decisions which hold that a bequest of all of the personal property is a general bequest. As we see it, such a holding is to do violence to the reason of the rule. It is further recognized that some courts, in doubtful situations, lean toward a holding that a bequest is general and not specific, the reason being that it will prevent ademption and thus more nearly carry out the intent of the testator. We are not in accord with the holdings that are based on a judicial bias against specific legacies. In re Estate of Hunter, 132 Neb. 454, 272 N. W. 318.

The paragraph of the will being construed refers to "all of *my* personal property" etc. (Emphasis supplied.)

We cite, then, Smith v. Wheeler, 326 Mass. 223, 93 N. E. 2d 544, 18 A. L. R. 2d 516. There the reference was to "my" one-half interest in a business. The court held that the will set apart a particular portion of the testator's estate with no further provision being made for the payment of the legacy and that it could only be satisfied by the thing or interest bequeathed.

The question of whether all of the personal property may be held to be a specific legacy has been determined in Smullin v. Wharton, 86 Neb. 553, 125 N. W. 1112. There a will bequeathed all of the personal property of which the testator died seized. The language used was more prolix than the language used in the

instant will, but in its material aspects there appears no substantial difference.

Having concluded that the bequest in paragraph 1 of the will is a specific bequest, it follows that it is exempted from liability for the payment of debts and costs of administration if that is necessary to carry into effect the intent of the testator. It appears that such is a necessary conclusion, testator not having directed otherwise, for unless that is done the specific bequest will be defeated in large part.

In In re Estate of Strolberg, 106 Neb. 173, 183 N. W. 97, 26 A. L. R. 643, we stated the rule that: Legacies, as a general rule, are payable primarily out of the personal estate of the testator, and real estate will not be charged with their payment unless the intention to do so is expressly declared or clearly inferable from the dispositions of the will; that the chief criterion is the intention of the testator, which may appear either expressly or by implication from the language and dispositions of the will; that such intention cannot be inferred solely from or shown solely by evidence of circumstances altogether extraneous to the will, nor is such evidence admissible on the question of intent where there is no ambiguity in the will; but where legacies are not expressly charged upon the land and the intention of the testator is not clear, the court may and should, for the purpose of ascertaining the intention, read the will in the light of the circumstances existing when it was made.

We quoted the above rule in Hahn v. Verret, 143 Neb. 820, 11 N. W. 2d 551.

The will here shows a distinct intention of the testator to favor Esther over Mary in the distribution of his estate. He first bequeathed Esther all of his personal property. He next devised to her a life estate in 320 acres of land. He next devised to Mary a life estate in 160 acres of land. He next devised to Esther's children the land specifically devised, subject to the

life estates. He then devised the residue of his estate to Esther and Mary in equal shares. He provided, however, if Mary predeceased him that "then any and all provisions contained in this will for her benefit and all devises and bequests made herein for her shall be construed and shall be effective as devises and bequests for my daughter Esther Bray so that the life estate provided for my daughter Mary Sedlak in paragraph 3 herein would become a life estate for my daughter Esther and the entire residue of my estate as described in this paragraph (5) shall then, if my said daughter Mary should not survive me, pass to my said daughter Esther Bray."

In In re Estate of Strolberg, *supra,* we cited generally the case of Reid v. Corrigan, 143 Ill. 402, 32 N. E. 387. We review that case.

There the will made no provision for the payment of debts. There it devised specific real estate to the wife "and also all my personal property of every description"; it then devised $3,000 to a niece; it then devised specific real estate to two organizations; it then devised all the residue of the real estate to close relatives.

In the Corrigan will the testator devised "all the * * * residue" of "my real estate." In the case before us the testator devised the residue "of my estate"; however, by construction of the will, and in fact, the residue in the instant case is real estate.

In the Corrigan case the issue was whether the bequest of $3,000 was to be paid out of the personal estate bequeathed to the wife or out of the residuary real estate, while in the case before us it is a question of from which source the debts and expenses of administration shall be paid.

We quote, then, at length from the opinion in the Corrigan case in which it was held that the bequest was a charge on the residuary devise: "In the administration of testate estates the personal property is the primary fund for the payment of debts and general

legacies, unless a contrary intention on the part of the testator satisfactorily appears. It is sometimes difficult to determine whether or not such contrary intention does appear. But it is no longer necessary that it should be shown by express words,—it 'may be implied from the whole will taken together.' * * * It is an elementary rule in the construction of wills, that effect must be given to that intention, if it can be done, consistently with the rules of law. In other words, this bequest must not be allowed to abate, unless it shall be found that, by no fair interpretation of the entire testamentary devise, can it be ascertained from what part of his estate the testator intended it should be paid, therefore, the only question here presented for decision is, can it be charged upon the real estate devised to appellees by the fourth or residuary clause. In determining that question it becomes important to ascertain, first, whether by the terms of the preceding clauses it can, consistently with the intention of said testator, be paid out of any other part of his estate.

"That it was not his purpose to charge it upon the real estate devised by the first and third paragraphs of his will is conceded. It is said, however, that the personal estate bequeathed to the wife is not exonerated from its payment. The argument in support of this contention is based upon the foregoing rule, by which the personalty is made the primary fund for the payment of all general legacies. We have, however, seen, that rule ceases to be applicable, whenever a contrary intention clearly appears. Here, all the personal property, of every description, is given to the wife without limitation or qualification. How could an intention to exonerate this property be more clearly expressed than by the language here used? While it is true that a bequest of all the personal estate is ordinarily treated as a general legacy, yet where an intention to give it discharged of its primary liability for debts and general legacies clearly appears, it must be treated as a

special bequest, and exonerated accordingly. * * * It is just as clear that the maker of this will did not intend the $3,000 to be taken out of his personal estate as if he had said so in terms. The express gift of all of that class of property to the wife is, in effect, the expression of an intention that no one else shall have it, or any part of it."

Commenting in the Corrigan opinion on cases where the residuary clause covered both personal and real estate, the court said: "It is true, in these cases the residuary clauses of the wills before the courts were broad enough to cover personal as well as real property, but the intention to charge the realty was not inferred because there was a blending of the two classes of property, but from the fact that the personalty was so disposed of that it could not be made available for the payment of the legacies given.

"Suppose the language of the residuary clause here had read, 'all the rest, residue and remainder of my real and personal estate,' could it have been said that an intention to charge the real estate was more clearly shown than by the language which was used? There being no personal estate left, language blending real and personal property would have been meaningless; and yet, if the testator had said, 'all the rest of my real *and personal* estate,' instead of 'all the rest of my real estate,' there would have been no difficulty in finding authorities sustaining a charge of this legacy upon the real estate devised in the residuary clause. * * * By holding that the expression, 'rest, residue and remainder,' was intended to limit the devise to appellees to that part of his estate which should remain after deducting all that had been previously bequeathed, effect can be given to the entire will, whereas to say that by their use he intended to devise all of his real estate not previously devised, without reference to said legacy, we are forced to defeat an intention as clearly expressed as language can make it, or attribute to him

the inconsistency of having made his niece the object of his bounty by words, at the same time intending that she should never enjoy that bounty."

We construe the will so as not to attribute that "inconsistency" to the testator or as stated elsewhere in the Corrigan opinion not to construe the will to attribute to the testator "a purpose to make a gift in appearance and not in reality."

In In re Estate of Hunter, *supra,* we quoted with approval this rule: Generally speaking, and in the absence of an expression of a contrary intent, where the assets of an estate are insufficient to pay all obligations and legacies, there will be an abatement in the following order: (1) Residuary estate, (2) other general legacies pro rata, (3) specific bequests or devises.

Mary contends here that the language is dictum. We need not debate that contention if true. It does not affect the soundness of the rule. In the instant case there were only specific devises and bequests and a residuary devise. Obviously there can be only one residuary clause. The rule is in accord with our conclusion here that the debts and costs of administration are to be paid out of the residuary estate. Otherwise the specific legacy contained in paragraph 1 of the will would be in large part abated.

Mary calls to our attention the holding in Lienhart v. Conway, 146 Neb. 821, 21 N. W. 2d 749, that: "Another statement of legal rule applicable here is that the personal estate of a deceased person is primarily liable for all debts created or personally assumed by him, whether secured by mortgage on real estate or not, and heirs and devisees have the right to require the payment of any such debts out of the personal estate." See, also, Schade v. Connor, 84 Neb. 51, 120 N. W. 1012, to which we refer later.

This overlooks the two preceding holdings of that opinion that: "By statute (section 30-230, R. R. S. 1943), if a testator makes provision in his will for the

payment of his debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, or so far as the same may be sufficient. * * * A well-recognized rule in the interpretation of wills is that the court will give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with established rules of law."

Mary contends that in accord with section 30-405, R. R. S. 1943, we should follow the rules stated first above quoted from Lienhart v. Conway, *supra,* and 97 C. J. S., Wills, §§ 1317(a), 1322(a) and (c), pp. 227, 235, 237.

Here it is overlooked that these rules are all subject to the rule that the testator may by will avoid the application of the general rule. This is made clear throughout the text and by particular reference on pages 227 and 237 to 34 C. J. S., Executors and Administrators, §§ 478, 479, pp. 360, 362, wherein it is said: "* * * the general rules with respect to what property is available for the payment of debts are subject to the power of a testator to direct, by his will, what property shall be used, or shall constitute the primary fund, for this purpose, * * *. However, the order in which property is applied to the payment of debts is subject to directions of the testator * * *."

Mary finally contends that section 30-405, R. R. S. 1943, controls and that under that provision it becomes mandatory and that the personal estate is first chargeable with the payment of the debts and expenses notwithstanding the provisions of section 30-232, R. R. S. 1943, which permits "specific devises and legacies" to be exempted if that is necessary to carry into effect the intention of the testator. If that contention were to be accepted it would likewise render ineffective the provisions of section 30-230, R. R. S. 1943, which permit a testator to designate the estate to be appropriated for

the payment of debts and expenses of administration.

These contentions have been decided adversely in Smullin v. Wharton, *supra.* There we put aside the rule of Schade v. Connor, *supra,* followed in Lienhart v. Conway, *supra,* as "inapplicable" because of the terms of the will, quoting the statute that is now section 30-232, R. R. S. 1943.

Mary contends that we did not there refer to section 30-405, R. R. S. 1943, and hence would avoid the effect of that holding. That is a distinction without material difference. We did cite there the provisions of the statute which with an immaterial amendment are now sections 30-1101, 30-1102, and 30-1126, R. R. S. 1943. Those sections, and particularly sections 30-1101 and 30-1102, R. R. S. 1943, are to be followed by the executor or administrator to obtain a license to sell real estate for the payment of debts and expenses of administration under the provisions of section 30-405, R. R. S. 1943.

We conclude that section 30-405, R. R. S. 1943, is not applicable here.

Paraphrasing language found in Smullin v. Wharton, *supra,* the real estate referred to in the residuary clause is that portion of the estate left after the payment of charges, liabilities, and specific legacies.

We affirm the judgment of the trial court.

AFFIRMED.

WILLIAM M. WYLIE, APPELLEE, V. FRANK CZAPLA ET AL., APPELLANTS.

97 N. W. 2d 255

Filed June 12, 1959. No. 34574.

1. **Appeal and Error.** A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the

close of all the evidence, such testimony is in the record and its admission is not assigned as error here.

2. **Trial.** If the evidence upon an issue is undisputed or such that minds of men could reasonably arrive at but one conclusion, the question is one for decision by the court as a matter of law. Otherwise, it is a question for the jury to decide as other issuable facts in the case.
3. **Automobiles: Damages.** In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident.
4. ———: ———. In order for the evidence upon the issue of damages to be sufficient under the foregoing rule, there are three material elements which must be factually proved by competent and relevant evidence, to wit: (1) That as a result of the accident, the automobile was damaged, and the character, kind, and extent thereof from which it can be reasonably concluded that the automobile was in such condition after the accident that it was not or could not be repaired and placed in substantially as good condition as it was immediately before the accident; (2) the reasonable market value of the automobile immediately before the accident; and (3) its reasonable market value immediately after the accident.
5. ———: ———. When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages in an action for negligence. However, the necessity for and the reasonable cost of such repairs must be factually proved by competent and relevant evidence.
6. ———: ———. Generally, in an action to recover damages to an automobile, neither rule aforesaid relating to the measure of damages is exclusive of the other, but the rule or rules to be applied and submitted depend upon the competent and relevant evidence adduced at the trial in support of the damages claimed.
7. ———: ———. Damages to an automobile should be proved by factual evidence rather than by the mere conclusions of witnesses, and a party's mere statement or assumption that his vehicle has been damaged in a certain amount without appropriately adducing any facts on which such estimate is made, is insufficient to support a verdict and judgment therefor.

APPEAL from the district court for Nance County: ROBERT D. FLORY, JUDGE. *Reversed and remanded.*

John E. Dougherty, for appellants.

Philip T. Morgan, for appellee.

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

CHAPPELL, J.

Plaintiff, William M. Wylie, brought this action against defendants, Frank W. Czapla and his father, Walter Czapla, seeking to recover damages to plaintiff's 1952 Ford Victoria car, alleged to have been proximately caused by the negligence of defendant Frank W. Czapla, who, as the alleged servant of Walter Czapla, was driving a 1949 International pickup truck owned and maintained by defendant Walter Czapla. Hereinafter William M. Wylie will be called plaintiff; Frank W. Czapla will be called defendant; Walter Czapla will be called the father; and when speaking of both father and son, they will be called defendants.

Plaintiff's petition alleged in substance that on January 17, 1953, at about 10:15 a. m., he was driving his car in a southeasterly direction on state highway No. 39 about 1 mile northwest of its junction with state highway No. 22 in Nance County; that plaintiff's car was trailing behind the pickup truck driven by defendant; and that when plaintiff's car reached the point aforesaid, and after plaintiff had given a signal to overtake and pass defendant's truck, and while plaintiff's car was in the act of passing him, said defendant negligently and without notice, knowledge, or warning abruptly turned the truck to the left into the path of and against plaintiff's car, proximately causing the same to be damaged in the sum of $1,600, for which amount plaintiff prayed judgment against defendants and each of them. Plaintiff alleged that defendant driver, while so operating the truck as a servant of his father, was negligent substantially as follows: That he failed to give any signal of his intention to turn; failed to keep a proper lookout and yield the right-of-way to a passing vehicle; failed to exercise ordinary and reasonable care in making a left-

hand turn; and failed to give plaintiff one-half of the right-of-way and keep his truck on the right half of the road after a signal for passing was given by plaintiff, which negligence proximately caused plaintiff's car to be damaged. In that connection, plaintiff alleged that his car was damaged on the right front, front, frame, and chassis. However, there is no competent evidence to sustain a conclusion that plaintiff's car was so damaged.

Defendants' answer admitted the location of the highways; the ownership of plaintiff's car; and denied all other allegations of plaintiff's petition. Defendants then alleged that plaintiff's damages, if any, were proximately caused and contributed to by the negligence of plaintiff, which was more than slight and was the sole proximate cause of the accident. Plaintiff's alleged negligence was substantially as follows: That plaintiff failed to keep and maintain his car on the right half of the highway and operated same at an excessive and negligent rate of speed without due regard for the use, traffic, and condition upon said highway; that plaintiff failed to sound a horn or other signal of his intention to overtake and pass defendants' truck, but suddenly and abruptly attempted to overtake and pass said truck when plaintiff knew or should have known that defendant was making a left-hand turn on said highway; and that plaintiff failed to keep his car under reasonable control so as to be able to turn aside and avoid an accident. Plaintiff's reply was in the nature of a general denial.

Upon trial to a jury, and when plaintiff had rested, the father moved to dismiss plaintiff's petition for want of any evidence connecting him with plaintiff's alleged cause of action. Thereupon, without objection, plaintiff was given leave to withdraw his rest and adduce further evidence. Plaintiff then called the father as a witness, who admitted that he owned the truck involved, which was used in operating his farming business; that on the morning of the accident, he told his son, the defendant,

to drive the truck and take his son-in-law, or some cream at the son-in-law's place, to town; and that the accident occurred while his son was driving the truck, as he had been directed to do.

Plaintiff then rested again, and the father renewed his motion to dismiss as to him, which was overruled. Defendants then moved to strike from the record all evidence of damages to plaintiff's car for the reason that same was not proper and sufficient to prove any element of damages alleged in plaintiff's petition, and that motion was overruled. Defendant then moved for a directed verdict for the reason that the evidence was insufficient in fact and law to sustain a judgment against defendant; and that the evidence showed that plaintiff was guilty of negligence more than slight as a matter of law which barred his recovery. That motion was also overruled.

At conclusion of all the evidence, plaintiff moved for a directed verdict in his favor, for the alleged reason that defendant had admitted negligence as a matter of law in that he had failed to look and give a signal before making a left-hand turn across a public highway, and failed to give the statutory signal before making such left-hand turn, and that defendant's negligence was the proximate cause of the accident. That motion was overruled and same is not an issue here. The father then renewed his motion for directed verdict, which alleged insufficiency of the evidence to generate a jury question against him on the theory of master and servant or principal and agent, and that motion was overruled. Defendants and each of them then renewed their motion to direct a verdict or dismiss plaintiff's action and render judgment for defendants, which motion was overruled.

Thereafter the issues were submitted to the jury and a verdict was returned in favor of plaintiff and against defendants, and fixed the amount of plaintiff's damages at $1,000. Judgment was rendered accordingly, and defendants' motion for judgment notwithstanding the

verdict or in the alternative for new trial was overruled. Therefrom defendants appealed, assigning some 17 unnumbered alleged errors requiring reversal, some of which are interwoven or interrelated, and we will so dispose of them.

As far as important here, defendants assigned and argued in substance that the trial court erred as follows: (1) In refusing to sustain defendants' motions for directed verdict made at conclusion of plaintiff's case and renewed at the conclusion of all the evidence, and in failing to sustain defendants' motion for judgment notwithstanding the verdict or in the alternative for new trial because the evidence disclosed that plaintiff was guilty of more than slight negligence as a matter of law; (2) in failing to direct a verdict for the father at the close of plaintiff's evidence and at conclusion of all the evidence because there was not sufficient evidence to go to the jury on the issue of master and servant or principal and agent, and that in any event the trial court erred in failing to submit that issue to the jury in instruction No. 4 as a material allegation which plaintiff was required to establish by a preponderance of the evidence; (3) in giving instruction No. 7, which included applicable rules of the road, the trial court erroneously stated the kind of signal required to be given by a driver before turning left across a highway, and erroneously failed to include that part of section 39-7,108, R. R. S. 1943, relating to the duty of a driver to decrease speed "when approaching and going around curves" and that part of section 39-7,110, R. R. S. 1943, relating to the duty of a driver to not drive on the left side of the highway "upon a curve in the highway where the driver's view along the highway is obstructed"; and (4) in giving instruction No. 9, which erroneously submitted plaintiff's measure of damages as the difference between the value of plaintiff's car immediately before the accident and its value immediately thereafter, because the evidence was insufficient to support a recovery upon such

theory. We sustain the last assignment, which we deem to be the primary and controlling question.

Instructions Nos. 1, 2, and 3 given by the trial court summarized the pleadings substantially as heretofore set forth. The trial court thereafter appropriately submitted the issues of negligence and contributory negligence which were pleaded and supported by the evidence. It would serve no useful purpose here to unduly prolong this opinion by repeating the evidence adduced by the parties with relation to such issues. It is sufficient to say that the evidence thereon was conflicting and that the issues of negligence and contributory negligence were questions for the jury. Under the circumstances in this case, and contrary to defendants' contention, the fact that the jury awarded plaintiff $1,000 instead of $1,600 as prayed is not conclusive that the jury deducted $600 for the alleged contributory negligence of plaintiff. Bearing in mind that every controverted fact with relation to such issues must be resolved in plaintiff's favor, and after giving him the benefit of every inference that can reasonably be deduced from the evidence, we conclude that defendants' first assignment has no merit.

With regard to the second assignment, we held in Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130, that: "A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here."

In the light thereof, this record discloses without dispute the following, as shown by the testimony of defendant, the father, and the son-in-law: In addition to the evidence of the father as a witness for plaintiff, which we have heretofore set forth, it was admitted that the father and the son-in-law, who lived about

three-quarters of a mile away, had more or less of a business arrangement between themselves whereby they exchanged work and used each other's machinery; that the son-in-law had driven the father's truck before; that they had regularly delivered cream from the son-in-law's place over to the father's farm to be picked up there in the father's truck and taken to town; and that on the morning of the accident the son-in-law's truck would not start in order to bring the cream over to the father's farm, so the son-in-law walked over to the father's place and the father told defendant to take the father's truck and drive over to the son-in-law's place with him and help the son-in-law start his pickup truck, or take the son-in-law and the cream to town. They could not start the son-in-law's truck, so they loaded the cream and some milk to feed the father's hogs into the father's truck, and were on the road back to the father's farm to deliver same, as was regularly done, when the accident occurred. Under such circumstances, we conclude, as the trial court evidently did, that the issue of master and servant or principal and agent was established as a matter of law for the court and was not an issue for submission to and determination by the jury. It is elementary that if the evidence upon an issue is undisputed, or such that minds of men could reasonably arrive at but one conclusion, the question is one for decision by the court as a matter of law. Otherwise, it is a question for the jury to decide as other issuable facts in the case. Defendants' second assignment has no merit.

We turn then to the question of whether or not instruction No. 7, given by the trial court, was prejudicially erroneous in two particulars as contended by defendants. We conclude that it was not. Such instruction said in part: "No person shall turn a vehicle from a direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving an appropriate signal in the manner here-

inafter provided in the event any other vehicle may be affected by such movement. A signal of intention to turn right or left shall be given continuously during not less than the last 50 feet traveled by the vehicle before turning. The signals required shall be given either by means of the hand and arm *or by a signal lamp or signal device.*" (Italics supplied.) Defendants first claim that the italicized portion was erroneous because defendants' truck was a 1949 International pickup and the law requiring such truck to be equipped with such lamps or signal devices was not effective until after the accident. In that connection, at time of the accident, section 39-7,116, R. R. S. 1943, was applicable. It provided in part that the signals required "shall be given *either* by means of the hand and arm or by a signal lamp or signal device" just as the court gave it. (Italics supplied.) Contrary to defendants' contention, the instruction did not say either directly or by inference that the law required defendants' truck to be equipped with such lamps or signal devices. As a matter of fact, the court simply told the jury that the required signal of intention to turn left could be given in either manner. The jury could not have been misled thereby and the language used could not have been prejudicial to defendants.

Defendants next contended that the trial court erred prejudicially in failing to include those parts of sections 39-7,108 and 39-7,110, R. R. S. 1943, heretofore quoted. In that connection, as shown by photographs and oral testimony, the curve here involved was a long, gradual, almost imperceptible curve upon which the driver's view along the highway was open and not obstructed in any manner for long distances. The curve admittedly started about one-quarter mile back of the Czapla driveway where defendant turned the truck left across the highway, and ran for about one-quarter mile beyond such driveway. There were no other cars on the highway at the point of accident; the blacktop highway

was dry and smooth; the day was clear; no driver's view was obstructed or affected by any curve; and said curve had nothing to do with the accident or the cause thereof. Defendants' contention has no merit.

Defendants contended that instruction No. 9, which in conformity with plaintiff's theory of recovery submitted the measure of plaintiff's damages as the difference between the value of plaintiff's car immediately before the accident and its value immediately thereafter, was erroneous because the evidence was insufficient to support a recovery upon that theory. We sustain that contention.

In Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751, citing Helin v. Egger, 121 Neb. 727, 238 N. W. 364, and Lund v. Holbrook, *supra,* we reaffirmed that: "In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident." See, also, Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617; Folken v. Union Pacific R. R. Co., 122 Neb. 193, 239 N. W. 831.

In each of said cases, competent factual evidence was adduced disclosing the character, kind, and extent of the damages to plaintiff's vehicle, and its condition as a result of the accident, from which, together with other evidence, it could be reasonably concluded that the vehicle could not be repaired and placed in substantially as good condition as before the accident. Also, there was competent evidence of the difference between the vehicle's reasonable market value immediately before and immediately after the accident.

In other words, in order for the evidence upon the issue of damages to be sufficient to recover under the quoted rule aforesaid, there are three material elements which must be factually established by competent evidence, to wit: (1) That as a result of the accident

the vehicle was damaged, and the character, kind, and extent thereof from which it can be reasonably concluded that the vehicle was in such condition after the accident that it was not or could not be repaired and placed in substantially as good condition as it was immediately before the accident; (2) the reasonable market value of the vehicle immediately before the accident; and (3) its reasonable market value immediately after the accident. In that connection, it is elementary that plaintiff as owner may testify as to the value of the vehicle immediately before the accident. He may also, upon proper foundation laid, testify as to the character, kind, and extent of the damages to his vehicle caused by the accident, or produce other qualified witnesses who can do so, as distinguished from mere conclusions that the vehicle was not or could not be repaired and placed in substantially the same condition as it was immediately before the accident.

In Kendrick v. Furman, 80 Neb. 797, 115 N. W. 541, this court held that: "Where one claims his property has been damaged by certain acts of the defendant, it is not proper to ask the witness in what manner he has been damaged, but he should state the facts, and the jury will then in the exercise of its function find whether the litigant has been damaged."

The owner as such may also testify to the reasonable value of his car immediately after the accident, and the reasonable cost of the repairs made necessary thereby may be shown by competent evidence as bearing on the difference between the value of the car before and after the accident. See, 6 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 3430, p. 78; 25 C. J. S., Damages, § 157, p. 809.

In that connection, this court reaffirmed as early as Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585, that: "When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of

damages in an action for negligence." In that opinion, citing Layton v. Sarpy County, 83 Neb. 628, 120 N. W. 179, and other authorities, this court stated and discussed both the rule which now appears in Dorn v. Sturges, *supra,* and the rule reaffirmed as above set forth, and concluded in effect that in an action to recover damages to a motor vehicle neither rule aforesaid relating to the measure of damages was exclusive of the other, but that the rule or rules to be applied and submitted depend upon the competent evidence adduced at the trial in support of the damages claimed. See, also, 6 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 3415, p. 49, citing Thrapp v. Meyers, *supra,* and many other authorities.

As stated in 6 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 3416, p. 57, citing authorities: "So testimony by a witness that a certain sum was paid out to put the machine in running order does not furnish a sufficient basis to estimate the damages on the basis of the cost of repairs, since there is no way of ascertaining how much of such amount was spent to repair damage caused by the alleged negligence of the defendant, nor whether such amount was a reasonable compensation for such repairs, or the relative value of the automobile when so repaired, as compared with its value prior to the injury." Also, as said in § 3430, p. 78: "Any evidence bearing upon the value and condition of an injured automobile before the accident and its condition afterwards is admissible on the question of damages under proper allegations in the pleadings, and subject to general rules concerning the competency and relevancy of evidence. * * * Plaintiff's testimony as to the original cost of his car, injured in a collision, the effort to have it repaired, his trouble with the car after the collision, and the sale price thereafter, is pertinent, in connection with other evidence, to the issues of market value of car before and after the collision and the damage caused thereby. * * * The testi-

mony as to the value of repairs by a witness, who did not testify to the necessity of the repairs covered by his estimate, nor to the accuracy of his estimated value, is mere hearsay, and receipted bills for repairs, if objection is made to them, are not of themselves competent evidence of the reasonable cost of the repairs, but, where there is testimony that the items contained in such bills are correct, and that the charges are just and reasonable, and a proper predicate laid, such bills may be admissible." Further, as said in § 3431, p. 83: "The fact of damage, and its amount, the cost of repairs, value before and after the injury, depreciation in value, * * * are matters to be established by evidence. If there is no evidence on which to base damages properly, only nominal damages can be recovered. * * * Mere general statements, or vague and indefinite testimony, will not justify a verdict for damages."

In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, this court concluded that: "A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. * * *." See, also, Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250, wherein we held: "Where there are elements of damage, such as expenditures, capable of pecuniary measurement, the law requires the amount shall be proved."

As recently as O'Hara v. Frederickson Building Corp., 166 Neb. 206, 88 N. W. 2d 643, this court reaffirmed that: "The general rule is that damages, to be recoverable, must be direct and certain. * * * Damages which are uncertain, contingent, conjectural, or speculative, cannot be made the basis of a recovery, whether applied to the existence, nature, or proximate cause thereof."

Also, as early as Kriss v. Union P. R. R. Co., 100 Neb. 801, 161 N. W. 414, Ann. Cas. 1918A 1122, this court concluded that: "In an action for damages, the burden is upon the plaintiff to prove by a preponderance of the evidence each element of damage sustained. * * *."

As stated in Oleck, Damages to Persons and Property, § 319, p. 739, citing authorities: "The party who claims pecuniary damages has the burden of proving both that they were the result of the wrong done by the other party, and their amount. * * * But ordinarily the claimant must prove his damages by presenting competent evidence which satisfies the applicable measure of damages, and from which the amount of the damages can be computed. * * * Where property damage is concerned (eg.: automobile damage) the claimant must prove the causation by the other party's wrong, and the amount of damage; but this amount also must be shown to be reasonable (eg.: the repair bill must be reasonable). * * * A claimant must prove the amount of expenses which he claims he had to incur as a result of the defendant's wrong, and he also must prove their causal connection, and their reasonableness."

As stated in 15 Am. Jur., Damages, § 356, p. 795, citing authorities: "As a rule * * * actual or compensatory damages are not to be presumed, but must be proved. To warrant their recovery, the actual detriment occasioned must be shown by competent evidence and with reasonable certainty, for the recovery is limited to such damages as are established by the evidence. * * * The evidence must afford data, facts, and circumstances reasonably certain from which the jury may find the actual loss; and the plaintiff must show by a preponderance of evidence the damages caused by the injury complained of. * * * There must be proof that the damage sought to be recovered has occurred, that it was caused by the wrong of the defendant, and was of the extent and amount thereof. It has been said that the amount of loss is as much a fact to be proved as the fact of loss."

Also, as said in 25 C. J. S., Damages, § 162, p. 813, citing many authorities: "Damages should be proved by statements of facts rather than by the mere conclusions of witnesses. Plaintiff's mere statement or assumption

that he has been damaged to a certain amount without stating any facts on which the estimate is made is too uncertain. * * * There can be no recovery for an element or item of damage which does not necessarily result from the act complained of, in the absence of proof of the loss or injury, and of the reasonableness, extent, or value of the element or item as the case may be; * * *. The value of property lost or the extent of its depreciation by injury must be ascertained by a money standard from evidence, and cannot be based on conjecture." Further, as stated at page 816: "Damages should be proved with all the certainty the case permits. Absolute certainty is not required and reasonable certainty is ordinarily sufficient; but an award cannot be based on conjecture.

"Damages cannot be allowed where not supported by the required degree of proof, nor can a substantial recovery be based on anything except evidence which justifies an inference that the damages awarded are just and reasonable. Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation. As a general rule, the evidence should be such as to enable the court or jury to determine the injury and the amount of damages with reasonable certainty or accuracy; and it is sufficient if they are so established."

In the light of such authorities, we have examined the record, which discloses the following evidence: There is no doubt that plaintiff's car was damaged in the accident, but the character, kind, extent, and amount thereof was not shown by competent evidence, and the amount of damages claimed is purely speculative, conjectural, and uncertain. Over consistent objections that plaintiff's evidence relating to damages was incompetent, irrelevant, immaterial, without sufficient foundation, and not tending to prove any issue with regard to damages, plaintiff was permitted to testify in substance as follows: That plaintiff purchased the car involved

December 5, 1952; that its value was approximately $2,600 immediately before the accident; and that after the accident he had it repaired. Plaintiff then identified exhibit No. 1 as an estimate sheet received by him on the damage done to his car and the work done, and materials put on his car as repairs arising because of the accident, and that he paid "$866 and some odd cents" to have his car repaired. Said exhibit No. 1 was never offered or received in evidence, and there is no evidence showing what work was done or what materials were necessary or furnished to repair the car or the reasonable value thereof. Plaintiff then gave as his conclusion, without support of any other competent evidence, that after the car was repaired, it was not "in substantially as good a shape as it was before the accident." He was then asked how he ascertained "that it was not in substantially as good a shape" and he answered, "Well, taking anything, when it is repaired, it isn't as good as it was when it was new," which this court concluded was insufficient in Goodell v. Union Automobile Ins. Co., 111 Neb. 228, 196 N. W. 112. However, such answer was stricken upon motion of defendants, and no complaint thereof is made or could be made here. As owner, plaintiff was then permitted to give his opinion that immediately after the accident his car was worth approximately $1000. That is all of the evidence relating to damages.

There is no evidence factually showing or describing the kind and extent of the physical damage to his car except for a small photograph of his car taken after the accident from which no inference or conclusion could reasonably be drawn or estimated. Also, there is no evidence that the "$866 and some odd cents" which plaintiff paid to have his car repaired was the reasonable value of the repairs and materials required to do so as a result of the accident. In such situation, the evidence was insufficient to support more than nominal damages, and the trial court erred prejudicially in the giv-

ing of instruction No. 9 heretofore set forth.

As we view it, the trial court was not required to sustain defendants' motion for judgment notwithstanding the verdict, but was required to sustain defendants' alternative motion for new trial. It is well established that: "An appellate court, in reversing for insufficiency of the evidence to sustain the finding, verdict, or judgment, may remand for a new trial, except where the case is a proper one for final judgment." 5B C. J. S., Appeal and Error, § 1941, p. 486. See, also, § 25-1315.02, R. R. S. 1943.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded for further proceedings in accord with this opinion.

REVERSED AND REMANDED.

EMIL KJELDGAARD ET AL., APPELLEES, V. ALBERT L. CARLBERG, APPELLANT, IMPLEADED WITH CHRISTINA GLEESON ET AL., APPELLEES.

97 N. W. 2d 233

Filed June 12, 1959. No. 34557.

1. **Specific Performance.** When land, or any interest therein, is the subject matter of an agreement the power of a court of equity to enforce specific performance thereof is beyond question.
2. ———. But such equitable remedy is not a matter of right but one that may be granted by the court in its sound judicial discretion, controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies.
3. ———. Specific performance will not be enforced unless the contract has been entered into with perfect fairness and without misapprehension, misrepresentation, or oppression, or where it will be unjust or inequitable to do so.
4. ———. Courts of equity do not enforce specific performance

of a contract where circumstances have arisen which make its performance inequitable.

APPEAL from the district court for Burt County: PATRICK W. LYNCH, JUDGE. *Reversed and dismissed.*

Sidner, Lee, Gunderson & Svoboda, for appellant.

Raun & Samuelson and *Charles E. Boughn,* for appellees Kjeldgaard et al.

Moodie & Moodie, for appellees Gleeson.

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

MESSMORE, J.

The plaintiffs Emil Kjeldgaard, Frank L. Wieden, Maude L. Peters, Maude L. Peters, guardian of Robert A. Peters, a minor, and Fred Oberhelman brought this action in the district court for Burt County against Christina Gleeson, Leroy Gleeson, her husband, Christina Gleeson, administratrix of the estate of George Haye, deceased, and Albert L. Carlberg, defendants, for specific performance of an agreement entered into by the foregoing parties to survey certain land, and to assess damages that had arisen as a result of the failure of the defendant Carlberg to carry out the terms and conditions of the agreement. The trial court rendered judgment in favor of the plaintiffs and against the defendant Carlberg; assessed damages in the amount of $138 in favor of plaintiff Kjeldgaard and $40 in favor of plaintiff Wieden to be paid by said defendant Carlberg; and ordered that this defendant pay $50 toward the costs of the survey and the costs of this action.

The defendants Christina Gleeson, her husband Leroy Gleeson, and Christina Gleeson as administratrix of the estate of George Haye, deceased, filed a motion to dismiss for the reason that she had complied with the proposed changes set forth in the survey agreement. We find no ruling on this motion, however, these de-

fendants evidence no particular concern in this litigation. Insofar as this appeal is concerned, the only defendant is Carlberg.

The defendant filed a motion for new trial which was overruled. From the overruling of the motion for new trial, the defendant appealed.

For convenience we will refer to Emil Kjeldgaard as Kjeldgaard; Frank L. Wieden, as Wieden; Albert L. Carlberg, as Carlberg or defendant; Fred Oberhelman, as Oberhelman; R. H. Cutler, as Cutler; Willis Lind, as Lind; and other parties by their first and last names, or by their last names as occasion necessitates.

The plaintiffs' petition, insofar as necessary to set forth, alleged that on or about July 19, 1951, the plaintiffs and defendants entered into an "Agreement for Survey" of a parcel of land designated as the "Tryon estate land"; that it was the intention of the parties to the survey agreement to subdivide the Tryon estate land into four parcels of approximately 151 acres each; that in order to do this, the parties realized there might have to be an adjustment of the outside boundary lines of the Tryon estate lands, specifically the east and west boundaries of said land; that during the fall of 1951 or early spring of 1952, R. H. Cutler, the county engineer and surveyor of Burt County, commenced a survey of the land covered by the survey agreement and was unable to complete the survey, and requested Willis Lind, the county surveyor of Dodge County, to complete the survey; that on the 28th and 30th of December 1953, and the 5th and 7th of January 1954, Lind entered upon the land of the parties to the survey agreement and made a survey thereof, and on the 8th and 10th of March 1954, made a realignment survey of said land; that the six subdivisions of the parcel of land made by Lind are designated as Lots 1, 2, 3, 4, 5, and 6; and that Lot 1 is owned by Oberhelman, Lot 2 by Kjeldgaard, Lot 3 by the defendant Carlberg, Lot 4 by Wieden, Lot 5 by Maude L. Peters and Robert A. Peters, a minor, and

Lot 6 by Christina Gleeson and Leroy Gleeson, her husband, and is a part of the estate of George Haye, deceased.

The petition further alleged that Lind completed the survey and established some changes in the boundary lines of all of the tracts of land, and did so establish them that the four Tryon estate lots were approximately equal, and had 151 acres or more in each lot. The petition further alleged that all parties agreed to the new boundary lines except the defendant, and all adjustments were made to the satisfaction of all the parties to the survey agreement except the defendant who refused to change the boundary lines to conform to the survey made by Lind. The petition set forth certain facts to show damages suffered by Kjeldgaard and Wieden, and prayed for specific performance of the survey agreement, damages, costs, and equitable relief.

The defendant filed an amended answer and cross-petition denying the allegations of the plaintiffs' petition not specifically admitted. For further answer the defendant alleged that at the request of the plaintiffs, he signed the survey agreement; that said instrument was drawn by the plaintiffs and provided that in the event there were any shortages or over-runs found in the survey, the parties thereto were to settle the same on a take and give basis satisfactory to all concerned; that said plaintiffs represented to this defendant that he would be notified at the time the survey was to be run; that after the survey was run, if the parties agreed to the same, there would be adjustments made of their respective boundary lines; that if the parties did not agree to make the adjustments, there would be none made; that Cutler, county engineer of Burt County, mentioned in the survey agreement, did not make the survey in question, but it was made by another individual; that the so-called survey was improper and unauthorized, and the substitution made by Cutler in

having another surveyor survey the land in question was without the knowledge or authorization of the defendant; and that the plaintiffs and the substitute surveyor had arbitrarily made adjustments based on the unauthorized survey, had taken possession of the defendant's land, torn down his fences, and destroyed his crops. The prayer was that the plaintiffs' petition be dismissed and the defendant recover damages and costs.

The plaintiffs' reply to the amended answer and cross-petition of the defendant denied all allegations therein inconsistent with the allegations of the plaintiffs' petition.

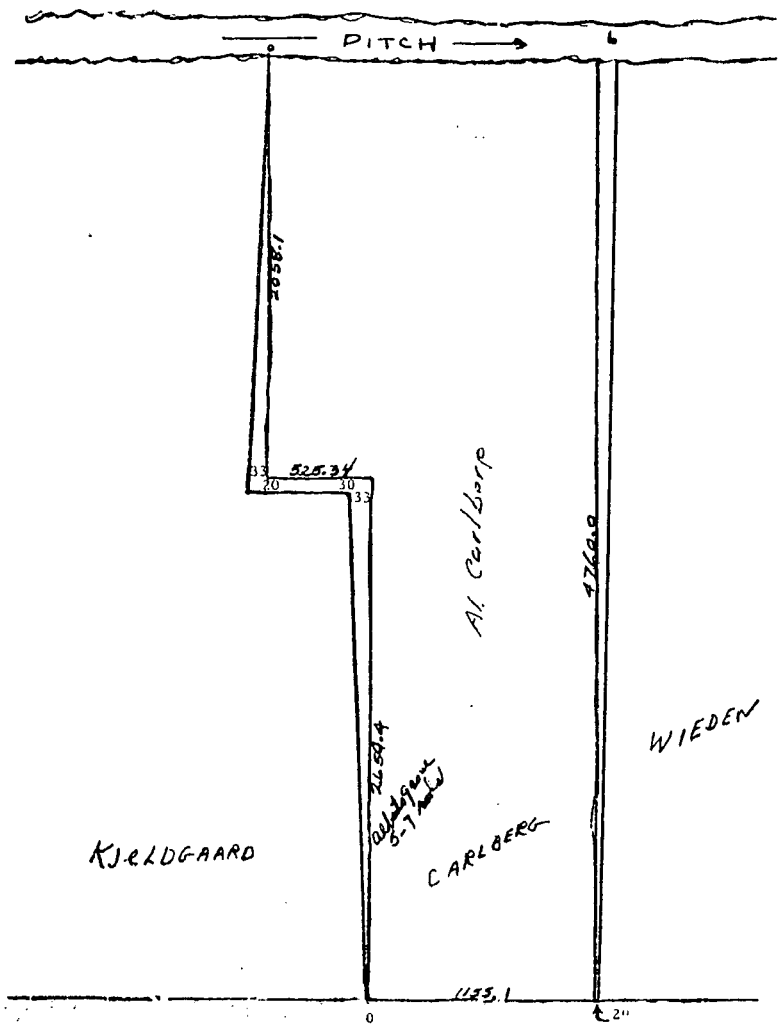
Originally, the Tryon estate was one tract of land located in Sections 33 and 34, Township 24 North, Range 8 East of the 6th P. M., in Burt County. Sometime prior to 1934, this land was divided into four tracts which were not described by metes and bounds. Each tract of land, as divided, had some low land and some high bank land, and each tract was to contain approximately 151 acres, or a trifle more.

Wieden acquired a part of the Tryon property on January 30, 1931. This land is designated in the petition as Lot 4. Oberhelman took possession of his tract of land on or about February 24, 1947. This land is designated as Lot 1 in the petition. Kjeldgaard's land is designated as Lot 2 in the petition. In April 1935, the defendant purchased the land designated as Lot 3 in the petition.

We have refrained from setting forth the description of the lands owned by the parties mentioned above, for it is apparent from the record that the deeds to said lands contained descriptions reciting certain fractional subdivisions of sections and parts of sections. Since the tracts were odd acreages, these fractional designations were complicated, and apparently did not conform to the regular governmental surveys.

The Kjeldgaard, Carlberg, and Wieden lands are the principal lands involved in this controversy. We set forth a copy of exhibit No. 7 appearing in the record,

which shows the Kjeldgaard land to be directly west of the defendant's land, and the Wieden land directly east of the defendant's land. The outside lines indicate the defendant's land prior to the survey, and the inside lines show the defendant's land according to the Lind realignment survey.



Claus Peters testified that he lived within a mile of the Tryon estate land. He had no interest in this litigation, but acted on behalf of his sister-in-law who desired to have a survey of the lands made to obtain, as nearly as possible, the acreage content of the six parcels of land. He wrote out an agreement in longhand and employed an attorney at Lyons to prepare an agreement to survey. Before so doing, he did not consult the plaintiffs. The agreement was prepared and sent by the attorney to this witness on July 2, 1951. This agreement reads as follows:

"AGREEMENT FOR SURVEY. We, the undersigned present owners of the John H. Tryon Estate land, located on the North side of Highway No. 51 and running north to the Bancroft-Lyons Drainage Ditch, do hereby agree to have an official survey made by R. H. Cutler, County Engineer and Surveyor, Tekamah, Nebraska, who shall subdivide said land into four (4) parcels of approximately 151 acres each,—the intention being to conform as closely as possible to the original division made by Tryon. The cost of this survey shall be equally divided among the present owners and agents as the same appear hereon. If any irregularities, shortages, or over-runs are found by this survey the same are to be settled on a 'take and give' basis satisfactory to all concerned. Dated this 19th day of July, 1951.

"/s/ Christina Gleeson 7-19-51
Christine Gleason, for herself and as Administrator.
/s/ Frank L. Wieden 7-19-51
Frank L. Wieden
/s/ Albert L. Carlberg 7-20-51
Albert L. Carlberg
/s/ Emil Kjeldgaard 7-19-51
Emil Kjeldgaard
/s/ Maude L. Peters and Maude L. Peters, Gdn. A. Robert Peters 7-23-51
Maude L. Peters, for herself and as

guardian of Robert A. Peters, a minor.
/s/ Fred Oberhelman 7-19-51
Fred Oberhelman."

The agreement stated that Cutler was to make the survey. He entered upon the land of the parties and started to make the survey but, due to illness, was unable to carry on and complete it. He called upon Lind, the county surveyor of Dodge County, to make the survey, by writing Lind a letter dated December 11, 1953. This letter informed Lind that the survey had been ordered by Claus Peters, and asked Lind to get in touch with Claus Peters, which he did. Claus Peters went with Lind and showed him the extent of the survey, but took no part in it. Although Claus Peters had no interest in this litigation, he did obtain the signatures to the agreement to survey.

Lind testified that the only persons he talked to with reference to the survey prior to commencing it were Cutler and Claus Peters. No one made any suggestions as to where to place the lines or stakes. Cutler had located the four corners of Section 34, and all of the section corners except the northwest corner of Section 33, which Lind located and marked. Lind used the field notes that Cutler had prepared, and proceeded to complete the survey and divide the Tryon estate land into four tracts of approximately equal size.

The defendant objected to this survey for the reason that the adjustment of his boundaries in accordance therewith would give him only 147½ acres of land. The defendant refused to accept the findings of Lind. Lind then made a realignment survey which is the basis of this litigation. This realignment survey required adjustment to the defendant's east and west boundary lines. These adjustments were not parallel with, and equal distant from, the existing boundary lines, and were irregular. Apparently only 6 feet was involved on the defendant's east boundary line, and presented no difficult problem. On the west boundary

line, about 33 feet was taken out of the defendant's land at about the middle thereof. The defendant refused to accept this realignment survey for the reason that it would cause his land to have irregular fields, pointed rows, take out a part of his grove, and destroy his irrigation system.

After the defendant objected to this survey, Lind consulted with some of the plaintiffs. As a result, Oberhelman agreed to relinquish to Kjeldgaard up to 17 feet off of his east line near the south end of his property. Kjeldgaard agreed that Lind could take 25.9 feet at the south half of his east line, and 32 feet at the north half of his east line and give it to Carlberg, making the total width of Carlberg's south line 1155.1 feet. This was the only change made in the realignment survey which was made on March 8 and 10, 1954. Lind then computed the acreage content of each of the lots, as follows: Lot 2, Kjeldgaard's land, 153.18 acres; Lot 3, defendant Carlberg's land, 153.31 acres; and Lot 4, Wieden's land, 151.8 acres.

The defendant requested a deputy state engineer, Willis L. Brown, to survey the outside boundaries of Section 33, Township 24 North, Range 8 East of the 6th P. M., in Burt County. At this point in the trial the plaintiffs offered to pay their proportionate share of the costs to have a survey by a deputy state engineer selected by the defendant to make a complete survey of the Tryon estate land, and offered to abide by the division lines set up by him after he completed such survey of Sections 33 and 34, whatever he determined and found it to be, to find and determine the just, true, and correct division lines dividing the tract into four equal parts as near as possible, and as close to the old boundaries as possible, having in mind that it was desirable to keep the field as near an exact square as possible. There was an objection to this offer, and it was not accepted.

Lind testified that the object of the survey was to

divide the Tryon estate into four lots or subdivisions of equal acreage.

Kjeldgaard testified he understood that in accordance with the agreement to survey, fence lines might have to be changed on a give and take basis.

Wieden testified that the signing of the agreement to survey was for the purpose of getting the four lots divided equally, as near as possible, and he understood that new lines were to be placed where the survey showed they should be.

Oberhelman was willing to sign the survey agreement and to make the adjustments necessary, and he moved his fences accordingly.

The defendant testified that he signed the agreement to survey for the reason that he thought it was just an adjustment of fences, and did not think that it would require the taking of 4 acres of his land.

It appears from the evidence that Kjeldgaard and Wieden, after the realignment survey was made, moved their fences from the old boundary lines to the lines established by the realignment survey; that Carlberg moved the fences put in place by Kjeldgaard and Wieden back to the old boundary lines; and that Kjeldgaard, on another occasion, moved the fence back to the new realignment line in order to obtain pasture for his stock. In any event, the week before Arbor Day, the fence was removed by Carlberg, and the sheriff was called. Upon the insistence of the sheriff, the fence was left on the old line until such time as this matter could be settled, and did stay there in fact until August.

Kjeldgaard and Wieden testified to damages sustained by them, caused by the actions of Carlberg. Likewise, Carlberg testified to damages sustained by him caused by the actions of these plaintiffs. The defendant's cross-petition relating to damages was dismissed. We deem it unnecessary to set forth this testimony in view of what we say later in the opinion.

The defendant testified that the blue print of the ad-

justments as found by Lind was mailed to him, and that was the first time he observed that any adjustments would have to be made with reference to the boundary lines of his farm; that no one asked him if the adjustments were satisfactory; and that he objected to the adjustments and refused to move his fences unless he was ordered to do so by the court.

We have taken cognizance of the defendant's assignments of error and have considered the same in relation to this appeal. However, considering the record in its entirety, the controversy between the parties in this appeal should be determined as subsequently appears in the opinion.

We believe the following to be applicable to this appeal.

This case is triable de novo in this court. See Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176.

In Mainelli v. Neuhaus, 157 Neb. 392, 59 N. W. 2d 607, this court said: "When land, or any interest therein, is the subject matter of an agreement the power of a court of equity to enforce specific performance thereof is beyond question. See, Bennett v. Moon, 110 Neb. 692, 194 N. W. 802, 31 A. L. R. 495.

"But such equitable remedy is not a matter of right but one that may be granted by the court in its sound judicial discretion, controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies." See, also, Garsick v. Dehner, 145 Neb. 73, 15 N. W. 2d 235; Wiiest v. Pounds, 142 Neb. 882, 8 N. W. 2d 211; Mercer v. Payne & Sons Co., 115 Neb. 420, 213 N. W. 813.

"Specific performance will not be enforced unless the contract has been entered into with perfect fairness and without misapprehension, misrepresentation,

or oppression, or where it will be unjust or inequitable to do so." Morgan v. Hardy, 16 Neb. 427, 20 N. W. 337.

In 49 Am. Jur., Specific Performance, § 78, p. 95, it is said: "Courts of equity do not enforce specific performance of a contract where circumstances have arisen which makes its performance inequitable, * * *."

In the light of the evidence and the authorities heretofore cited, we conclude that specific performance of the agreement to survey, respecting the boundary lines of the lands here involved, should be denied. We find that the plaintiffs, Kjeldgaard and Wieden, and the defendant Carlberg are not entitled to a judgment for damages.

It appears from the record that the plaintiffs have made an earnest effort to settle this dispute and to avoid litigation. Under the circumstances, we conclude that the plaintiffs shall pay one-half of the costs and the defendants shall pay one-half of the costs in the district court and each party shall pay his own costs in this court.

REVERSED AND DISMISSED.

IN RE ESTATE OF GEORGE KRESOVICH, DECEASED.
ORVAL L. COX, SR., ET AL., APPELLEES, V. ANNE MARIE KRESOVICH ET AL., APPELLANTS.
97 N. W. 2d 239

Filed June 19, 1959. No. 34509.

1. **Death: Executors and Administrators.** In this jurisdiction a cause of action for wrongful death is a sufficient estate to justify the appointment of an administrator.
2. **Insurance: Executors and Administrators.** Where a motorist who was domiciled in a state other than Nebraska and who had automobile indemnity insurance came to Nebraska and had an accident which resulted in his death which it was claimed flowed from a tortious act of such owner, causing injury and damage to another or other persons, the insurance is an estate and asset of the deceased which is sufficient to permit and support administration in this jurisdiction.

3. ———: ———. The insurance represented by the insurance policy was an asset of the insured before his death and after his death it became an asset of his estate in this the jurisdiction where he came to his death and another or others sustained injury and damage by reason of his tortious act.
4. ———: ———. In such an instance a proceeding for administration may be maintained in any county in the state where the insurance company is carrying on its business and is amenable to service of process.
5. **Executors and Administrators: Appeal and Error.** In an instance where a petition has been filed for administration of an estate, an administrator appointed, and claims have been filed against the estate, and later the administrative proceeding is abated and dismissed for want of jurisdiction by the county court, which abatement and dismissal is vacated on appeal, the claims stand for trial on their merits in the county court.

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

Baylor, Evnen & Baylor and *Warren K. Urbom,* for appellants.

Healey, Davies, Wilson & Barlow and *Kenneth Cobb,* for appellees.

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

YEAGER, J.

This appeal grows out of a proceeding in the county court of Lancaster County, Nebraska, for the appointment of an administrator or, as denominated, an ancillary administrator of the estate of George Kresovich, deceased.

Prior to his death George Kresovich was domiciled in Cook County, Illinois. On or about August 8, 1954, he was operating an automobile owned by him in Cherry County, Nebraska, and while so doing his automobile collided with an automobile owned by one Orval L. Cox, Sr., and operated by one Orval L. Cox, Jr. Kresovich died as a result of the collision. As further results it is claimed that Lois Leanne Cox, age 2, a

daughter of Orval L. Cox, Sr., was injured; that Lois Norma Cox, his wife, was injured; that Steven Cox, age 15, son of Orval L. Cox, Sr., was injured; that George Cox, age 14, son of Orval L. Cox, Sr., was injured; that Orval L. Cox, Sr., was injured; and that the automobile of Orval L. Cox, Sr., a resident of El Cajon, California, was damaged. It is contended that the collision and alleged injuries and damages resulted from negligence of Kresovich.

At the time of the collision there was in full force and effect a policy of insurance wherein Kresovich was the named insured and the automobile he was driving was described. The policy was issued by Allstate Insurance Company. This policy provided for payment of all damages which Kresovich should become obligated to pay for bodily injuries or injury to or destruction of property. It provided further that no action would lie against the insurance company until after the liability of the insured should be determined by judgment after trial.

On July 27, 1956, Orval L. Cox, Sr., filed an application in the county court of Lancaster County, Nebraska, for the appointment of an administrator. In it he alleged the death of Kresovich in Cherry County, Nebraska. He alleged further that Kresovich was possessed of certain personal property including the insurance policy above referred to in Lancaster County, Nebraska. He alleged also that he was a creditor by reason of his claim for damages which has been mentioned herein. This was the basis for the application for the appointment of an administrator.

A hearing was had on the application and C. Russell Mattson was duly appointed administrator. Thereafter claims were filed by all of the parties who it was claimed were injured and damaged by the collision.

Thereafter Anne Marie Kresovich and Allstate Insurance Company filed petitions for revocation of the letters of administration and for abatement of the action or

proceeding. The stated grounds of the petitions are numerous but for the purposes of consideration here it was substantially alleged that the courts of Nebraska were without jurisdiction for the reasons that Kresovich was domiciled in the State of Illinois; that proceedings were had for the administration of his estate in the probate court of Cook County, Illinois, and that the only courts having jurisdiction to entertain the causes of action asserted by Orval L. Cox, Sr., in his application for appointment of an administrator were the courts of the State of Illinois; and that there was no estate of George Kresovich to administer in Lancaster County, Nebraska.

Anne Marie Kresovich and Allstate Insurance Company filed objections to venue in Lancaster County, Nebraska, on the ground that there was no estate, property belonging to, or debts owing to George Kresovich in the county, and particularly that the policy of insurance issued to Kresovich by the Allstate Insurance Company was not in the county.

A hearing was had and the county court sustained the petitions for revocation of the letters of administration and dismissed the proceeding. An appeal was taken from this judgment to the district court. The district court reversed the judgment of the county court and remanded the cause with directions to that court to set aside the order revoking the letters of administration and with further direction to hear and determine claims of creditors filed. From this judgment of the district court the appeal herein has been taken. The appeal is by Anne Marie Kresovich and Allstate Insurance Company.

It becomes clear from an examination of the record and the briefs that for the purposes of the consideration here no statement of facts is required in addition to the brief review already set out herein. As to those reviewed the parties are in substantial accord and they

furnish the basic background for the decision in this case.

The appellants in their statement of questions involved say: "Does an automobile indemnity insurance policy create a debt which becomes an estate of the deceased insured sufficient to create a basis for administration of his estate in the absence of a judgment against the insured or his representative on behalf of a creditor for a risk covered by the policy?"

There are other points in the statement but whether or not they require consideration depends upon the proper answer to this question.

So that there may be no confusion, it is pointed out that the question of venue or of the institution of proceedings in Lancaster County, Nebraska, rather than Cherry County, Nebraska, where the collision occurred, is not presented by the briefs. The question is limited to that of jurisdiction in Lancaster County because the Allstate Insurance Company, though an Illinois corporation, is under proper authority conducting its business there.

The answer to the question propounded by the appellants depends primarily upon whether or not an automobile indemnity insurance policy creates an asset of a deceased insured who is charged with tortious liability for injury and damage to a third person or persons growing out of the use and operation of the automobile described in the insurance policy, prior to a trial and adjudication of liability and damage in an action based upon the tort; whether or not, if the domicile of the deceased is in a jurisdiction other than the one where the tortious act and the death of the insured occurred, administration may be had and action maintained against the administrator to recover for injury and damage in the jurisdiction where the alleged tortious act occurred; whether or not the insurance liability of the insurer is at that location an asset of the insured; and whether or not administration may be had and

action maintained where the insurer is properly carrying on its business.

These propositions have not in their entirety been passed upon in this jurisdiction. This court however is committed to the theory that a cause of action for wrongful death is a sufficient estate or asset to justify the appointment of an administrator. In Missouri P. Ry. Co. v. Bradley, 51 Neb. 596, 71 N. W. 283, in dealing with this question, it was said: "The authority of the county court did not rest alone upon the few articles of personal property already mentioned which the deceased had upon his person when he died, since the cause of action against the railroad corporation was sufficient estate to justify the appointment of an administrator, had there been no other estate to be administered." No case has been found wherein there has been a departure from this pronouncement.

This court however has not passed upon the question of whether or not the liability, or claimed liability, of an alleged nonresident tort-feasor and his insurance carrier is an estate or asset sufficient to support the appointment of an administrator.

There are two diametrically opposed lines of authority in other jurisdictions. The leading cases wherein it was held that where there was only a charge of liability it could not be said that there was an estate or asset sufficient to support the appointment of an administrator are: In re Estate of Rogers, 164 Kan. 492, 190 P. 2d 857; In re Roche, 16 N. J. 579, 109 A. 2d 655; Wheat v. Fidelity & Casualty Co. of New York, 128 Colo. 236, 261 P. 2d 493. The courts of five other jurisdictions have rendered decisions bearing in some measure on this question and in some measure supporting it, but none of them are directly in point, hence they will not be cited herein.

The first of these three cases decided was In re Estate of Rogers, *supra.* The basic reasoning in the three cases is similar. In that light only the comments in that case

will be reviewed here. In that case the court, in the opinion, said: "The answer (to the question the court was called upon to decide) depends upon whether (1) the indemnity policy, prior to the establishment of the insured's liability for damages, by judgment or agreement, constitutes an asset of the insured's estate; and (2) if it does, is the situs of that asset in Kansas after the death of the insured or does its situs, upon his death, become fixed in the state of his domicile?" In answer the court took the position that the insured's liability for damages did not constitute and could not become an asset of his estate until after judgment or agreement of liability. It was held that the situs for enforcement of liability was the domicile of the deceased.

Attention is called to the fact that the pronouncement that the insured's liability is not an asset and would not support an administration proceeding in Kansas is contrary to the holding of this court in Missouri P. Ry. Co. v. Bradley, *supra.*

On the other side of the proposition are the following cases from the indicated jurisdictions: Robinson v. Carroll, 87 N. H. 114, 174 A. 772, 94 A. L. R. 1437; Gordon v. Shea, 300 Mass. 95, 14 N. E. 2d 105; In re Vilas' Estate, 166 Or. 115, 110 P. 2d 940; Furst v. Brady, 375 Ill. 425, 31 N. E. 2d 606, 133 A. L. R. 558; Liberty v. Kinney, 242 Iowa 656, 47 N. W. 2d 835; Miller v. Stiff, 62 N. M. 383, 310 P. 2d 1039; Kimbell v. Smith, 64 N. M. 374, 328 P. 2d 942. There are other cases cited which tend to support this viewpoint but which are not wholly in point. For this reason they are not set out here.

As was done with regard to the cases on the other side of the proposition involved here the reasoning on which the courts came to their conclusion will not be detailed herein. They each did however, as we interpret, hold that in an instance where a motorist who was domiciled in one state and had indemnity insurance, as was true in the case here, went to another state and had an accident which resulted in his death which

it was claimed flowed from a tortious act of such owner, and caused injury and damage to another or other persons, the insurance was an estate and asset of the deceased which was sufficient to permit and support administration in the jurisdiction where death occurred.

The main distinction between this and the cases holding to the contrary, again as we interpret, is that in the cases to the contrary it was concluded that the policy of insurance in and of itself was not an estate or asset and could not so become unless and until a right of recovery had been adjudicated in favor of a party injured and damaged and against the estate of the insured; whereas under this line of authority the contract of insurance was an asset owned by the insured from the date the contract was entered into, and remained such and followed him until his death, after which it became estate of the insured in the jurisdiction where he came to his death. In other words the contractual assumption of prospective liability of the insured by the insurer became an asset of the insured in his lifetime and of his estate on his death.

After consideration of the reasoning contained in the cases wherein the question of whether or not automobile indemnity insurance of a deceased alleged tortfeasor who came to his death in this state is an asset and estate of the deceased sufficient to sustain administration in this jurisdiction, the conclusion arrived at is that it is so sufficient and it is so determined. This reasoning finds support in Missouri P. Ry. Co. v. Bradley, *supra,* wherein, as already pointed out, it was held in effect that an unliquidated claim of liability in this jurisdiction amounts to an estate and asset which will support administration.

It appears pertinent to remark that it is difficult to see how the claimed liability of Kresovich could be treated as an asset and estate, but the insurance for which he contracted whereby that liability was transferred to the insurer, with authority of a person injured

and damaged to proceed directly against the insurer after judgment fixing liability and damage, could not be treated likewise as an asset and estate. Surely the insurance was an asset.

The assignments of error present the question of whether or not the insurance policy was a sufficient asset of the estate to provide a basis for administration in Lancaster County, Nebraska. The question of venue was before the district court by pleading but only the question of the state's jurisdiction as distinguished from venue has been presented here by argument in the briefs. Venue will not therefore be considered.

It appears to be conceded, though not with certainty, that if there is sufficient estate to be administered in this state administration is allowable in this jurisdiction. If in this connection we are mistaken, the interpretation of Missouri P. Ry. Co. v. Bradley, *supra,* of what is now section 30-314, R. R. S. 1943, is authority for permission of administration in any county in the state where there was estate to be administered.

The next question is that of whether or not, for the purpose of supporting administration, the insurance was an estate and asset of the decedent in the State of Nebraska.

The Allstate Insurance Company, in which the decedent was insured, is an Illinois corporation and at all times mentioned maintained an agency in Lincoln, Lancaster County, Nebraska. This is declared by appellants in their brief. Citation is not necessary in this light to say that it was subject to service of process in this county and state.

With regard to where proceedings could be maintained where a nonresident insured tort-feasor came to his death, it was substantially pointed out in Robinson v. Carroll, *supra,* that the proceedings could be maintained where the insurance company was amenable to process. The same position was generally taken in Gordon v. Shea, *supra;* In re Vilas' Estate, *supra;*

Furst v. Brady, *supra;* Liberty v. Kinney, *supra;* Miller v. Stiff, *supra;* Kimbell v. Smith, *supra.*

The precedent of these cases, if followed, makes of Lancaster County, Nebraska, the proper county and state within which to maintain the proceeding. They are sustained by sound reasoning and will be followed here.

It follows of course that the holding here should be and is that the district court did not err in overruling the judgment of the county court dismissing the administration proceedings.

The district court overruled the dismissal of the proceeding and also remanded the cause to the county court for further proceedings. The appellants requested of this court, if it found that the dismissal was not proper, that it require that the administrative proceeding be held for complete disposition by the district court instead of being remanded to the county court. In the brief of appellees no impropriety in a direction that the matter be heard in its entirety in the district court is suggested.

There would be no question about the propriety if the appeal from the county court was from some step taken with regard to a matter in a proceeding over which the county court clearly had administrative jurisdiction, instead of as here where the basic question is that of whether or not the county court had any jurisdiction to entertain or maintain the proceeding.

Section 30-1606, R. R. S. 1943, provides: "Upon the filing of such transcript (from the county court) in the district court, that court shall be possessed of the action, and shall proceed to hear, try, and determine the same, in like manner as upon appeals brought upon the judgment of the same court in civil actions; * * *." See, also, In re Estate of Marsh, 145 Neb. 559, 17 N. W. 2d 471; Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614.

The case of Ribble v. Furmin, 71 Neb. 108, 98 N. W. 420, was one wherein a claim was filed in a valid administration proceeding. It was denied on the ground

that it was filed out of time and the court had no jurisdiction to entertain it. On appeal it was determined that it was not out of time. As to whether or not it should be sent back to the county court for trial the court said: "A judgment of the district court upon such an appeal, remanding the cause to the county court with direction to 'permit the filing of the claim and to set a day for hearing, and to proceed to hear and pass upon the same,' is not the proper judgment, but a hearing in the district court on such claim should be had in the same manner as though the appeal had been from an order disallowing the claim upon hearing before the county court."

In Egan v. Bunner, 155 Neb. 611, 52 N. W. 2d 820, this court said: "It has long been established in this jurisdiction that county courts have exclusive original jurisdiction of all matters relating to the settlement of the estates of deceased persons, and that the only jurisdiction thereof which the district court can acquire is by appellate procedure. However, an appeal from the county court when perfected confers upon the district court in the matter appealed the same power possessed by the county court. After the district court becomes so possessed of the case, the county court has no further jurisdiction over the issues so removed. If there should be another trial of the case it must be in the district court which shall proceed to hear, try, and determine the same as provided by sections 30-1606, R. S. Supp., 1951, and 30-1607, R. R. S. 1943, and as provided therein the result, not the case itself, shall be certified back to the county court."

In the present instance, however, a petition for administration was filed. Thereafter claims were filed. After this the appellants filed their petitions for abatement and dismissal of the proceedings. The petitions were sustained. The claims of course followed the abatement and dismissal of the petitions. In the light of this it becomes apparent that the basic issue was

jurisdiction over the subject matter of the administration proceeding. The question then arises: Does the fact that claims were filed in the county court before that court held that it was without jurisdiction of the administrative proceeding and before appeal to the district court make them a part of the action within the meaning of the statute quoted and an issue in the matter from which appeal was taken within the meaning of Ribble v. Furmin, *supra,* and Egan v. Bunner, *supra?*

No direct answer has been found to this question in the cases from this court. The conclusion reached however is that reasonably it ought not to be said the mandatory declaration of law that county courts have exclusive original jurisdiction of all matters relating to the settlement of estates of deceased persons has been met in the absence of opportunity to present the merits of the claims.

This conclusion is not in real conflict with the holdings in Ribble v. Furmin, *supra,* and Egan v. Bunner, *supra.* In neither of those cases was jurisdiction of the proceeding in the county court brought into question. In the former there was a question of whether or not the district court was empowered to conduct a hearing and make a determination on a claim filed in a valid proceeding in the county court wherein in the county court it was held that no jurisdiction to hear the claim existed, but wherein there was a reversal by the district court. In the latter case also the jurisdiction of the administration proceeding was not brought into question.

The case of Anheuser-Busch Brewing Assn. v. Hier, 55 Neb. 557, 75 N. W. 1111, though not directly in point, appears to contain a statement of principle to which the matter involved here is related. In that case it was said: "A cardinal principle governing courts in the administration of justice is that the power to make valid orders is only co-existent with jurisdiction of the cause."

In the present case the only question before the dis-

trict court on appeal was that of whether or not the county court had jurisdiction of the administrative proceeding. No actual order was made which coexisted with the order of the county court abating and dismissing the proceeding. If it be said that the effectual dismissal of the claims by the determination upon the question of jurisdiction amounted to a coexistent order, it was not valid for the reason that it was inconsistent with the judicial denial by the county court of jurisdiction and contrary to the principle that valid orders are only those which are consistent with jurisdiction of the particular matter which is before the court for consideration. The county court was not therefore ousted of its original exclusive jurisdiction to hear and adjudicate the claims filed.

The request that the case be retained for the determination of issues by the district court should be and is denied.

The judgment of the district court is affirmed.

AFFIRMED.

EDWIN BELL, APPELLEE, V. WILLIAM H. CROOK, APPELLANT.
97 N. W. 2d 352

Filed June 19, 1959. No. 34546.

1. **Automobiles: Highways.** A motorist is justified in assuming that highway signs, having the appearance of regularity, were erected by proper authority.
2. **Highways.** If it is established that stop signs have been at a highway intersection for a considerable period of time and have been recognized by the users of the intersecting roads as designating one of them a favored highway, it will be presumed, until the contrary appears, that the signs were installed by competent officials acting upon authority of law.
3. ———. An arterial highway is not deprived of its character or status because stop signs on an intersecting road are temporarily displaced or otherwise made invisible.
4. **Automobiles: Highways.** If a motorist knows of the through character of a highway, the presence or absence of warning

signs is immaterial as respects his negligence in failing to yield the right-of-way.

5. ———: ———. A motorist traveling on a favored highway may assume that traffic on an intersecting secondary highway will yield the right-of-way, and the effect of his right to rely on this assumption is not lost because warning signs have been temporarily misplaced or removed.

6. ———: ———. The requirement in this state is that when a motorist enters an intersection of two highways he is obligated to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a motor vehicle not shown to be in a favored position, the presumption is that its driver will respect the right-of-way of the motorist and the question of his contributory negligence in proceeding to cross the intersection is a question for the jury.

7. **Highways.** All travelers are required to exercise due care in coming to and crossing an intersection of public highways.

8. **Automobiles: Highways.** The rule that the failure of the driver of an automobile upon approaching an intersection to look for vehicles approaching the same intersection, where, by looking, a collision could be avoided, constitutes negligence more than slight as a matter of law and operates to defeat a recovery is subject to certain limitations. It was not intended to make a person entering a favored intersection an insurer against a collision irrespective of the negligence of the other party.

9. ———: ———. The driver of a motor vehicle approaching a highway protected by stop signs must stop before going upon it, look to his left and to his right, and permit vehicles to pass which are at a distance and traveling at a speed that it would be imprudent for the motorist to proceed into the intersection.

10. ———: ———. There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching and entering a favored highway intersection acted with due care.

11. **Negligence: Trial.** The trial court must without request charge the jury as to each issue presented by the pleadings and the evidence in the cause, including the affirmative defense of contributory negligence.

12. ———: ———. Each specific charge of contributory negligence pleaded and supported by proof must be by proper instruction submitted to the jury for its determination, and the failure to do so is error.

13. **Automobiles: Highways.** The restrictions of subsection (4), section 39-7,108, R. R. S. 1943, include speed limitations upon the prima facie lawful speeds fixed for any highway outside of a city or village. They impose a duty to decrease speed to less

than the prima facie lawful speeds when the conditions described exist and they characterize conditions by virtue of which the prima facie lawful speeds are unsafe and unlawful.

14. **Automobiles: Trial.** An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question.

15. ———: ———. In the trial of an action concerning the collision of motor vehicles on an intersection of a favored highway and a nonfavored road which involves issues of negligence and contributory negligence, the jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the motor vehicles in approaching and crossing the intersection.

APPEAL from the district court for Richardson County: CLOYDE B. ELLIS and VIRGIL FALLOON, JUDGES. *Reversed and remanded.*

Paul P. Chaney and *Healey, Davies, Wilson & Barlow,* for appellant.

C. Russell Mattson and *Jean B. Cain,* for appellee.

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

BOSLAUGH, J.

The substance of the petition on which this cause was tried is exhibited by these statements: Appellant was on December 28, 1956, the owner of a Buick sedan automobile which was used in such a manner as to cause the owner of it to be subject to the family purpose doctrine. His son, Thomas William Crook, 18 years of age, lived in the home of his father and operated the automobile at the times important to this litigation with the permission of his father for a purpose for which it was owned by him. The son was a careless and reckless person and a careless and reckless operator of the automobile, of which appellant had knowledge, but in disregard thereof he permitted his son to have and operate it.

Appellee on that date was driving a Ford pickup truck, owned by him and his wife as joint tenants, in a proper manner southerly on a county road toward the intersection of it and an east-and-west road known as Stone Corner about 5 miles north and east of Falls City. Appellee entered the intersection. The automobile operated by Thomas William Crook traveling from the west was driven into the intersection in a careless and negligent manner and into and against the truck operated by appellee.

The north-and-south road at the place of the accident and north and south thereof was then and had been prior thereto an arterial road and was protected by stop signs erected on roads intersecting with it. Appellee and the public traveling on the north-and-south road believed that it was a favored highway protected by stop signs requiring all traffic entering it from the east and the west to stop before doing so.

The stop sign on the west of the intersection at Stone Corner was on December 28, 1956, and had been for a short time prior thereto knocked down and displaced and it was and had been in that condition without notice to or knowledge of appellee or others using the north-and-south road. It was known to Thomas William Crook before and on that date that the north-and-south road was a favored road protected by stop signs as aforesaid. He knew the stop sign on the west side of Stone Corner was displaced but he also knew that appellee and others traveling on the favored highway would assume that vehicles on the east-and-west road would stop before they or any of them would enter the intersection at Stone Corner.

The automobile operated by Thomas William Crook was not stopped before it entered the intersection and it was negligently driven against and into the truck of appellee therein. The collision of the vehicles and the injuries to and disability of appellee were caused by the negligence of Thomas William Crook which con-

sisted of his failure: To yield the right-of-way to appellee who had first entered the intersection and was then traveling on a favored highway; to stop before he entered the intersection; to maintain a speed that was reasonable and proper under the circumstances and that was not in excess of 60 miles per hour; to have his automobile under reasonable control; to keep a proper lookout for other traffic on the highway; and to exercise care and caution in approaching and entering the intersection. Appellee because of the negligence of Thomas William Crook suffered serious injuries and permanent disability. The truck of appellee was destroyed and he asked damages from appellant in a specified amount.

Appellant by answer admitted the ownership of the Buick automobile by him and that it was on December 28, 1956, at about 1:40 p. m. operated by his son upon an east-and-west road in Richardson County; admitted the ownership of the truck as stated by appellee which he was operating at that time in a southerly direction on a north-and-south road in the named county; and admitted that the vehicles were at the time approaching an intersection about 5 miles northeast of Falls City known as Stone Corner. Appellant therein asserted that the Buick automobile entered the intersection first; that appellee carelessly and negligently drove his truck upon and against the automobile of appellant; and that the negligence of appellee, detailed in the answer, was the cause of any injuries or damages he sustained because of the collision of the vehicles.

This appeal is from the order of the trial court which denied the motion of appellant for judgment notwithstanding the verdict or, in the alternative, for a new trial.

The record contains evidence tending to establish the following matters: Appellant was on December 28, 1956, the owner of the Buick automobile involved in the accident which is the occasion of this litigation.

It was owned and maintained by him for the use, benefit, convenience, and pleasure of his family. A son of appellant then lived in the family home and was 18 years of age. He was operating the automobile of his father for a family purpose for which it was owned and maintained and with the consent and knowledge of his father at the time of the accident which happened at an intersection known as Stone Corner.

The home of appellee was northeast of Barada. He was operating a Ford truck, which will be designated the truck, on a north-and-south county graveled road in a southerly direction north of its intersection with an east-and-west highway at a location known as Stone Corner about 5 miles northeast of Falls City on the afternoon of December 28, 1956. It was a clear, dry day. The intersecting highways were each 30 feet between the shoulders and each was in good condition. The territory at and surrounding the intersection known as Stone Corner was level and free of obstructions to vision. A traveler from the north or from the west had a clear view for a quarter of a mile of the road west and of the road north, respectively, of the intersection.

Appellee had traveled the north-and-south road at that location and for a distance of about 15 miles north from where it intersects with Highway No. 4 for about 17 years, during which time the north-and-south road was a through or arterial highway protected by stop signs on either side of it at the intersections of it by east-and-west roads. There was during this time a stop sign on the west side and one on the east side of the intersection known as Stone Corner. Appellee was on the day of the accident traveling south towards the intersection on a trip to White Cloud, Kansas. He had no memory from the time he was a few miles north of Stone Corner until afterwards when he was in the hospital at Falls City and a cast was being cut from his arm. He had no remembrance of approaching Stone Corner or anything about the accident. The last thing

he could recall before the collision was seeing a man who lived a few miles north of Stone Corner and at that time appellee was on the right-hand or west side of the road traveling south. He did not know and could not tell how fast he was traveling but he said that he knew he had the right-of-way. His truck was in good condition before the collision. The weight of the truck was about 4,000 pounds and the weight of the Buick car was slightly less.

Thomas William Crook, hereafter called Crook to distinguish him from his father, the appellant, and a classmate and guest of Crook were on the afternoon of December 28, 1956, at about 1:30 p. m., traveling east on the east-and-west road towards Stone Corner in the automobile of appellant, hereafter referred to as the Buick. It was operated by Crook and to his right in the front seat was his guest. The speed of the Buick on the trip until it came to a bridge west of Stone Corner was 70 or 75 miles per hour. The speed was decreased for the bridge and was not more than 55 to 60 miles per hour thereafter until it was within about a block of the intersection known as Stone Corner when the speed of it was further decreased. Either immediately before the Buick reached the bridge or just after it was crossed, the guest of Crook had been turning the dial of the Buick radio and Crook also attempted to do something concerning the operation of the radio. Crook told his guest during that trip that he had been over the road they were traveling the night before, taking home a friend of his.

When the Buick was about a quarter of a mile west of the intersection the guest saw a truck approaching from the left. It was traveling from the north towards the intersection. The truck was about the same distance from the intersection as the Buick was. The Buick decreased its speed as it neared the intersection. The truck was traveling in the middle of the road and it and the Buick reached and entered the intersection

at approximately the same time. The speed of the Buick was about the same or a little less than the speed of the truck. There is no evidence that Crook looked for traffic as he approached and entered the intersection or that he saw or knew of the truck until immediately before the collision when he swerved the Buick to the right and about that time the truck struck the Buick on its left front end and it started to turn over. Crook did not stop the Buick before he entered the intersection. The stop sign which had been installed on the west side of the intersection was at that time displaced and was in the ditch south of the road. The guest of Crook did nothing to call his attention to the truck as it was traveling towards and into the intersection.

The deputy sheriff of Richardson County learned of the accident at about 1:40 p. m., went immediately to the scene of it, and made an investigation. There were no skid marks made by either of the vehicles concerned in the accident. There was a scarred place about 1½ feet long and 2 inches deep in the intersection. It was 2 feet west and about 2 feet south of the center of the intersection. The truck after the accident came to rest 42 feet from that location at the southeast corner of the intersection, and the Buick traveled 92 feet from the scarred place in the intersection and stopped about on the south property line of the east-and-west highway east of the intersection. The vehicles were extensively damaged. The north-and-south road had a rock surface and the main-traveled portion of it was about in the center of it. The stop sign which had been installed on the west of the intersection had been mashed down and was displaced at the time of the collision of the vehicles. The deputy sheriff found no debris or marks in the intersection other than the scarred place described above.

A witness was traveling from the west and came upon the scene of the accident soon after it occurred. Ap-

pellee was lying in the road about 30 feet east of the truck. The body of Crook was south of the Buick about 10 feet in the field. Another person, referred to as the other boy, presumably the guest of Crook, was then in the ambulance. The stop sign west of the intersection was knocked down, was misplaced to the east, and was in the ditch. There were indications that a vehicle had displaced it. The witness had lived in that vicinity for 56 years and he knew that there had been stop signs at the intersection for 17 years. He estimated that the stop sign had been displaced a couple of days. He saw it shortly before the accident and he was surprised that it had been knocked down before the day of the accident. The stop sign was down 5 years previously when another accident occurred at the intersection. The stop signs at this intersection were up and down at different times. It was his recollection that the stop sign on the east of the intersection was also displaced on December 28, 1956.

A member of the county board said that during his tenure of 8 years in that position he had been acquainted with the north-and-south road and the Stone Corner intersection. The road north from Highway No. 4 had stop signs on it during that period. He was at the intersection on the Sunday before December 28, 1956. The west stop sign was down and he then put it back in place. He had erected the stop sign several times while he was a member of the county board. He estimated this was as much as five or six times each year. The sign on the Sunday before the accident appeared to him to have been pulled up but not pushed over. This was true lots of times. He never saw the west sign knocked down. It was pulled out. The one on the east appeared to have been knocked down.

A few nights before the accident Crook and three of his friends traveled the east-and-west highway from the west to the Stone Corner intersection and beyond. Crook was operating the automobile. One of the guests

desired to leave the automobile temporarily and he asked Crook to stop. The automobile had entered the intersection. It was stopped and backed off of the intersection. One of the young men was a witness and on direct examination he could not remember any conversation then had about the stop sign. He knew there was a stop sign at that intersection but he could not say he saw it that night. Later on further examination the witness admitted that he had made a statement on February 26, 1957, that there was conversation about a stop sign at the Stone Corner intersection to the effect that the stop signs were lying in the ditch and that Crook slowed as he came there but was about halfway in the intersection when someone in the automobile spoke about the stop sign. Crook stopped the automobile and backed up where he should have stopped before he entered the intersection. After that they went on east from the intersection.

Appellant lived in Falls City and was a bridge, paving, and soil conservation contractor. He operated from Kansas to North Dakota. He was assisted by his son, Thomas William Crook, when he was not in school. He worked on different crews, operated trucks, and drove his father's automobile on trips he had to make on engagements away from Falls City. These trips were more frequent than two times a week and usually at night. The son operated the automobile and his father would sleep on the trip. The son worked generally 6 days a week or a total of 60 hours but this varied depending on whether the work was interrupted by weather conditions. A fair average was 50 hours per week. During the school months the son drove his father two or three trips each month. The son operated trucks in Kansas and Nebraska but principally in Richardson County. He was well acquainted with the roads in that county. Thomas William Crook and Melvin Voegele, who was 17 years of age and lived on a farm northeast of Rulo, were close and intimate friends. They were

frequently together and went back and forth from Falls City to where Melvin Voegele lived. The trip Crook made a few nights before the accident described above, which was later identified as the Saturday before Christmas of 1956, was from Falls City to the home of Melvin Voegele. He was taken home by Crook. The east-and west road past the Stone Corner intersection was traveled in going and returning that night. It is a permissible inference that that road was frequently used by Crook in going between Falls City and the home of Melvin Voegele and returning therefrom to Falls City. Crook knew the nature of a highway stop sign and what it required. He knew the nature of an arterial highway protected by stop signs. Appellant testified he was certain that his son knew his duties and obligations when he approached a stop sign when traveling into an arterial highway.

Previous experiences of Crook were indicative of some of his practices as an operator of an automobile. He was charged in the police court with a stop sign violation of a city ordinance of Falls City on February 26, 1955, pleaded guilty, and was assessed a penalty and costs which he paid. He was charged in the same court with reckless driving of an automobile on June 6, 1955, in violation of an ordinance of the city, pleaded guilty, and was assessed a penalty and costs which he paid. He was charged in the same court with a stop sign violation on June 24, 1956, of an ordinance of the city, pleaded guilty, and was assessed a penalty and costs which were paid. When the reckless driving charge was heard appellant asked the police judge to suspend the driver's license of his son and the judge did order it suspended for 30 days. Later appellant asked the judge if he could not take the license of his son. The judge said he could not without noting the fact on the license and sending it to the state. The judge did not think the offense was sufficient to justify such action.

A pending motion of appellee recites that he has dis-

covered that a judgment has not been rendered in accordance with the verdict and he asks that the cause be by this court remanded to the district court in which the trial was had to afford him an opportunity to seek the rendition of a judgment nunc pro tunc. A case brought to this court by an appeal may not be remanded to the district court in which the trial was had for further proceedings therein while the appeal is pending and undetermined in this court. Generally there may not be simultaneous dual jurisdiction of a case.

A judgment on the verdict nunc pro tunc is not available because a judgment in the case has not been rendered. A nunc pro tunc order is to make the record speak the truth. Its function is not to supply some affirmative action of the court which should have been but was not taken. Its true purpose is to complete the record so it will exhibit action actually had but which through inadvertence or mistake was not entered in the record. Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475; North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 149 Neb. 823, 32 N. W. 2d 869. The omission of the rendition and entry of a judgment was not the default of any duty of the clerk of the district court as the motion asserts. The special circumstances of this case required the trial court to order what judgment should be entered in the case. § 25-1314, R. R. S. 1943.

The right to appeal did not depend upon the rendition and entry of a judgment on the verdict. The absence of such a judgment is not significant in respect to this appeal. The order in this case denying a new trial was an appealable order. § 25-1315.02, R. R. S. 1943; Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130; Mueller v. Keeley, 163 Neb. 613, 80 N. W. 2d 707. The pending motion should be and is denied.

There is a page following the end of the brief of appellee entitled "ADDENDUM" for the purpose, as he says, to point out "a possible defective Bill of Ex-

ceptions herein." Appellee asks no relief in that respect. The trial of the case to and including the return, receipt, and filing of the verdict was had before Judge Ellis. He died while the motion of appellant for judgment notwithstanding the verdict or, in the alternative, for a new trial was pending. The parties thereafter stipulated that the motion should be heard and adjudicated by Judge Falloon, that he had been furnished a transcript of the evidence produced before Judge Ellis which the parties agreed was a true transcript thereof, and that the transcript of the evidence should be allowed and settled as the bill of exceptions in the case by Judge Falloon. He heard and denied the motion. The transcript of the evidence was timely served and returned in the time and manner provided by law. The parties stipulated in the transcript that it contained all the evidence offered and received and all the proceedings had before Judge Ellis and that Judge Falloon should allow and settle it as the bill of exceptions in the case, which he timely did.

The possible defect suggested is that a section of the statute provides in the case of the death of a judge "before whom the cause was tried" it should be the duty of the clerk to settle and file the bill. § 25-1140.06, R. R. S. 1943. Another section of the statute requires the bill of exceptions to be presented to and settled by "the judge who heard or tried the case." § 25-1140.05, R. R. S. 1943.

This appeal is from the adjudication made in the case after Judge Falloon had been furnished all the evidence produced and all the proceedings had before Judge Ellis in the case. It is of this adjudication that appellant complains in this court. Schields v. Horbach, 40 Neb. 103, 58 N. W. 720, considered a motion to quash a bill of exceptions on the ground, among others, that it was not signed by the judge who presided at the trial of said cause. This court said: "The first objection is not well taken. The order excluding the attorney from

appearing in the case was made by Judge Ogden, and the latter could properly settle the bill of exceptions relating to that part of the proceedings, notwithstanding he did not preside at the trial of the case upon the merits. The statute contemplates that the judge who makes the decisions, of which complaint is made, should sign the bill of exceptions * * *." Judge Falloon, under the circumstances of this case, was, within the statute, the judge who heard and tried it and he was authorized to settle the bill of exceptions.

The decision referred to by appellee, Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N. W. 2d 630, is not in point. Judge Frum tried and entered a decree in that case. He died. Judge Raun succeeded him and he settled the bill of exceptions. The opinion does not indicate that Judge Raun performed any other act or had any other connection with the case. He did not make the adjudication from which the appeal was taken. The opinion mentions that the parties did not stipulate as to the bill which was settled by Judge Raun.

An important issue in this case is whether or not there was evidence from which the jury could find that the north-and-south road was at the place of the accident an arterial or favored highway by having stop signs normally erected on the intersecting road at the Stone Corner intersection and at its other intersections even though sometimes the stop signs were displaced or were otherwise not in their normal visible position. There was evidence that for as long as 17 years the north-and-south road from Highway No. 4 for a distance of about 15 miles north had stop signs installed at the locations where it was intersected by other roads. The Stone Corner intersection was one of the places where the north-and-south road was protected by the erection of stop signs on the east and west of it. These facts were known to appellee as he traveled towards the intersection on the day of the accident and because of that he thought he had the right-of-way

over other traffic which entered and traversed the intersection. The north-and-south road had not been designated a favored highway by the county board or any public body. It had been considered and respected by the public as an arterial road. There was evidence that these facts were known to Crook before and at the time of the accident. In any event the evidence was of a character that an inference to that effect was permissible. There were quite frequent occasions when stop signs at various locations along the highway were displaced, not in their normal visible position, and temporarily remained in that condition. The stop signs at the Stone Corner intersection were known to have been displaced as many as five or six times in a yearly period. At the time of the accident, the occasion of this litigation, each of the stop signs was displaced and the west one was pulled up and was lying in the ditch along the road. Appellant asserts because of these circumstances that the north-and-south road at the location of the accident was then only an unprotected, unfavored county road. Appellee believes that it was a favored highway protected by stop signs and that its character was not changed, destroyed, or suspended because some of the stop signs were at times displaced and were not visible to travelers on the highway. Travelers using the highway had a right to assume that the stop signs along it were installed by proper authority.

In King v. Gold, 224 Iowa 890, 276 N. W. 774, it is said: "A motorist has a right to assume that highway signs having the appearance of regularity have been erected by proper authority."

Rogers v. Jefferson, 223 Iowa 718, 272 N. W. 532, contains the following: "There is no testimony in the record casting any light on the question as to who actually put these signs (a SLOW sign and a STOP sign) in their then location, but it may be fairly assumed that no one but the officers of the law in charge of the enforcement of highway regulations had anything to

do with it. In any event, we think that appellee's son was warranted in assuming that the 'SLOW' sign against which appellant was proceeding was placed there by proper authority, and that he was entitled to take it into consideration in determining his movement toward the intersection."

The court said in Trimble v. Bridges, 27 Tenn. App. 320, 180 S. W. 2d 590: "Where evidence disclosed that stop-sign had been at intersection for at least four years, in absence of any evidence to contrary, it was presumed that sign was placed there by competent officials in exercise of statutory authority * * *."

An arterial highway is not deprived of its character or status because a stop sign on an intersecting road is temporarily displaced or otherwise rendered invisible.

Connors v. Dobbs, 77 Ohio App. 247, 66 N. E. 2d 546, discusses this subject in this manner: "Plaintiff Connors, possessed of knowledge that Hawkins avenue was a main thoroughfare, had a right to rely on that knowledge and upon his preferential right to proceed uninterruptedly across its intersection with Bryden drive, until such time as, in the exercise of ordinary care, he became aware of defendant's intention not to stop before entering the intersection. Then he was required to exercise ordinary care not to injure Dobbs. * * * Dobbs, under these circumstances, was by law required to stop before entering the intersection, and his failure so to do was negligence. * * * A proper sign having been erected, Dobbs was charged with knowledge of the designation of Hawkins avenue by ordinance as a main thoroughfare, even in the then absence of a stop sign; and the evidence would warrant the inference that he had actual knowledge that Hawkins avenue, at the place of collision, was so designated, and that, even though he was approaching from plaintiff's right, he was required to come to a full stop before entering said intersection."

Titus v. Braidfoot, 226 Ala. 21, 145 So. 423, states:

"Mere temporary removal or destruction of sign indicating character of highway, designated by city ordinance as boulevard, does not change character thereof."

In Rowan v. Becker, 73 S. D. 273, 41 N. W. 2d 836, it is stated: "Under this record but little importance can be attached to the absence of one stop sign on the east side of the highway where the accident occurred. The respondent lived in the immediate vicinity of the town of Agar. He knew that Highway No. 83 was a designated arterial highway. There were at least two stop signs on the intersection to the east of the highway crossing plainly visible to travelers approaching said crossing from the east. He had ample notice that he was approaching an arterial highway."

Metzger v. Moran, 1 Wash. 2d 657, 96 P. 2d 580, declares: "When the proper authority has established an arterial highway and notified its existence to the public by the erection of a stop sign, any one approaching the arterial from an intersecting street is presumed to know that it is such and required to obey the statutory injunction to stop. He cannot be heard to say he did not know of the existence of the sign, or that he could not see it. * * * The proof offered by the appellants, which the court refused, tended to show that, after the accident, they left their car and went back to the stop sign, where they saw the parked cars. * * * The respondent, driving on the arterial street, for whose protection the stop sign was posted, had a right to assume that the law would be obeyed. If the appellants could have excused their failure to stop by showing that parked cars interfered with their seeing the sign, other drivers failing to stop could, with equal reason, urge that their view was interrupted by passing vehicles to their right. The purpose of the law can be accomplished only by imputing to the driver knowledge of the existence of the sign and full responsibility for failure to stop before entering the arterial."

Flannery v. Tessaromatis, 91 Ohio App. 215, 108 N.

E. 146, states: "* * * that a motorist involved in a collision at an intersection with an automobile approaching from the left on an arterial highway can not be heard to say that he did not know of the existence of the stop sign or that he could not see it; and that a motorist driving on an arterial street has the right to assume that the law will be obeyed and that the motorist approaching the intersection from the cross-street will stop before crossing."

Jones v. McCullough, 148 Kan. 561, 83 P. 2d 669, states: "The defendant insists he was not obliged to stop, because there was no stop sign on the north side of the intersection, and a police ordinance provided that no provision of the stop-sign ordinance should be enforceable against an alleged violator if, at the time and place of the alleged violation, the sign was not in a proper position and sufficiently legible to be seen by an ordinarily observant person. Obviously, such a police ordinance, while it would be effective to relieve the violator from prosecution and fine, could not change the character or nature of streets and thoroughfares which were expressly designated by another ordinance as constituting principal streets and rights of way. Nor could it vitiate still another ordinance which in no way related to the stop-sign ordinance, and which gave plaintiff the right of way where he first entered the intersection or where he and defendant entered it at the same time."

Annotation, 162 A. L. R. 927, contains the following supported by numerous citations: "A motorist proceeding along a favored highway is entitled to assume that traffic on an intersecting secondary highway will yield him the right of way, and the effect of his right to rely on this assumption is not lost because warning signs have been misplaced or removed, or signal lights are not functioning properly. * * * If, of course, a motorist knows of the through character of a highway, the presence or absence of warning signs is immaterial

as respects his negligence in failing to yield a right of way."

In 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 998, p. 242, this language appears: "That the usual marker or sign erected to inform travelers of the superior character of an intersecting road is temporarily removed or destroyed does not change the character of the road nor affect the usual incidents appropriate to such road, such as its conferring the right of way upon traffic flowing along it as against that on intersecting roads * * *. A driver has the right to assume, unless he knew otherwise, that a sign has been erected by the proper authority."

The trial court was correct in concluding that the north-and-south road at the place of the accident was an arterial or favored highway. The jury was, under the circumstances of this case, justified in finding as it did that Crook knew before the accident that the Stone Corner intersection was protected by stop signs and that the north-and-south road was an arterial highway. There is evidence that Crook knew the significance of such a highway, that he knew the purpose and requirements of stop signs erected to protect a favored highway for travelers thereon, and that he knew his duty and responsibility as a motorist traveling on a secondary road approaching and entering its intersection with a favored or arterial highway.

Appellant argues that the contributory negligence of appellee was more than slight as a matter of law and that the motion of appellant for a directed verdict or for judgment notwithstanding the verdict should have been granted by the trial court. This hypothesis assumes that the intersection was not protected by stop signs and that the north-and-south road at the intersection had lost its status as an arterial highway. Appellant then says that the vehicles involved in the collision reached and entered the intersection about the same time, that the automobile of appellant was to the

right of appellee, that it had the directional right-of-way, and that it was in the favored position and entitled to the immediate use of the intersection. The defect in this is that the north-and-south road had not lost its character as an arterial highway at the time of the accident and Crook was not in a favored position as he approached, entered, and traveled in the intersection. The issue of contributory negligence of appellee was in these circumstances one for determination by the jury. In Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617, the defendant made the identical argument in this respect as is relied upon by the appellant in this case. The defendant in that case said that its driver in approaching the intersection from the right had the right-of-way, that there was no evidence that the plaintiff entered the intersection first, and that plaintiff was negligent in entering the intersection with knowledge that a truck was approaching and in not watching for it. This court denied the validity of that contention. It said: "The rules in this state are that when a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question."

Appellant contends that if the doctrine above discussed is applicable and if appellee was in a favored position because he assumed that the road he was on was an arterial highway, nevertheless his conduct was such that he was precluded from any recovery as a matter of law. The basis for this conclusion is the duty imposed by law upon a motorist approaching an intersection even though the motorist is in a favored position. All travelers are required to exercise due care in coming to, entering, and traversing an intersection of

public highways. Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482; Pankonin v. Borowski, 167 Neb. 382, 93 N. W. 2d 41.

The following from Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, is appropriate in considering this contention of appellant: "This court has held that the failure of the driver of an automobile, upon approaching an intersection, to look for vehicles approaching the same intersection, where, by looking, a collision could be avoided, constitutes negligence more than slight as a matter of law and operates to defeat a recovery. * * * But this rule is subject to certain limitations. It was not intended to make a person entering a street intersection an insurer against a collision irrespective of the negligence of the other party. * * * In the instant case the plaintiff approached the intersection from the defendant's right, and, consequently, had the right of way over all cars approaching from the left which had not entered the intersection ahead of her. * * * Plaintiff had the right to assume that the driver of any car approaching the intersection in an unfavored position would take the steps necessary to permit her to clear the intersection. * * * There is no evidence * * * that defendant's car first entered the intersection and thereby became the favored car * * *. The proper rule is that when a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. * * * If he fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right of way and the question of his contributory negligence in proceeding to cross the intersection is a jury question." See, also, Pupkes v. Wilson, 165 Neb. 852, 87 N. W. 2d 556; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571; Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820; Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67.

The duty of Crook, because of the circumstances

present, was to stop the Buick before he entered the intersection and not to have moved into it until he could have done so without hazard to appellee. § 39-729, R. S. Supp., 1957; § 39-754, R. R. S. 1943; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854. There is evidence that appellee as he was traveling toward but several miles north of the intersection on the day of the accident had in mind that he had the right-of-way on the road he was using over a traveler entering it from a non-favored road. Appellee had a right to assume that Crook would obey his duty to stop when he came to the intersection and allow appellee to cross it safely until he had warning that Crook would not do so. Thereafter appellee was required to use due care not to injure Crook. Appellee was not required to assume that Crook would do an unlawful or negligent act. Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Styskal v. Brickey, *supra.*

Appellant complains that he alleged that appellee did not keep a proper lookout as he came to and entered upon the intersection and that the trial court failed to submit that specification of contributory negligence to the jury. Appellant also asserts that appellee did not look to his right as he came to and entered upon the intersection or he looked and did not see the Buick which was in plain view or he saw it and did nothing to avoid the collision. There is no evidence that appellee did not look to his right or that he did not maintain a lookout for traffic approaching the intersection from the west. The absence of memory prevented him from saying what the facts were in this regard. Crook survived the accident by only a few days and he was not available as a witness. The guest in the Buick with Crook did not notice what appellee was doing as he traveled about the last quarter of a mile before the collision. The guest testified only as to what the truck of appellee was doing while the witness saw it before the collision. There is no presumption that appellee was

negligent. The burden was on appellant to prove the contributory negligence charged by him against appellee, a specification of which was his failure to keep a lookout.

In Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832, this court observed: "It is a question of fact as to the negligence of the parties as to what they did or did not see, or what they should or could have seen."

Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673, states: "The only other allegation of negligence charged against the defendant is that he failed to keep a proper lookout. The record is devoid of any evidence on this subject unless it can be inferred that the happening of the accident is evidence of it. This, of course, is not the case, as negligence must be affirmatively established." The presumption, since there is no evidence to the contrary, is that appellee did have a proper lookout as he came to and entered the intersection.

Price v. King, 161 Neb. 123, 72 N. W. 2d 603, contains the following: "The defendants contend primarily that the evidence shows Nellie Price was guilty of negligence more than slight as a matter of law when compared with the negligence of the defendants. The only negligence shown on the part of Nellie Price was that she was driving fast. * * * Whether she was negligent in failing to keep a proper lookout, or in failing to yield the right-of-way, is dependent upon the facts proved, and consequently is a matter for the jury. The presumption is that she used due care. There is a natural presumption that everyone will act with due care. The mere fact that an accident happens does not prove contributory negligence. Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed." See, also, Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470; Bailey v. Spindler, 161 Neb. 563, 74 N. W. 2d 344; Engel v. Chicago, B. & Q. R. R. Co., 111 Neb. 21, 195 N. W. 523; Chase v. Chicago, B. & Q. Ry.

Co., 91 Neb. 81, 135 N. W. 430; 20 Am. Jur., Evidence, § 217, p. 214. The trial court was correct in its conclusion that appellee was not guilty of contributory negligence as a matter of law and that there was no issue for the jury as to whether or not appellee looked for traffic from the west as he came to and entered the intersection.

The answer of appellant charged that the collision of the vehicles was proximately caused by the negligent acts of appellee as he approached and entered upon the intersection which were in part as follows: Excessive and unlawful rate of speed of more than 60 miles per hour in disregard of the safety and well-being of others upon the highway; the operation of his truck at a speed greater than was reasonable and proper without regard for the traffic and use of the highways and the intersection and especially as they were then being used by Crook; and failure of appellee to reduce the speed of his truck or to stop it before its collision with the Buick operated by Crook when appellee saw or by reasonable care should have seen the Buick coming to and entering upon the intersection.

The trial court undertook to instruct the jury as to the statutes of the state regarding the speed of motor vehicles under varying circumstances and conditions. Appellant contests the correctness of the instruction and asserts that it is defective and prejudicial. Therein it was stated that no person shall drive a vehicle on a highway at a greater speed than is reasonable and prudent under the circumstances then existing and that a speed of 60 miles per hour is prima facie a lawful speed on a highway between the hours of sunrise and sunset. This was followed by the statement: "The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when special hazards exist with respect to other traffic, and speed shall be decreased as may be necessary to avoid colliding with any

person * * * on or entering the highway in compliance with the legal requirements, and the duty of all persons to use due care." The language of subsection (4) of section 39-7,108, R. R. S. 1943, is as follows: "The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection * * * or when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased 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 * * *." The instruction omitted the limitation and restriction of the statute that the fact that the speed of a vehicle was less than the prima facie limits should not relieve the driver from the duty to decrease speed "when approaching and crossing an intersection." This was an important and material omission in this case. That specific limitation and restriction was involved in the charges of contributory negligence made by appellant against appellee that he operated his truck at an unlawful rate of speed of more than 60 miles per hour in coming to and going upon the intersection, that the speed of appellee was greater than was reasonable and proper under the circumstances then existing, and that appellee failed to use any care to reduce the speed of his truck or to stop it before its collision with the Buick when he saw or should have seen the Buick coming to and entering the intersection. There was evidence tending to prove these charges. The intersection was unobstructed. Appellee could have seen and was charged with the obligation of seeing the Buick when he was as much as a quarter of a mile north and the Buick was about an equal distance west of the intersection. This opportunity and duty continued to the time of the collision. The truck was driven by appellee down the center of the

road at about 55 to 60 miles per hour without decreasing its speed, attempting to stop, or to do anything to avoid or prevent the collision. The speed of appellee, his acts, and omissions, as alleged by appellant and supported by the evidence, were an issue in the case. Any violation of the statute by appellee was a fact to be considered by the jury with all the other evidence in deciding the existence and degree of any contributory negligence of appellee. A correct applicable instruction was mandatory.

The court must without request properly instruct the jury upon each material issue presented by the pleadings and evidence, including the affirmative defense of contributory negligence. Each specific charge of contributory negligence pleaded and supported by proof should be by the instructions submitted to the jury for its determination and a failure to do so is error. Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839.

The restrictions of subsection (4) of section 39-7,108, R. R. S. 1943, are speed limitations upon the prima facie lawful speeds fixed for any highway outside of a city or village. They impose a duty to decrease speed to less than the prima facie lawful speeds when the conditions described exist. They characterize conditions by virtue of which the prima facie lawful speeds are unsafe and unlawful. Krepcik v. Interstate Transit Lines, *supra.* The material applicable limitations and qualifications upon speed contained in the statute should all be included in an instruction on that subject to enable the jury to know and understand the duty of drivers in approaching and crossing an intersection of highways.

In Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333, it is stated: "In Hamblen v. Steckley, 148 Neb. 283, 27 N. W. 2d 178, this court concluded that a similar instruction, given under circumstances comparable with those at bar, was prejudicially erroneous. Therein it was held: 'An instruction reciting the provisions

of statutes regulating and controlling the speed of motor vehicles should include therein all the material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question.' "

In Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557, this court said: "An instruction on speed should always contain all material applicable limitations and qualifications thereon as contained in statutes or ordinances as they relate to the factual situation with which the jury is confronted."

In the trial of an action concerning the collision of motor vehicles on an intersection of a favored highway and a nonfavored road which involves issues of negligence and contributory negligence, the jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the motor vehicles in approaching and crossing the intersection. Bezdek v. Patrick, *supra.* Appellee when he was coming to and entering the intersection was obligated to decrease the speed of his truck and was required, notwithstanding his favored position, to not only look for an approaching vehicle but to see the automobile which was in plain sight and which was coming from the west to the intersection. Burhoop v. Brackhan, *supra.* The instruction as to speed was erroneous in the respect discussed above and the omission therein was prejudicial to appellant.

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

REVERSED AND REMANDED.

IN RE APPLICATION OF ARTHUR G. MILLER, DOING BUSINESS AS MILLER'S TRANSFER.
ARTHUR G. MILLER, DOING BUSINESS AS MILLER'S TRANSFER, MINDEN, NEBRASKA, APPELLEE, V. CONSOLIDATED MOTOR FREIGHT, INC., ET AL., APPELLANTS.

97 N. W. 2d 265

Filed June 19, 1959. No. 34573.

1. **Public Service Commissions: Appeal and Error.** An order issued by the State Railway Commission takes effect from the time prescribed therein and continues in force unless the order is annulled, revised, or modified by the commission, or set aside by a court of competent jurisdiction.
2. ———: ———. On an appeal to the Supreme Court from an order of the State Railway Commission granting a certificate of public convenience and necessity the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or not the order complained of is reasonable and not arbitrary.
3. **Public Service Commissions: Motor Carriers.** The burden is on an applicant for a certificate of public convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity.
4. ———: ———. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.

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

Viren, Emmert, Hilmes & Gunderson, for appellants.

Robert E. Powell, for appellee.

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

MESSMORE, J.

Arthur G. Miller, doing business as Miller's Transfer, appellee, hereinafter referred to as Miller, filed an ap-

plication with the Nebraska State Railway Commission, hereinafter referred to as the commission, on March 6, 1958, wherein Miller sought an extension of his regular route certificate of public convenience and necessity authorizing the transportation of commodities generally, except those requiring special equipment, other than refrigeration, between Minden and Hastings, Nebraska, over certain specified routes set forth in his application. By this application Miller sought to serve two additional towns, Minden and Heartwell, as a regular route common carrier by motor vehicle.

On May 27, 1958, Consolidated Motor Freight, Inc., of Hastings, Nebraska, and Burlington Truck Lines, Inc., of Galesburg, Illinois, appellants, hereinafter referred to as protestants, filed a formal protest objecting to the granting of the application of Miller.

On July 1, 1958, an examiner for the commission filed a report with the commission wherein he recommended that Miller's application be granted in its entirety.

On July 7, 1958, the protestants filed exceptions to the examiner's report and recommendation.

On July 28, 1958, oral argument on the objections filed by the protestants to the examiner's report and recommendation was had before the commission.

On August 1, 1958, the commission entered its order sustaining the exceptions filed by the protestants to the examiner's report, overruled the examiner's report, and denied Miller's application in part.

On September 8, 1958, Miller filed a "motion for rehearing and reconsideration" of the commission's order entered August 1, 1958.

On September 9, 1958, a motion for rehearing of the commission's action of August 1, 1958, was filed by the protestants.

On September 24, 1958, the protestants made request in writing that their motion for rehearing filed under date of September 9, 1958, be withdrawn. This request was granted by the commission.

On September 22, 1958, hearing was had on Miller's motion for rehearing and reconsideration before the commission.

On November 11, 1958, the commission issued its order in which it sustained Miller's motion for reconsideration, vacated and set aside its prior order dated August 1, 1958, approved the examiner's report as previously referred to, and granted Miller's application in its entirety.

The protestants predicate error on the following: The commission's order of November 11, 1958, sustaining Miller's motion for reconsideration was unlawful, null, and void for the reason that the commission had no jurisdiction to sustain motions for reconsideration.

The protestants, in addition, set forth several assignments of error. However, for the purpose of this appeal, these assignments of error may be summarized as follows: The commission erred in failing to consider or determine the adequacy of existing service being offered or rendered by existing regular route carriers in the area involved in the application; and the commission erred in authorizing the issuance of a certificate of public convenience and necessity to the applicant Miller in that the action of the commission in this respect was arbitrary, unreasonable, contrary to law, and not sustained by competent probative evidence.

With reference to the protestants' assignment of error relating to the jurisdiction of the commission to sustain Miller's motion entitled "motion for rehearing and reconsideration," the protestants make reference to Article IV, section 20, of the Constitution of this state, which provides in part: "There shall be a State Railway Commission, * * *. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law."

Protestants direct attention to section 75-406, R. R. S. 1943, which provides in part: "The procedure to ob-

tain such reversal, modification, or vacation of any such order or regulation made and adopted, upon which a hearing has been had before the State Railway Commission, shall be governed by the provisions in force with reference to appeals from the district courts to the Supreme Court of Nebraska; Provided, no motion for a new trial shall be required to be filed, but instead a motion for rehearing shall be filed * * *."

In the case of In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, it was said: "In conformity with the constitutional provision, the legislature has the right to prescribe how the Nebraska state railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate." See, also, In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552; R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177.

The protestants argue that without taking any additional evidence the commission, arbitrarily and without any reasons therefor, reconsidered the action previously taken by it in which it made a finding that the evidence did not warrant the granting of a certificate of public convenience and necessity to Miller, then, as heretofore pointed out, subsequently the commission determined that the evidence taken before the examiner did warrant the granting of a certificate of public convenience and necessity as prayed for by Miller in his application filed with the commission; and that section 75-406, R. R. S. 1943, contemplates a rehearing, and not a reconsideration, for the reason that section 75-405, R. R. S. 1943, in effect, provides that if any railway company, common carrier, or person affected thereby, shall be dissatisfied with the decision of the commission affirming, revising, annulling, or modifying any decision of the commission, the common carrier or person affected may institute proceedings in the Supreme Court to revise, vacate, or modify the order complained of. Therefore,

in consideration of sections 75-405 and 75-406, R. R. S. 1943, there is a jurisdictional defect, and the commission is without authority to reconsider its action as it did in the instant case.

Section 75-225, R. R. S. 1943, reads in part as follows: "Jurisdiction is hereby conferred upon and vested in the State Railway Commission, and it shall be its duty * * * (3) to administer, execute and enforce all other provisions of said sections, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration, *except that proceedings before the commission,* appeals to the Supreme Court, and the enforcement of orders by the commission shall be governed in all respects by sections 75-401 to 75-423; * * *." (Emphasis supplied.)

Section 75-415, R. R. S. 1943, relates to orders of the commission, what such orders shall contain, how they shall be prepared and served on the parties of interest, and when such orders shall become effective.

Section 75-416, R. R. S. 1943, provides in part: "The order or orders provided for in sections 75-412, 75-413 and 75-415 shall be in force and effect from and after the date fixed by the State Railway Commission, and shall so remain until annulled, modified or revised by the commission, or until finally adjudged to be unreasonable and unjust in a court of competent jurisdiction, * * *."

In the case of Airline Ground Service, Inc. v. Checker Cab Co., 151 Neb. 837, 39 N. W. 2d 809, this court said: "Under the provisions of section 75-416 the order takes effect from the time prescribed and continues in force for the time specified unless the order is annulled, revised, or modified by the commission, or set aside by a court of competent jurisdiction."

The applicant in the instant case, as previously stated, filed a motion entitled "motion for rehearing and reconsideration" in which the applicant prayed the commission to reconsider its action previously taken as

shown by its order dated August 1, 1958, to vacate and set aside such order, and to approve the examiner's report. This is exactly the action the commission took. The applicant was not appealing from any decision of the commission to a higher court. The commission still retained jurisdiction over the subject matter of the entire proceedings.

We are unable to find any statutory provision which specifically prohibits the commission from reconsidering any action it may have taken on any orders that it may have previously issued, especially so under the circumstances as shown in the instant case. We conclude that the protestants' assignment of error is without merit.

This brings us to the protestants' other assignments of error above set forth. In this connection, the following are applicable.

In the case of Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665, 90 N. W. 2d 268, it was held: "On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission granting a certificate of public convenience and necessity, the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or not the order complained of is reasonable and not arbitrarily made." See, also, Houk v. Peake, 162 Neb. 717, 77 N, W. 2d 310.

"The burden is on an applicant for a certificate of convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity." Houk v. Peake, *supra.*

"In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing car-

riers contrary to public interest." Canada v. Transit, Inc., 154 Neb. 256, 47 N. W. 2d 507. See, also, Moritz v. Transcontinental Bus Lines, Inc., 153 Neb. 206, 43 N. W. 2d 603.

For convenience, the protestant Consolidated Motor Freight, Inc., will be referred to as Consolidated.

The record discloses that Miller owns and drives a commercial truck, and holds authority from the commission to engage in this type of business. He testified that he purchased this authority a little over a year prior to the hearing before the examiner, which occurred on June 2, 1958, and has been conducting operations under this authority since that time. Miller operates a 1957 Ford van with an 18-foot box, and would not need to add new equipment if his application was granted. Miller conducts all of his business from his home in Minden, and his wife keeps his books. He does not advertise in the Minden directory, but maintains a telephone in his residence. At Hastings he interlines with all trucks, and docks at the Interstate Freight Lines terminal free of charge. Interstate Freight Lines takes his telephone calls. He has been performing truck service on a regular route basis 6 days a week, and performs on irregular authority occasionally, on a call and demand basis. Miller leaves Minden between 6:30 and 7 a.m., each morning, and arrives at Hastings between 8 and 8:30 a.m. He leaves Hastings between 11:30 and 11:45 a.m., and normally returns to Minden between 2:30 and 4 p.m., the same day. He testified that he has had quite a number of requests during the past year from various shippers at Minden and Hastings to pick up freight for them; that the particular reason he is requesting authority to serve Minden on a regular route basis is because of the call and demand for freight service; that the towns on the east end of his route are small and there is not enough freight moving to enable him to make a living; that in the event his application is granted he could serve Minden on a regular

route basis which would benefit him financially; and that he intends to operate generally on the same schedule between Minden and Hastings as he has previously operated. He would continue to make pickups at various terminals at Hastings. The granting of the application would result in one round-trip between Minden and Hastings on approximately the same schedule as heretofore set forth, and would enable Miller to eliminate 18 deadhead miles per day and to operate over better highways and roads than those over which he presently operates.

C. G. Lehmkuhl testified that he is engaged in the retail hardware and furniture business in Minden and has been so engaged for 25 years. He obtains supplies from Hastings, Omaha, and Lincoln. He gets very little furniture from within the state. Most of his hardware comes from Omaha and Hastings, and some from Lincoln. He carries 1,500 items of hardware in his store, which come from Omaha and Hastings. In intrastate shipments, he tries to control how the items he needs are to be delivered. In obtaining commodities from Omaha and Hastings, he uses mostly motor carriers, and once in a while shipments come by rail. With reference to Hastings, he would like to have commodities coming from there delivered the next day. He further testified that his store probably carries the largest inventory of miscellaneous merchandise in Minden; that on shipments originating in Omaha and destined to Minden, he usually routes them by Interstate Freight Lines so they can be brought to Minden by Miller; that he has one account in Hastings from which he gets many commodities, and this firm has instructions to give this business to Miller if possible, for the reason that the same day delivery out of Hastings is definitely of assistance to him; that the need for such shipments occurs quite frequently; that Consolidated brings commodities to him quite frequently; and that he has also received goods from the Red Ball Truck Company, and it is

possible that he has received goods from Buckingham Freight Lines and also from the Burlington Truck Lines out of Omaha. He gains 1 day by using Interstate Freight Lines and Miller out of Omaha. That is important because he handles many items, and there is always some item short, and the quicker he can get it, or other items, the better and more satisfactory it is for his business. It would be an advantage if Miller could supply daily service from Hastings, because his timing is such that if this witness knew something was wanted in the morning, he could receive delivery of it in the afternoon. He had been unable to get that kind of service from Consolidated because their timing was such that their truck left Hastings too early. Consequently, he would lose a day in the delivery of commodities by using Consolidated. He would make use of Miller's service, and the same would be beneficial to him. Previously he used the service of the Vannier Truck Line, but this service was discontinued. Vannier offered the same type of service that Miller proposes, which was satisfactory and desirable, and he preferred this type of service to that presently furnished by Consolidated.

John G. Oder testified that he is engaged in the business of running a Ford dealership known as Pioneer Motor Company in Minden. In Nebraska, he buys automotive parts and accessories which are delivered by truck, and these items come mostly from Hastings. He tries to direct the routing on shipments which come from Hastings. On this type of service, he prefers Miller's Transfer for the reason that if he calls for parts in the morning, he will have them delivered to him at Minden in the afternoon. This service is essential to his business for the reason that if there is a broken-down automobile in the shop and parts are needed for it, he wants to get those parts as soon as possible. Consequently, he would use Miller's service, and would continue to use Consolidated service as occasion for its service might be required. He further testified that in the past

there was daily service out of Hastings furnished by Bert Vannier. Vannier and some other lines consolidated, and the service that he had been getting from Consolidated since the merger or consolidation was not the same type of service he obtained from Vannier. It is an advantage to him to have 6-day service, as his business is open Saturdays until 9 p.m.

Lester Nelson testified that he is employed as manager of the Farmers Union Oil Company which operates a bulk plant and service station. This business is located in Minden. It sells gas, oil, tires, tanks, hoses, and about every item a farmer needs. This business gets all of its tires from Hastings, also small automotive parts like radiator hoses, tire patches, and other items of similar nature. He prefers Miller for delivery service, particularly in the tire line, for the reason that there are many sizes of tires on the market and his company is forced to carry a large inventory of tires. If Miller could render daily service, he could often obtain such merchandise as he might need by the middle of the afternoon, and by reason thereof could reduce his inventory on tires. In the past he used the service of Bert Vannier, which was very good. He would like to have the same type of service put in operation now, and he knew of no carrier but Miller who could give that kind of service, that is, delivery the same day out of Hastings.

Raymond S. Hendricks testified that he is an automobile repairman engaged in such business in Minden. His work principally consists of straightening automobile bodies, painting cars, installing glass, and fixing wrecked car bodies. He obtains various commodities such as glass, car parts, and fenders from Hastings. He does not carry much of an inventory. He uses Miller's service when possible, and has used such service on emergency shipments. This witness previously used the Vannier service, which was satisfactory, and he

would like to have the same type of service restored at this time.

Clarence Bauer testified that he lives in Minden, runs a garage, and distributes automotive parts. He has engaged in this business since 1931. He obtains most of his supplies from Hastings and Omaha. He has used the service of Consolidated from Hastings. He prefers Miller's service on account of the convenience, and because he can obtain delivery from Hastings the same day. Such service is a necessity to his business, because he has emergency calls for automotive parts quite often. If he is unable to supply these parts, customers usually go to other towns to obtain such service. Prior to a couple of years before this hearing, he used Vannier's service nearly every day, and would like to have that type of service restored again. He would use Miller's service, and would also use Consolidated service because it hauls parts and appliances for his business.

Arthur Jeppson testified that he is a well driller who drills wells and repairs pumps and windmills. He often obtains his supplies from Omaha, Beatrice, Hastings, and sometimes from Grand Island. He has used the service of Consolidated from Omaha to Minden. Such service is a little bit later, and he would not get the items that he needed until the following day, whereas if he could use Miller's service he could get the items the same day in the afternoon. He used Vannier's service, which was very satisfactory. He would like to have the same type of service available now, and would use such service if it was available. He would make use of Miller's service out of Hastings.

Alfred Ivor Petersen testified that he lived in Minden and was the manager of the Glantz Manufacturing Company. The business of the company is primarily the manufacture of mechanical hand tools which are shipped to many points in the United States. In shipping, this plant uses both motor carrier and rail services out of Minden. He was acquainted with Consolidated, and used

its service for moving commodities. He testified that such service was satisfactory.

Paul A. Warp testified that he lived in Minden and operated the Warp Publishing Company, engaged in publishing and distributing educational books. In the distribution of these books, he shipped by using motor carrier and rail service in and out of Minden. He was acquainted with and used the services of Consolidated, and found this service satisfactory. He testified further that there was no need for different or additional service, insofar as his operation was concerned.

John Bowman testified that he was the secretary-treasurer of Consolidated Motor Freight, Inc.; that it has been engaged in the transportation business approximately 2½ years; that it was a consolidation of a number of companies, namely, Hastings Transfer Company, Overnight Express Company, and Vannier Transfer; and that the present Consolidated Motor Freight, Inc., holds authority to operate between Omaha and McCook, serving all intermediate points between Lincoln and McCook, including Grand Island and Hastings. This service operates on a schedule basis. It owns 8 pick-up and delivery trucks, 12 tractors, 8 of which are over-the-road tractors, and 15 semi-trailers, and provides daily service to and from Omaha and Lincoln, except on Saturday. A tractor-trailer unit leaves Hastings at 4:30 a. m., goes to McCook, and returns to Hastings. At 6 o'clock every morning a tractor-trailer unit leaves Hastings for Minden and Holdrege and return. At 8:30 a. m., a tractor-trailer unit leaves Hastings for Lincoln and return. At 10:30 a. m., a tractor-trailer unit leaves Hastings for Grand Island and return. At 2:30 p. m., the first unit goes out of Hastings for Omaha; at 3:30 p. m. the second unit leaves; and at 5:30 p. m. the third unit leaves. From Omaha west, the units leave Omaha in the evening and arrive at Hastings during the night. He further testified that Consolidated previously conducted service similar to that of Vannier, but discon-

tinued the service because of lack of volume of business. Consolidated would restore the same service if the volume of business would warrant it, and was willing to furnish such service, if requested. This witness further testified that Consolidated would restore the service previously offered by Vannier only in the event the volume of freight would warrant the re-establishment of such service, and this volume would need to be from 10,000 to 15,000 pounds daily. This witness testified that he did not know where his company could obtain such a volume of freight delivery to warrant re-establishing the service previously offered by Vannier.

From the record it is apparent that such volume of freight as testified to by the witness Bowman is presently not available, and is unlikely to develop in the immediate future. It also appears from the record that the existing motor carriers serving Minden are unwilling to give the shipping public located at Minden the kind and type of service needed for proper conduct of the business of the shipping public, except if they may prescribe the terms and conditions, that is, by a guaranteed specific volume of freight.

In Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464, it is said: "In this instance there appears no order of the commission requiring the existing carriers to provide adequate service. Such an order was not required for here the certified carriers able to render adequate service clearly indicated an unwillingness to furnish the required service except under conditions as to time of service, cost, and adequacy which the carriers desired to control or unless otherwise they could find assurance of profitable operations. The commission accepted the alternative and issued a certificate to an applicant found, and shown without dispute, to be fit, willing, and able properly to perform the service required by the shipping public. Its decision in this regard cannot be held to be unreasonable or arbitrary."

We also held in Richling Transport Service v. Transit,

Inc., 154 Neb. 108, 47 N. W. 2d 413: "Furthermore, the statute requires that the finding that applicant is fit, willing, and able to perform the proposed service, and that such service is or will be required by the present or future public convenience and necessity, must be sustained by evidence showing that the granting of the certificate was not arbitrary or unreasonable." See, also, Bee Line Motor Freight v. Petersen & Petersen, Inc., 153 Neb. 517, 45 N. W. 2d 465.

In the light of the evidence and the authorities heretofore cited, we affirm the order of the commission.

AFFIRMED.

KENNETH BRIERLY, APPELLANT, V. FEDERATED FINANCE COMPANY, A CORPORATION, ET AL., APPELLEES.
97 N. W. 2d 253

Filed June 19, 1959. No. 34582.

1. **Appeal and Error.** 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.
2. ———. 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 the bill of exceptions, its existence or contents cannot be considered by this court.
3. ———. In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

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

E. D. Warnsholz, for appellant.

Wagener, Marx & Galter, for appellees.

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

WENKE, J.

This is an action in equity filed by Kenneth Brierly in the district court for Lancaster County against Federated Finance Company, both as a corporation and as a partnership. The plaintiff, by this action, seeks to have cancelled an alleged promissory note executed by him on December 18, 1956, in the amount of $965.60 and the return of all payments he has made under and pursuant thereto because, as he claims, its provisions violate certain of the inhibitory provisions of the Nebraska Installment Loan Act, being sections 45-114 to 45-158, R. R. S. 1943, as amended. In answer thereto the defendants filed a general denial.

After issues were thus joined both plaintiff and defendants filed motions for summary judgment. The trial court had a hearing upon these motions and in consideration of the pleadings, depositions, interrogatories, admissions, and affidavits on file found there was no genuine issue as to any material fact and that defendants, by reason thereof, were entitled to a judgment as a matter of law. It thereupon sustained defendants' motion for summary judgment and rendered judgment for the defendants, dismissing plaintiff's petition. This was done under and pursuant to the authority granted the trial court by section 25-1332, R. R. S. 1943.

Plaintiff thereupon filed a motion for new trial and has perfected this appeal from the overruling thereof. Appellant says that it is his position that the trial court erred in overruling his motion for summary judgment and sustaining that of appellees, stating: "There is only one relevant question of fact to be decided: Did the promissory note and chattel mortgage executed by plaintiff on December 18, 1956, in favor of Standard Motor Company in the face amount of $965.60 represent a bona fide good faith time price of the Chevrolet auto-

mobile purchased or did it represent a loan of money?"

There is no bill of exceptions. In view thereof the following apply: "Requests for admissions and the answers thereto cannot be considered by this court unless contained in a bill of exceptions." Johnson v. School Dist. No. 3, *ante* p. 547, 96 N. W. 2d 623. "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. * * * 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. * * * 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." Peterson v. George, *ante* p. 571, 96 N. W. 2d 627. "In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment." Johnson v. School Dist. No. 3, *supra.*

Applying the foregoing principles to the record before us we find the judgment of the trial court must be affirmed.

AFFIRMED.

ALVINA WISCHMANN ET AL., APPELLEES, V. RALPH RAIKES, APPELLANT.

97 N. W. 2d 551

Filed June 26, 1959. No. 34368.

1. **Judgments.** It is a fundamental principle of jurisprudence that material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.
2. ———. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
3. **Waters.** The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.
4. **Judgments.** An adjudication by this court extends to all matters decided expressly or by necessary implication and not alone to the questions actually and formally presented but to all existing in the record and necessarily involved in the decision.
5. ———. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.
6. **Actions.** A litigant may not be permitted to split a cause of action or present an issue for determination and avoid the effect of an estoppel by withholding proof of it.
7. **Equity.** It is a well-settled principle of equity jurisprudence that, 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.
8. ———. The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the

beginning of the litigation, but at the time the decree is rendered.

9. **Damages: Trial.** It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict, otherwise the jury may be confused and misled.

10. **Damages.** If the owner of lands is prevented from planting any part or all thereof by reason of conditions caused by the unlawful or negligent conduct of another, his measure of damages on that account may be either the reasonable rental value or use value thereof for the season or seasons when he cannot do so because of such conditions.

11. **Crops: Damages.** In case of the destruction of a perennial crop the measure of damages is the difference between the value of the land immediately before the injury, with the crop growing thereon, and the value of the land immediately after the destruction of the crop.

12. ———: ———. The measure of damages, when a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another, is the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing.

13. **Judgments.** The pleadings and judgment, but not the opinion of the appellate court, may be introduced in evidence to support a plea of res judicata.

14. **Trial: Appeal and Error.** A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error.

APPEAL from the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. On rehearing. See 167 Neb. 251, 92 N. W. 2d 708, for original opinion. Original opinion withdrawn. *Reversed and remanded.*

Kennedy, Holland, DeLacy & Svoboda, Gross, Welch, Vinardi & Kauffman, Malcolm D. Young, William P. Mueller, and *Bryant, Christensen & Sullivan,* for appellant.

John J. Edstrom, Nelson & Harding, and *Duane W. Acklie,* for appellees.

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

WENKE, J.

On rehearing we have come to the conclusion we were in error in two areas in our original opinion herein released on October 31, 1958, and reported in 167 Neb. 251, 92 N. W. 2d 708. We therefore withdraw that opinion and substitute therefor the following.

On June 10, 1954, Willy Wischmann and Alvina Wischmann, husband and wife, brought this action in the district court for Saunders County against Ralph Raikes. Willy Wischmann died on April 17, 1956, and the action, as to him, was revived in the name of Alvina Wischmann as the administratrix of his estate.

The purpose of the action is to recover monetary losses which the Wischmanns claim they suffered by reason of the loss of the use of their lands since 1945 and for injury to their crops, livestock, and fences since that time. The Wischmanns contend their losses resulted from the defendant digging channels and constructing dikes and levees on his lands whereby he unlawfully obstructed the flow on his lands of the floodwaters flowing in the flood planes of Mosquito, Wahoo, and Silver Creeks, as they cross his lands, and the natural flow of Silver Creek, and thereby causing such waters to flow over and across plaintiffs' lands where it had not been wont to flow prior to such channels being dug and dikes and levees being constructed. The trial court limited the plaintiffs' right of recovery to damages, if any, they had suffered after June 10, 1950, that being 4 years prior to the institution of this action. The jury returned a verdict for the plaintiffs in the sum of $10,000 "for loss of use of the land."

Defendant filed both a motion for judgment notwithstanding the verdict and for new trial. He perfected this appeal from the overruling thereof. The

trial court entered a judgment on the verdict for the plaintiffs.

Appellees were at all times herein material the owners of the northeast quarter and the north half of the southeast quarter, north and east of a railroad right-of-way, of Section 21, Township 13, Range 9, in Saunders County, Nebraska. Appellant was at all times herein material the owner of the northwest quarter and the northeast quarter of the southwest quarter of Section 18, all of the east half of Section 18, south and west of the railroad right-of-way, and all of the west half of Section 17, south and west of the railroad right-of-way, in Township 13, Range 9, Saunders County, Nebraska. The railroad right-of-way referred to above is the Ashland-Prague branch of the Chicago, Burlington & Quincy Railroad Company.

Appellant contends there was no sufficient and proper proof adduced to support or substantiate any of appellees' claims that any activities on his part were in fact a proximate cause of any of their claimed injuries and damage for the years in question; that is, that appellees have failed to prove any causal connection between their claimed damage and the diversion of floodwaters. The burden of proof to sustain their cause of action devolved on the appellees. However, "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." Smith v. Platte Valley Public Power & Irr. Dist., 151 Neb. 49, 36 N. W. 2d 478. See, also, Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603.

On May 7, 1952, Ernest G. Bahm and Mabel E. Bahm, husband and wife, Theodore Sohl, Willy Wischmann, and Alvina Wischmann filed an action in the district court for Saunders County against Ralph Raikes. Therein the plaintiffs alleged the defendant had dug channels

and erected dikes and levees on his lands that unlawfully diverted floodwaters of Mosquito, Wahoo, and Silver Creeks from the flood plane thereof over and across plaintiffs' lands and also diverted the natural flow of Silver Creek from Wahoo Creek into Ab's Lake from where it flowed across plaintiffs' lands. Plaintiffs therein alleged: "That by reason of the acts of the defendant, as herein alleged, the plaintiffs have suffered irreparable injury and damage to the lands described in paragraph I herein, have lost crops growing on said lands and have been prevented from cultivating and farming parts of said lands; that the acts of the defendant will continue to cause irreparable injury and damage to said lands and crops." Paragraph "I" therein referred to describes the tracts of land owned by each of the several plaintiffs. It includes the Wischmanns' 240-acre tract. It will be observed that this is the same cause of action as pleaded herein.

The plaintiffs then prayed: "* * * that the defendant, his agents and servants, be enjoined and restrained from diverting the natural flow of Silver creek onto and upon the lands of the plaintiffs and from diverting the flow of flood waters of Wahoo, Mosquito and Silver creeks onto and upon the lands of these plaintiffs and from maintaining the dikes and levees erected and constructed as herein alleged, and that said defendant be ordered to remove said dikes and levees constructed and erected by him, his agents and servants, to return the flow of waters of Silver Creek to the course that existed at the time defendant purchased said real estate and for many years prior thereto and as herein alleged, and, with respect to the drainage of the waters of Wahoo, Mosquito and Silver creeks, to restore his said lands to the same level and condition as at the time said lands were purchased by said defendant and before said dikes and levees were erected and constructed and as they had existed for many years prior thereto, and to open the natural course of Silver creek

as the same existed on the lands of the defendant at the time said lands were purchased by said defendant and for many years prior thereto. Plaintiffs further pray * * * for such other and further relief and orders as may in equity be required."

An answer was filed thereto by Raikes and issues joined. Trial was had in December 1953, and January 1954. On February 15, 1954, the trial court rendered its decree finding generally for the plaintiffs and specifically: "That the defendant has diverted the flow of Silver creek from its natural course so that it now flows over and across the lands of the plaintiffs and where it would not flow, but for the work of the defendant; that the defendant has obstructed the flood channel across his land and diverted the flow of flood waters from Mosquito creek, Silver creek and Wahoo creek from the natural flood channel and onto the lands of the plaintiffs. That plaintiffs have suffered irreparable injury. That plaintiffs will continue to suffer irreparable injury if the defendant is permitted to maintain the dikes constructed by him and to continue to divert the flow of Silver creek from its natural course and to continue to divert the flow of flood waters from said creeks onto the lands of the plaintiffs." To prevent such injury from continuing the trial court ordered Raikes to do certain things to restore the situation to its former status and then ordered: "* * * that defendant be, and he hereby is, enjoined from maintaining the dikes along the present courses of Wahoo and Mosquito creeks which are above ordered to be removed and from diverting the natural flow of Silver creek and from diverting the flow of flood waters of Wahoo creek, Mosquito creek and Silver creek from the flood channels west and south of Wahoo creek as it flows through said lands of the defendant."

Raikes appealed therefrom to this court. We affirmed the judgment of the trial court. Bahm v. Raikes, 160 Neb. 503, 70 N. W. 2d 507. Therein we held: "The

appellant (Raikes) obstructed and changed the action and course of the floodwater of Mosquito Creek and of the flood plane thereof. * * * he obstructed the flood plane of Wahoo Creek and interfered with the action and course of water therein, * * *" and diverted "water that would have gone down Silver Creek before appellant had made transformations in the area and to conduct and force it toward the southeast north of the land of appellant through Ab's Lake and on to the east. This was a clear diversion of the water of Silver Creek from the course of its natural flow. * * * He farmed and got a crop from his land each year before 1944. His land has been substantially made unfit for cultivation and production."

As already indicated this action against appellant is upon the same factual situation as was involved in Bahm v. Raikes, *supra.* Among the allegations of appellees' amended and supplemental petition, on which the case was tried, are the petition, judgment, and affirmance of this court of Bahm v. Raikes, *supra,* appellees contending: "* * * the findings of the District Court of Saunders County, Nebraska, * * * are final and conclusive and binding upon the defendant in this action."

" 'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.' " Blum v. Truelsen, 139 Neb. 282, 297 N. W. 136.

Under the principle stated in Johnson v. Marsh, 146 Neb. 257, 19 N. W. 2d 366, as hereinafter set forth, the appellees herein are entitled, under the foregoing principle, to the legal effect of our holding in Bahm v. Raikes, *supra,* that: "His (Willy Wischmann's) land (240 acres) has been substantially made unfit for cultivation and production." The principle stated in Johnson

v. Marsh, *supra,* is as follows: "Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action." As stated in Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661: "In the light of such rule plaintiff argued that the trial court erred prejudicially in refusing to examine its own records and take judicial notice of its own proceedings, and the judgments rendered by that court and this court on appeal in Faught v. Platte Valley Public Power & Irr. Dist., *supra,* an interwoven and interdependent case in which defendant was a party. We sustain that contention. In such case not only the same trial court, but also this court on appeal, held that the very same 42-inch drain here involved was inadequate and that defendant was negligent in constructing and maintaining same. That question has been finally decided and could not properly be again submitted to a jury for it to determine whether or not the trial court and this court were correct in making such a decision. Therefore, the trial court erred prejudicially in failing and refusing to instruct the jury as a matter of law that defendant was negligent as alleged by plaintiff. To hold otherwise would be a travesty upon justice and permit a trifling with judgments duly rendered according to law. On the other hand, as a matter of course, the trial court should have told the jury that the burden was upon plaintiff to prove by a preponderance of the evidence that plaintiff's damages were proximately caused by such negligence of defendant, and the amount of plaintiff's damages." The foregoing has application here. See, also, Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224.

There was evidence produced in this case, as well

as in the case of Bahm v. Raikes, *supra,* to the effect that the silting on, eroding of, depositing of debris on, and the wetness of the Wischmann land, which made it unfit for cultivation and production since 1944, all resulted from what Raikes had unlawfully done. There was evidence herein adduced to the effect that this condition of appellees' land continued and did not start to improve until after Raikes removed the things that caused it. This he did sometime after our mandate, dated October 17, 1955, went down based on our opinion of June 3, 1955, as is evidenced by his answer filed herein on October 18, 1956.

Appellee Alvina Wischmann and her son Donald both testified it was because of this unfit condition of the land that during the years from 1950 through 1956 either all or part of the cultivated lands in the low areas of the Wischmann 240 acres could not be planted to crops. They also testified to the effect that these conditions destroyed the hay meadow and pasture so they were not fit for use. This evidence is sufficient to justify a jury finding a causal connection between what appellant unlawfully did and appellees' damages, that is, that it was the proximate cause thereof. We were in error in holding that it was not.

Appellant contends that because a trial was had in the district court for Saunders County in December 1953 and January 1954, upon the same cause of action, wherein an injunction therein prayed for by appellees was granted against the appellant, that the appellees, since they were plaintiffs therein, are now barred from maintaining this proceeding asking for monetary recovery based on damage suffered during the same period of time as was involved in the foregoing injunction proceedings. He contends the law is well settled that one is not allowed to split his cause of action; that is, if he might have had the relief he now seeks in an action he had previously brought and prosecuted to final judgment he may not again vex his former adversary with

another suit based upon the same wrong, contending he is entitled to have the issues in this case limited to all damages, if any, which plaintiff sustained after February 15, 1954.

As a basis for our holding in Bahm v. Raikes, *supra,* we cited the following authority: "In Ballmer v. Smith, 158 Neb. 495, 63 N. W. 2d 862, the court said: 'The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.'

"It is beyond the area of argument in this state that a riparian owner may not dam, obstruct, or dike against floodwaters of a running stream to the injury of a lower landowner. Ballmer v. Smith, *supra;* Frese v. Michalec, 148 Neb. 567, 28 N. W. 2d 197." It will be observed that what was sought to be enjoined must result in injury or damage to the party seeking relief therefrom, and both parties agree that such is the law. See, also, Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333. Plaintiffs therein, which included the Wischmanns (appellees herein), alleged and proved, as a necessary element of their cause of action on which they based their right to enjoin, that what Ralph Raikes (appellant herein) had done and was doing was damaging and injuring their lands and crops.

On June 10, 1954, the Wischmanns brought this action against Raikes in the district court for Saunders County upon the same factual situation as was involved in Bahm v. Raikes, *supra.* The only difference between that case and the one before us, insofar as the Wischmanns are concerned, is that in the former action injunctive relief was sought whereas herein monetary relief is asked, both based on the fact that what Raikes did injured or damaged the Wischmanns' lands and

personal property. It will thus be observed that injury or damage to their property because of what Raikes did is the basis upon which the Wischmanns claim certain rights in each of the two cases. There is no question but what the Wischmanns could have obtained both types of relief in the original action had they seen fit to do so. See, Brchan v. The Crete Mills, *supra;* Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56. The question here is, can they split such cause of action and in separate actions ask for two different types of relief when each type of relief is fundamentally based on the same facts or cause of action?

We said in Anderson v. Anderson, *supra,* that: "An adjudication by this court extends to all matters decided expressly or by necessary implication and not alone to the questions actually and formally presented but to all existing in the record and necessarily involved in the decision. Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818. A litigant, if he might have had all of the relief he seeks in an action he has brought and prosecuted to final judgment, may not again vex his former adversary with another suit based on the same wrong. If a matter becomes the subject of litigation and is adjudicated, the law requires the parties to bring forward their whole case and will not generally permit the same parties to open the same subject of litigation in respect to a matter which might have been brought forward as a part of the subject contested but which was omitted as a part of the case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. A litigant may not be permitted to split a cause of action or present an issue for determination

and avoid the effect of an estoppel by withholding proof of it." See, also, Wightman v. City of Wayne, 148 Neb. 700, 28 N. W. 2d 575; National City Bank of Cleveland v. Jones, 149 Neb. 844, 32 N. W. 2d 755; Triska v. Miller, 86 Neb. 503, 125 N. W. 1070; Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78; Williams v. Beckmark, 150 Neb. 100, 33 N. W. 2d 352; Pettijohn v. County of Furnas, 150 Neb. 736, 35 N. W. 2d 828. See also the numerous cases of this court reported under Key No. 713(2), Judgment, Nebraska Digest, under "Matters which might have been litigated."

We have also held: "'Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not.'" Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338. See, also, Morrell v. Towle, 141 Neb. 370, 3 N. W. 2d 655.

The basis for the breadth of this rule is the fact that in this state there has been a complete merger of legal and equitable remedies. Since 1867, what is now section 25-101, R. R. S. 1943, has provided: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a 'civil action.'"

Under our system of code pleading, a plaintiff is required to plead only the facts and it is the duty of the court to award him any relief, either legal or equitable, to which he is entitled thereunder. The defendant likewise may set up any defense he may have, legal or equitable, and the court is required to grant him any relief to which he may be entitled. As held in Hopkins

v. Washington County, 56 Neb. 596, 77 N. W. 53: "In this state there is but one form of action, to be called a 'civil action,' * * * in which either relief may be sought and obtained; and if the facts pleaded and proved demand, the rules of either law or equity, or both, may be enforced." See, also, City of Beatrice v. Gage County, 130 Neb. 850, 266 N. W. 777.

In view of this situation the following "Comment" from Restatement, Judgments, § 66, p. 282, has application: "Where the plaintiff brings a suit in equity to enjoin the continuance of a tort, and a decree is given in his favor granting the injunction, it depends upon the extent to which there is a merger of legal and equitable remedies in the particular State whether the plaintiff is precluded from thereafter maintaining an action at law to recover damages resulting from the tort prior to the bringing of the suit or the rendition of the decree. * * * If the court of equity could properly award damages but the plaintiff did not seek to recover damages in the suit, whether he can thereafter maintain an action at law to recover damages depends upon the extent to which legal and equitable remedies are merged in the State in which the suit was brought. In some States, although a court of equity may award damages, there is not such a merger of legal and equitable remedies that the plaintiff is compelled to seek damages in the equitable proceeding or be precluded from thereafter seeking damages in an action at law; in such States if the plaintiff brings a suit in equity to enjoin the continuance of a tort and does not seek damages which he has suffered from the tort, he is not precluded from thereafter maintaining an action at law to recover damages. *In States,* however, *in which there is a more complete merger of legal and equitable remedies, the plaintiff is compelled to seek in the equity proceeding whatever damages he may be entitled to, and if he makes no demand for damages he is precluded from thereafter maintaining an action at law to recover*

damages." (Emphasis ours.) See, also, 2 Freeman on Judgments (5th Ed.), § 593, p. 1250.

In 26 A. L. R. 2d 446, there will be found a recent annotation on the subject "Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit." On page 452 thereof, under section 5, will be found the case of Ledingham v. Farmers Irr. Dist., 135 Neb. 276, 281 N. W. 20, while on page 460, under section 9, appears the case of Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108. The annotation would indicate these cases come to opposite conclusions.

On March 11, 1937, Cora M. Hall, H. F. M. Hall, Lulu Kreiling, Cecile E. Shepard, Frank Olmsted, and Bert Cain brought an action in the district court for Saline County against the City of Friend by which they sought to enjoin the city from disposing of the waste water from its sewage disposal plant into a natural drain or watercourse which flowed across plaintiffs' lands, claiming that by doing so the city was irreparably injuring and damaging their lands and property. The plaintiffs also prayed for such other and different relief as to the court may seem just but did not ask for monetary damages as such. That is the same situation as was involved in the original action brought in Saunders County involving this litigation. The trial court in the Saline County case found that noxious odors emanated from the low places on plaintiffs' land caused by the water being allowed to flow thereon from the City of Friend's sewage disposal plant but found there were no other damages caused to plaintiffs' lands by the flow of water therefrom. The city was given 90 days in which to correct such odor by proper chemical treatment and did so. On appeal to this court we affirmed the trial court's judgment. Hall v. City of Friend, 134 Neb. 652, 279 N. W. 346. One of the bases for denying the injunction is stated therein as follows: "Under the facts in this case, the erection of a sewage disposal

plant having been properly done, without negligence, it will be held to be a lawful exercise of power that equity will not restrain." We therein set out that: "In Stuhr v. City of Grand Island, 120 Neb. 491, 233 N. W. 886, it was held: 'While a court of equity may enjoin such manner of construction or operation of a sewer system as causes or results in a nuisance, yet it will not perpetually enjoin the construction or operation of the system if so changed as not to cause or create a nuisance.' "

On March 29, 1939, Cecile E. Shepard, Cora M. Hall, H. F. M. Hall, and Lulu Kreiling filed their second amended petition in an action in the district court for Saline County against the City of Friend in which they sought to recover monetary losses from the city for damage to their lands and property based on the same factual situation as in the former suit. The trial court found the defense of res judicata should be sustained and dismissed the action. On appeal we affirmed the trial court's holding. Shepard v. City of Friend, *supra.* Therein we said: "On the facts pleaded in the former action the plaintiffs had available two remedies, namely, injunction and damages, provided, of course, that they sustained the allegations of fact. They sought only injunction. They failed to sustain their allegations of fact, hence, there having been no mistake of remedy, under the doctrine of res adjudicata they are estopped to assert the same facts in support of an additional and concurrent remedy which is dependent solely upon those facts.

"The fact that the plaintiffs did not seek to recover damages in the former action is not a matter to be considered of consequence here. The rule is that a party should not be vexed more than once for the same cause of action, and the doctrine of res adjudicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined therein."

As stated in Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735, which we cited in Brchan v. The Crete Mills, *supra:* "'An action for abatement and injunction necessarily includes damages, substantial or nominal, and, if the pleader is entitled to the former, it is for him to frame his complaint accordingly. Failing in this, he waives them, for to permit him to afterwards maintain a separate suit therefor is to permit the splitting up of a cause of action.'" The court goes on to say: "We think the reasoning of that case is decisive of this action, and that the facts set forth in the complaint in the prior action constitute one cause of action, though it embraced two elements: First, the discontinuance of the nuisance; and, second, the damages incident thereto."

In Ledingham v. Farmers Irr. Dist., *supra,* we said: "This is an action by William Ledingham, plaintiff, to recover from the Farmers Irrigation District, defendant, $3,500 in damages to growing crops by its failure to deliver to him from the North Platte river, through its canal, the quantity of irrigating water to which he was entitled during July, August and September, 1934, under his appropriation and vested contract right. * * * It pleaded also that a former suit barred the present action." We then said: "Defendant urges the further defense that the cause of action in which equitable relief was granted to plaintiff in the former suit necessarily included the damages allowed herein and precluded recovery therefor in the action at bar. It is argued that the entire controversy involving the equitable relief granted and the subsequent recovery of damages in the present action at law was determinable in the former suit in equity and that the splitting of what defendant calls a single cause of action is condemned as wholly untenable." We then held: "As already pointed out, the remedy sought was a determination of the quantity of water to which plaintiff is entitled under his appropriation and a permanent injunction to pre-

vent defendant from invading his vested contract rights to specific quantities of water for purposes of irrigation. *Damages were not pleaded, presented, proved or determined in the former case.* There is some diversity of judicial opinion on this subject in vast fields of litigation, *but the better view seems to be that, in a situation like the present,* the granting of an injunction is not necessarily a bar to an action at law for damages caused by the wrong enjoined." (Emphasis ours.)

This cause first came to this court as reported in Vonburg v. Farmers Irr. Dist., 128 Neb. 748, 260 N. W. 383. Therein we said: "This is an action for injunction and other equitable relief. * * * The following is a brief summary of the pertinent facts alleged in the petition: Each of the plaintiffs is the owner of land that has been regularly irrigated for more than 40 years from water furnished through a canal which is now owned by the defendant corporation. Plaintiffs claim the right to a continuation of this service under and pursuant to a prior appropriation of the water and to contracts entered into between them and the Farmers Canal Company, a former owner of the canal, and without being compelled to prorate the water in the canal with other patrons of the defendant corporation. * * * We are of the opinion that the present controversy hinges on the question of whether plaintiffs, by their contracts and under the law as then existing, acquired a vested right to the quantity of water for which their contracts call. * * * It follows that, if their rights are superior, then they are entitled to the water in preference to the subsequently acquired patrons of the defendant corporation." Then, in Vonburg v. Farmers Irr. Dist., 132 Neb. 12, 270 N. W. 835, which involves the same action, we said: "We therefore conclude that the original stockholders had a property right vested in them to the extent of the water claimed in their several contracts and such property right might be sold and disposed of as any other property under the law as it then existed." It

thus becomes evident that there is a distinction between the Ledingham case and the City of Friend case by reason of the fact that injury or damage was no part of the cause of action in the Ledingham case and did not properly belong to the subject of that litigation.

In view of our frequent holding, as evidenced by the many cases cited herein and under Key No. 713(2), Judgment, in the Nebraska Digest, to the effect that a party should not be vexed more than once for the same cause of action, and the doctrine of res judicata includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been raised and determined, we do not think appellees should be allowed to split their cause of action by filing two suits for different types of relief when such relief all flows from the same cause of action and could have been sought therein.

Appellees contend that because there were five different parties plaintiff in the prior equity matter it would have been impossible to adjudicate appellees' claim for damages because each plaintiff's claim would have been a separate cause of action not affecting the others. Based thereon appellees contend they should not be precluded here.

In Brchan v. The Crete Mills, *supra,* by quoting from Schreiner v. Witte, 143 Neb. 109, 8 N. W. 2d 831, we restated the oft-announced principle that: "It is a well-settled principle of equity jurisprudence that, 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." We then went on to say that: "In the case of Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 199 N. W. 390, 35 A. L. R. 396, a suit brought against eight defendants to abate a nuisance caused by the pollution of a stream, and recover damages, upon motion of the defendants, allegations as to damages were stricken.

The court said: 'Under the doctrine well established by this court, if a court of equity takes jurisdiction of a matter it will retain jurisdiction for the purpose of doing complete justice between the parties, and will, in a proper case, not only extend its equitable remedy but will also permit the recovery of damages.' The court overruled the order of the trial court in striking the plaintiff's allegations as to damages, holding: 'Had the action proceeded, the plaintiffs could have obtained their equitable remedy for the abatement of the nuisance, and, upon the determination by the court of the proportionate share of the damage caused by each of the defendants, were entitled to judgment for such amounts, thus disposing of the entire litigation in one action. To accomplish such a result is one of the principal functions of a court of equity.' See, also, McMechen v. Hitchman-Glendale Consolidated Coal Co., 88 W. Va. 633, 107 S. E. 480; Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735; Stoner v. Mau, 11 Wyo. 366, 72 P. 193; Carthew v. City of Platteville, 157 Wis. 322, 147 N. W. 375; Karns v. Allen, 135 Wis. 48, 115 N. W. 357, 15 Ann. Cas. 543.

"With reference also to the recovery of damages, damages to personal property located on the real estate may also be recovered in this equity action. See, Graham v. Pantel Realty Co., *supra*; Weingand v. City of North Platte, *supra;* Stoner v. Mau, *supra.*

"It is apparent that damages recoverable in an action of this kind are not limited to damages to the real estate alone, but include damages to personal property located thereon." The foregoing has application to the rights which the several plaintiffs had to recover their damages, if any, in the original injunction action.

"The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered." Conrad v. Kaup, 137 Neb. 900, 291 N. W. 687. See, also, Stocker v. Wells, 150 Neb. 51,

33 N. W. 2d 445; Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653; Comminge & Geisler v. Stevenson, 76 Tex. 642, 13 S. W. 556. The decree in the original injunction action was rendered on February 15, 1954.

We find appellees have precluded themselves from claiming any monetary loss for damages they may have suffered prior to February 15, 1954, by failing to ask for such in their original action.

Appellant also pleaded the statute of limitations. By the allegations of their amended and supplemental petition the appellees sought to recover monetary benefits from 1945 forward for damages, if any, which they had suffered. The trial court limited such right to June 10, 1950, or a 4-year period prior to the bringing of this action. "A temporary injury is defined in 32 C. J. 521, as 'An injury that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured party.'" Applegate v. Platte Valley Public Power & Irr. Dist., 136 Neb. 280, 285 N. W. 585. That was the appellant's position with reference to what he had done. As stated in Omaha & R. V. R. R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183: "* * * where damages result from a continuing nuisance * * * a recovery may be had for each injury as it occurs." However, recovery could only be had for a period of 4 years from the time each of such causes of action accrued. § 25-207, R. R. S. 1943. Any further discussion of this subject would, however, serve no useful purpose as we have already come to the conclusion that appellees have precluded themselves of the right to recover for any damages to their lands or personal property prior to February 15, 1954. To recover monetary losses for 1954, and any years subsequent thereto, because of the unfit condition of their lands for cultivation and other uses, the appellees must adduce evidence from which a jury could properly find that the conditions existing prior thereto continued after February 15, 1954, and were

caused by what appellant had unlawfully done; that damages, if any, which they suffered were caused thereby; and, if so, the value thereof.

In view of the foregoing it becomes necessary to reverse the judgment of the trial court and set aside the verdict for the jury was erroneously permitted to consider damages, if any, accruing to the appellees in the years of 1950, 1951, 1952, and 1953. However, there are some other questions raised which will reappear on retrial so we discuss them briefly.

"It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which they should take into consideration in arriving at their verdict, otherwise the jury may be confused and misled." Linch v. Hartford Fire Ins. Co., 138 Neb. 110, 292 N. W. 27, 129 A. L. R. 1063. See, also, Benedict v. Epply Hotel Co., 159 Neb. 23, 65 N. W. 2d 224.

As to the loss of the use of ground that had formerly been cultivated and planted to crops, which is the principal claim here, the usual rule is that: " 'If plaintiff was prevented from planting any part of his lands by reason of flooding due to negligence of defendant, his measure of damages on this account would be the reasonable rental value of such land for that season, * * *.' " Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550, 188 N. W. 239. See, also, Franklin Drilling Co. v. Jackson, 202 Okl. 687, 217 P. 2d 816. However, as stated in Gledhill v. State, 123 Neb. 726, 243 N. W. 909: "In the instant case, the plaintiff's claim is represented by the loss of the use of the land for the crop season for 1929. * * * 'The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured.' 17

C. J. 785. The determination of the value of the loss of the use of this land can be made almost certain in this case if based upon the evidence of the value of the crop which could have been raised upon this land but for the flood. * * * The best available test of the value of the use of the land to the lessee is the value of the crops which could and would have been grown upon this land, particularly where it is removed from speculation and remoteness and made definite and certain by proof as to what portions of the land and similar adjoining land produced." The court went on to say: *"When there is evidence of the actual value of other matured crops of a like kind grown during the same period, in portions of the same or adjoining land under similar conditions,* there is sufficient data to determine with reasonable certainty the probable value of an unmatured crop if it had matured. * * * In this case, there was nothing left to conjecture or speculation as to the probability of the crop or the extent of it dependent upon the rainfall or unfavorable conditions. Every element surrounding the production of a crop was then known and was applicable alike to the land that was flooded and that which was not. The trial court made this finding: 'The court further finds that said lands so flooded, set apart for the raising of corn in 1929, but for said flooding would have produced an average of 50 bushels per acre, of the value of 90¢ a bushel, and that the cost of raising, harvesting and marketing an acre thereof was $11.75.' In this particular case, there is no more accurate way of determining either the rental value or the value of the use than the determination made in this case from the evidence. The evidence is direct and certain that the owner of this land lost the amount calculated upon this basis from the flooding of the land." (Emphasis ours.) Which principle a court should apply when instructing the jury will depend on the evidence adduced at the trial.

As to the loss of a perennial crop, such as a hay

meadow or pasture, the rule is as stated in Hopper v. Elkhorn Valley Drainage Dist., *supra:* "'In case of the destruction of a perennial crop * * *, the measure of damages is the difference between the value of the land immediately before the injury with the crop growing thereon, and the value of the land immediately after the destruction of the crop.'" See, also, Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889; McKee v. Chicago, B. & Q. R. R. Co., 93 Neb. 294, 140 N. W. 145; Faught v. Dawson County Irr. Co., 146 Neb. 274, 19 N. W. 2d 358.

As to any crop that may have been injured, but not entirely destroyed, the rule is: "The measure of damages where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing." Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500.

Appellant contends the admission into evidence of the opinion of this court in Bahm v. Raikes, *supra,* and the reading of same to a jury in its entirety, constitutes error. Also that the court committed error in the admission of the petition, answer, and decree of the trial court and motion for new trial filed by defendant in the same action. With this we agree. In fact, the trial court went so far as to include in his instruction No. 1 to the jury the decree of the trial court in its entirety.

Under the plea of res judicata the pleadings and judgment relied on in support thereof may properly be introduced in evidence but not the opinion of the appellate court relating thereto. See Reams v. Clopine, 121 Neb. 86, 236 N. W. 158.

As stated in Reams v. Clopine, *supra:* "The pleadings and judgment, but not the opinion of the appellate court, may be introduced in evidence to support a plea

of res judicata." However, under the circumstances here shown, that would not be necessary because the trial court was duty bound to take judicial notice thereof. See Cover v. Platte Valley Public Power & Irr. Dist., *supra*. In such circumstances it is the trial court's duty to determine the legal effect thereof and, if necessary, instruct the jury in regard thereto. The legal effect thereof is not a question for a jury to determine. Otherwise, where a plea of res judicata is made, the pleadings and judgment relied on must be introduced in evidence for the benefit of the trial court in order for it to determine the legal effect thereof.

Appellant contends several of the instructions given by the court erroneously submitted the case to the jury. "A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error." McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923.

Some of the contentions in regard to instructions are clarified by what has been held herein. Others relate to issues which it will no longer be found necessary to submit. The rest of the contentions herein made by either side we do not find it necessary to discuss and answer in view of what has been held herein.

We reverse the judgment of the trial court and remand the cause with directions to sustain the appellant's motion for new trial.

REVERSED AND REMANDED.

MESSMORE, J., concurring.

I concur in the majority opinion. However, to be consistent with our opinions covering the subject matter as set forth therein, I am convinced that the principle of law announced in the case of Ledingham v. Farmers Irr. Dist., 135 Neb. 276, 281 N. W. 20, is in conflict with the case of Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108, and the instant case.

I am unable to draw the distinction between Leding-

ham v. Farmers Irr. Dist., *supra,* and the instant case. Consequently, I believe the case of Ledingham v. Farmers Irr. Dist., *supra,* should be overruled because it is in direct conflict with the principle of law announced in the instant case and the opinions of this court covering the same type of subject matter. See 26 A. L. R. 2d, § 5, p. 451, § 9, p. 460.

SIMMONS, C. J., dissenting.

The court, in my opinion, reaches a conclusion here that is unsound and unjust. In doing so it ignores many of our decisions of long standing, overrules in effect several decisions to which no reference is made, and finally reaches a revolutionary construction of a long-established and construed provision of our code of civil procedure.

The right of the plaintiffs to assert and have tried the issue of damages here involved is a valuable property right. It is proposed that it be largely denied. The basis of the denial is a procedural rule which is sound when properly applied. If there be doubt as to the application of the rule, we should follow that which protects and does not deny a property right. Here, as I see it, it is proposed that the rule be erroneously stated and applied, with the result that a grave injustice is to be done not only to these plaintiffs but to others that hereafter may be similarly situated.

A summary statement of the litigation involved is necessary. All italics appearing herein indicate emphasis supplied by me.

In Bahm v. Raikes, 160 Neb. 503, 70 N. W. 2d 507, the Wischmanns and others proceeded in equity to secure "an injunction, preventive and mandatory" to abate a nuisance. That was the only issue tried in the district court and in this court on trial de novo. There was no issue of damages pleaded, attempted to be proven, or determined.

In the instant case the Wischmanns brought a law action to recover for destruction of crops, for preventing

planting and harvesting of crops, for loss of livestock, and for damages to fences. 167 Neb. 251, 92 N. W. 2d 708. They did not seek to recover damages to land. So the former litigation was solely an action in equity for an injunction. The instant case is solely an action at law for the recovery of property damage, excluding damage to land.

Of course in the injunction action damages to crops and land were shown as an incident to the proof of a right to injunction. It does not follow that evidence of damages to crops and land as a foundation for proof of damages was an issue or was determined in the former action. Our opinion in the first case makes no reference to damages as a recoverable item and of necessity they were neither proven or determined. It is elementary that there is a material distinction between the two kinds of proof. The court holds that the plaintiffs may not "split" their "cause of action and in separate actions ask for two different *types* of relief when each type of relief is fundamentally based on the same facts or cause of action."

As above pointed out, the facts to prove an injunction action may be in part the same as the facts to prove a damage action, but in other respects are materially different. The court fails to recognize that elementary fact.

Insofar as the prayer for "two different types of relief" is concerned the holding is directly contrary to our holding in City of Alliance v. Cover-Jones Motor Co., 154 Neb. 900, 50 N. W. 2d 349, wherein we held that the relief sought "is no part of the cause of action."

I submit that the court is in error on both of the premises on which it predicates this feature of its decision.

There is no dispute as to the correctness of the rule of law stated in the first syllabus point prepared by the court: "It is a fundamental principle of jurisprudence that material facts or questions which *were an issue* in

a former action, and were there admitted or judicially *determined,* are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action."

That rule is by its terms applicable when a question has been "an issue" and "judicially determined" in a former action. The rule is not applicable to the situation which we have here. The quoted rule is taken from Blum v. Truelson, 139 Neb. 282, 297 N. W. 136. It in turn relies solely on a quote from an opening statement in American Jurisprudence which is now 30A Am. Jur., Judgments, § 371, p. 411. That it has no application here is shown by other statements in the following texts: "Where a second action is upon a different *claim, demand,* or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the points or questions actually *litigated* and *determined,* and not as to matters *not litigated* in the former action, *even though such matters might properly have been determined therein.* Accordingly, the view is generally taken that before the doctrine of res judicata is applied in such cases, it should appear that the *precise question involved* in the subsequent action was determined in the former action." 30A Am. Jur., Judgments, § 373, p. 418. See, also, Burke v. Munger, 138 Neb. 74, 292 N. W. 53; State ex rel. Caldwell v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N. W. 422, 14 L. R. A. N. S. 336; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. S. R. 444; Haines v. Flinn, 26 Neb. 380, 42 N. W. 91, 18 Am. S. R. 785; Gayer v. Parker & Son, 24 Neb. 643, 39 N. W. 845, 8 Am. S. R. 227.

"As far as subsequent proceedings under a different cause of action are concerned, the doctrine of res judicata is held not to apply to issues raised in the previous case which were not passed on by the court or jury in deciding it." 30A Am. Jur., Judgments, § 374, p. 421.

"If a matter was actually in issue in a former proceeding and judicially determined therein, the matter is conclusively settled by the judgment rendered in such proceeding. However, the conclusiveness of a judgment is confined to the thing in controversy, *or in issue* as determined *from the pleadings.*" 30A Am. Jur., Judgments, § 375, p. 422.

"It is generally declared that a judgment operates as res judicata only with respect to matters which were necessarily involved or determined in the former proceedings, or only with respect to the facts and matters necessary to uphold the judgment." 30A Am. Jur., Judgments, § 377, p. 425.

"Questions passed upon in the opinion of a court in rendering a judgment are not necessarily within the doctrine of res judicata. The reasoning and opinion of the court upon a subject, on the evidence before it, do not have the force and effect of the thing adjudged, unless the subject matter is definitely disposed of by *the judgment* of the court." 30A Am. Jur., Judgments, § 380, p. 429.

"Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in §§ 69, 71 and 72. * * *A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." Restatement, Judgments, § 68, p. 293.

Tested by these rules I submit that the stated rule here discussed has no applicability to the situation before us.

There is no dispute here about the rule stated in the second syllabus point prepared by the court: "Where cases are interwoven and interdependent and the controversy involved has already been *considered and de-*

termined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action." It relates to "*inter*woven and *inter*dependent" controversies that have been *considered* and *determined.* There can be no contention here that the issue of property damage was interwoven or interdependent with the issue of injunction and most certainly property damage was not "considered and determined" by the court.

The fourth syllabus point as prepared by the court is as follows: "An adjudication by this court extends to all matters decided expressly or by necessary implication and not alone to the questions actually and formally presented but to all existing in the record and necessarily involved in the decision." This is quoted from Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224. The sole authority for it is Kuhns v. Live Stock Nat. Bank, 138 Neb. 797, 295 N. W. 818. What was the Kuhns case? It involved this rule: Matters expressly, or by distinct and necessary implication, *adjudicated* at a former hearing, will not be considered again in the same case. It turned upon the "law of the case" rule as the opinion clearly shows. Obviously it has no bearing here. What was the Anderson case? The first action was one to quiet title. The second action was one for partition. We stated: "* * * the over-all contention in the suit to quiet title to the land and in this partition action was and is the ownership of the land, * * *." Appellants "attempted *in each* of the actions to put in issue two questions of fact" which were "*both adjudicated* adversely to appellants in the suit to quiet title." On that statement of fact we held that the determination of the first case was "final and binding" in the second case.

We quoted the rule stated in syllabus point 1 by the court, and the rule here discussed. When Anderson v. Anderson, *supra,* is analyzed and its rules applied

to the question being decided, it gives no support to the position now taken by the court.

Syllabus point 5 as prepared by the court is as follows: "The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."

Syllabus point 6 as prepared by the court is as follows: "A litigant may not be permitted to split a cause of action or present an issue for determination and avoid the effect of an estoppel by withholding proof of it."

Both are direct quotes from statements made in Anderson v. Anderson, *supra.* I have already discussed the fact situation that was being decided in the Anderson case. I refer now briefly to the authorities cited in Anderson v. Anderson, *supra,* to sustain the text:

Boomer v. Olsen, 143 Neb. 579, 10 N. W. 2d 507. The first syllabus point in that case is: "Whether a former judgment is a bar to an action ordinarily depends on whether the same evidence will sustain both the present and former action, *and when it appears that different proof is required,* a judgment in one of them is no bar to the other." If appears obvious that in a damage action "different proof is required" than in an injunction action to abate a nuisance. The second syllabus point in the Boomer case is: "Where the parties stipulated a single issue in the former action, a plea of res adjudicata is of no avail in a subsequent action between the same parties where it appears that *the issues are outside the scope of the stipulation.*" Here insert "pleadings in the first case" for "stipulation" and the rule is: Res judicata is of no avail in a subsequent action between the same parties where it appears that the issues are outside the scope of the pleadings in the first case.

At the expense of repetition I point out that there is no contention here that damages as such were an issue in the first case.

The next case cited is Williams v. Beckmark, 150 Neb. 100, 33 N. W. 2d 352. A mere statement of the facts of that case, taken from the opinion, shows it has no bearing on the question presented here: "The present action is between the same parties as the former. They both involved the recovery of accrued rentals and damages for the unlawful possession of the same property. The relevant evidence in the case at bar was practically identical with that in the former. The only difference in the two defenses was that in the former action defendant prayed for relief under the Occupying Claimants Act and for such other relief as might be just and equitable, while in the case at bar defendant sought only the latter relief."

The third and final case cited to sustain syllabus points 5 and 6 is Pettijohn v. County of Furnas, 150 Neb. 736, 35 N. W. 2d 828. This began as a tax foreclosure case resulting in a decree that all proceedings, including the treasurer's return of a public sale, were regular. Plaintiff later brought an action attacking the regularity of the proceedings. We held: "Under such circumstances the decree of the district court was a final determination of the issues before it and such decree is not subject to collateral attack." Plaintiff asserted a material alteration of the tax sale certificates. We held: "What we have heretofore said about collateral attack is applicable here. The plaintiff here was a defendant in the tax sale certificate foreclosure and was personally served with summons. If she had any defense to the action she was obliged to assert it there. The finding of the court that the tax sale certificates were properly and lawfully made, and entitled to be foreclosed, constitutes a final adjudication of that issue in so far as the parties to that action are concerned."

Accordingly I submit that syllabus points 5 and 6,

when analyzed in the light of the case decided and the cases cited to sustain the decision, do not support the application now given to them.

This brings us to syllabus point 7 as prepared by the court: "It is a well-settled principle of equity jurisprudence that, 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."

Here the court in applying the rule reads out of it the words "adjudicate all matters in issue." That is the material element in the rule.

The syllabus point is a quote from Schreiner v. Witte, 143 Neb. 109, 8 N. W. 2d 831. That case holds directly to the contrary of the application which the court now makes of the cited rule. There plaintiff brought an action in equity to foreclose a chattel mortgage. The defendant denied generally and by cross-petition advanced three causes at law: (1) Damages for breach of a partnership agreement; (2) a recovery of one-half of personal taxes; and (3) recovery for goods sold and delivered. Plaintiff answered the cross-petition by denying causes (1) and (2) and admitting cause (3). The court found for the plaintiff on his petition and on defendant's causes (1) and (2) and entered judgment for defendant on cause (3). The court denied a deficiency judgment. Plaintiff appealed. We held: "The defendant in the instant case submitted himself to a court of equity, set up his defense by way of cross-petition, and *affirmatively alleged damages,* that plaintiff was indebted to defendant for merchandise purchased and personal taxes paid by defendant." We followed that by a statement of the rule quoted as syllabus point 7. We then held: "The plaintiff in the instant case followed the correct procedure. The defendant is not now entitled to a jury trial. He voluntarily brought a law issue into the case. He had a right, if he was so minded, to file

his amended cross-petition for damages in this equity suit. *It was an independent cause of action, existing in defendant's favor, and would not be lost to him, or barred, if he had left it out of this suit.*"

I fail to see where the court gets support out of that decision.

The court quotes from Wheeler v. Brady, 126 Neb. 297, 253 N. W. 338, but does not dignify it by making it a syllabus point. I quote the quotation used by the court, with the unanswered question in my mind as to where the court applies that rule, or follows it, or gets support from it: "'Any right, fact or matter *in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action* before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not.'"

Wheeler v. Brady, *supra,* originated as an action to quiet title to real estate. A deed was involved. The trial court held that the deed was testamentary in character and not executed in accord with the law pertaining to the execution of wills. We affirmed. Then the second action was brought *to reform the deed* and to quiet title by the defendant in the first action. We held: *"The former decision is not of course an adjudication that the contract cannot be reformed. That question was not presented nor considered at that time.* That suit only decided that the purported deed as it stood did not convey title to the real estate in question, because it was testamentary in character, but since it was not executed according to the law relating to wills, title to a portion of the property was quieted in the other heirs at law. The cases in which the fundamental principles of res judicata are discussed are legion. * * * The right of reformation was *not a right, fact,*

or matter litigated in the first suit and the judgment therein was not a bar to this suit."

We cited the rule which the court quotes. It was taken from 34 C. J., Judgments, § 1154, p. 743. If an action to quiet title is not res judicata of an action to reform a deed and quiet title, then certainly an action in equity to enjoin a nuisance is not res judicata of an action for damages at law.

The court, after more discussion and quotations from decisions to which I shall refer presently, then holds that "the doctrine of res judicata includes not only the things which were determined in the former suit, *but also any other matter properly involved which might have been raised and determined.*"

About the first clause of this holding there is no dispute. I submit that the second clause (which I have emphasized) is contrary to the very decisions of this court which I have referred to herein and which the court quotes in part.

Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, is cited and followed repeatedly in these cases. It holds that: "In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined* in the original action, *not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action."

I now refer to a series of our decisions that are exactly to the contrary of the rule now announced by the court.

Wilcox v. Saunders, 4 Neb. 569, was decided in 1876. In that action Saunders had sued Wilcox in equity for specific performance of a contract to convey land. In that action Saunders specifically prayed for damages to the land. The issue of damages was tendered. The trial court decreed specific performance and specifically

did not determine the issue of damages. The judgment became final. Saunders then sued Wilcox in tort for damages for trespass "upon the same premises in controversy in the former suit." So there was in that case first an equity action for specific performance and then a law action for damages. The court held as to the issue of damages that when the trial court, in the first action, dismissed the issue of damages *"they were left in the same condition precisely as if they had never been brought into the case."* In the case now being decided damages were never "brought into the case." The court held it was not necessary to decide whether or not damages "could have been joined" in the former action and that only questions "determined" remained determined. The court, however, considered the question and held that damages "might be" included in the former action.

In the second action *at law for damages,* Saunders secured a verdict and judgment. We affirmed the judgment. Wilcox v. Saunders, *supra,* is the earliest of our decisions on the matter. It has been repeatedly cited favorably. I shall refer to one of the decisions later. It has never been criticized or modified. There it stands since 1876. It is now ignored by the court.

I next go to Herpolsheimer v. Acme Harvester Co., 83 Neb. 53, 119 N. W. 30. In the body of the opinion we held: "Where *issue has not been joined* nor any trial had on the merits, the doctrine of res judicata does not apply." That exactly describes the situation in the instant case. In the syllabus point prepared by the court we stated: "Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action."

In Bowker v. Drainage District, 102 Neb. 571, 168

N. W. 193, we held: "A judgment is not res judicata of a matter *not involved and tried* in the action. * * *." It is quoted with approval in Lincoln Nat. Bank & Trust Co. v. Grainger, 129 Neb. 451, 262 N. W. 11, wherein we held: "A judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. *Such judgment will not so operate,* unless it appears either on the face of the record or is shown by extrinsic evidence that the precise question *was raised and determined* in the former suit."

I next cite Gulizia v. Royal Indemnity Co., 139 Neb. 832, 299 N. W. 220. In that case we followed Plattsmouth Bridge Co. v. Turner, 128 Neb. 738, 260 N. W. 562, and reaffirmed this rule: Judgment is *not res judicata* as to any fact at issue in subsequent action where neither *issues* nor parties are the same. In both of the above cases the parties to the second action were not the same as those in the first. We pointed that out in the opinion. We also pointed out that "neither were the issues *identical*" in the Plattsmouth case; nor "was the * * * liability of the insurer as to the claim * * * involved" in the Gulizia case. The opinion in the Gulizia case was written by the same judge who is the author of the instant decision.

The above rule was restated and followed in Kuhl v. School District, 155 Neb. 357, 51 N. W. 2d 746. The opinion was adopted by six of the seven members now on the court. Two of the six of us now adhere to our former decisions.

I now go to two of our decisions, which the court considered at length. They are Ledingham v. Farmers Irr. Dist., 135 Neb. 276, 281 N. W. 20, and Shepard v. City of Friend, 141 Neb. 866, 5 N. W. 2d 108.

I first take up Ledingham v. Farmers Irr. Dist., *supra.* This opinion was written by Judge William B. Rose, who for over a third of a century was one of the ablest judges to serve on this court. The court now under-

takes to distinguish the Ledingham case from the instant case by reaching the conclusion that damages were no part of the cause of action in the first case. However, the theory upon which it might have been written is not controlling and should not concern us.

In that decision we stated the contention of res judicata as follows: "Defendant urges the further defense that the cause of action in which equitable relief was granted to plaintiff in the former suit necessarily included the damages allowed herein and precluded recovery therefor in the action at bar. It is argued that the entire controversy involving the equitable relief granted and the subsequent recovery of damages in the present action at law was determinable in the former suit in equity and that the splitting of what defendant calls a single cause of action is condemned as wholly untenable."

It was that contention which the court decided and which in effect is the contention made here which the court now sustains. How did we decide it? We held: "*Damages were not pleaded, presented, proved or determined in the former case.* There is some diversity of judicial opinion on this subject in vast fields of litigation, but the better view seems to be that, in a situation like the present, the granting of an injunction is not necessarily a bar to an action at law for damages caused by the wrong enjoined."

The Ledingham case cannot be brushed aside by conceiving some other basis upon which it might have been decided and reach the same result.

In the Ledingham case we followed Perdue v. Ward, 88 W. Va. 371, 106 S. E. 874, 14 A. L. R. 539, "and cases cited in note in 14 A. L. R. 543." There can be no question from that annotation what was being decided. In Perdue v. Ward, *supra,* the court refused to follow Gilbert v. Boak Fish Co., 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735. The annotation shows that this case

is the "only authority" contrary to Perdue v. Ward—and this court followed Perdue v. Ward.

Our decision in the Ledingham case further rested on Chapman v. General Petroleum Corp., 152 Or. 147, 52 P. 2d 190. I quote two paragraphs from that opinion: "The defense is based upon two major propositions: (1) That res adjudicata precludes plaintiffs from recovering damages in the instant action for the reason that they had an opportunity to adjudicate such matter in the suit instituted in December, 1931; that equity, having assumed jurisdiction, was able to grant complete relief and thereby avoid a multiplicity of suits; (2) that there is no evidence to support the finding of the jury that plaintiffs had sustained damage in the amount awarded, or in any sum. * * * The authorities in other jurisdictions, relative to the applicability of res adjudicata in such cases, are in conflict (see cases in note 14 A. L. R. 543), but in this state it is not an open question. In Norwood v. Eastern Oregon Land Co., 139 Or. 25, (5 P. (2d) 1057, 7 P. (2d) 996), the identical point was decided adversely to the contention of the appellant herein. It will be remembered that the question of damages was not an issue in the equity proceeding. We see no need to restate the law." The language is applicable here. There Oregon followed the same authority that we followed in the Ledingham case and in their own decision in Norwood v. Eastern Oregon Land Co., 139 Or. 25, 5 P. 2d 1057, 7 P. 2d 996. The latter case was one where the plaintiff had a decree for an injunction. He then sued for damages. Res judicata was offered as a defense. The court held: "In White v. Ladd, 41 Or. 324, (68 P. 739, 93 Am. St. Rep. 732), it is said: 'The potency of a judgment as an estoppel concludes every fact necessary to uphold it and extends, not only to matters actually determined, but to every other matter which the parties might have litigated and have had decided as incident to and essentially connected with the subject matter of the litigation,

and every matter coming within the legitimate purview of the original action, * * *.'

"The evidence relative to the issue of damages was not essential to the validity of the decree for injunction. The question of damages was merely incidental to the main relief sought in the equity proceeding. It was not necessarily involved therein. *In the instant action there is a different claim or demand than was at issue in the injunction suit, hence the decree therein is no bar here.*" This language is applicable here.

The court refused to follow Gilbert v. Boak Fish Co., *supra,* and stated that the contra rule followed by it was in accord with the "weight of authority." It relied on Perdue v. Ward, *supra,* and cases cited in 14 A. L. R. 539.

The Oregon Court tied its decision to ours. It quoted at length from "the best statement of the rule" found in Cromwell v. County of Sac, *supra.*

We relied on and quoted from the Cromwell case in Hanson v. Hanson, 64 Neb. 506, 90 N. W. 208. We relied on it again in Gering v. School District, 76 Neb. 219, 107 N. W. 250. We described the Cromwell case as one "recognized by all text writers." We held that: "* * * where the second action is upon a different *claim or* demand, the judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the judgment was rendered."

Notwithstanding the direct positive refusal of this court to follow Gilbert v. Boak Fish Co., *supra,* on the precise issue here involved, the court now quotes from it with approval. The court's justification for so doing is that Gilbert v. Boak Fish Co., *supra,* was cited with approval in Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333. It was so cited, but for a rule that is not in dispute here. The mere fact that the case was so cited does not justify the overruling, in effect, of the Ledingham case and the adoption of a contrary rule that was rejected after consideration of the precise question. I would adhere to the Ledingham case rule.

At this point it may be well to quote from 1 Am. Jur., Actions, § 103, p. 486, where under the title "Legal and Equitable Relief" the text states: "* * * although there is authority to the contrary, it is held that a suit for an injunction is not a bar to a later action for past damages on account of the thing enjoined, where there was no prayer for damages in the prior suit and no award of damages made." The "contrary" case is Gilbert v. Boak Fish Co., *supra,* which we refused to follow in the Ledingham case. The rule is that of Perdue v. Ward, *supra,* which we followed in the Ledingham case.

Before going to other cases of this and other jurisdictions, I cite other texts which are considered as authority.

In 50 C. J. S., Judgments, § 657, p. 102, this rule is stated: "A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. In other words, he must present his whole case, extending his claim so as to embrace everything which properly constitutes a part of his cause of action or defense, and cannot bring a new suit to recover something more on the same cause of action.

"The general rule *does not mean,* however, that the prior judgment is conclusive of matters *not in issue or adjudicated,* and which were not germane to, implied in, or essentially connected with, the actual issues in the case, although they may affect the ultimate rights of the parties and *might have been presented* in the former action, and is not applicable to issues the trial of which rests within the discretion of the court. Moreover, it has also been held that the rule cannot properly be invoked as to an issue which *affirmatively ap-*

pears not to have been determined by the judgment in the former action."

Here our Wightman v. City of Wayne, 144 Neb. 871, 15 N. W. 2d 78 (a case cited by the court's opinion), is relied on. But that rule relates to the splitting of a cause of action, a situation erroneously assumed by the majority opinion to exist here. This is made clear by the following paragraph of 50 C. J. S., Judgments, § 658, p. 104: "As discussed supra § 657, the rule that a judgment is res judicata as to every matter which might with propriety have been litigated and determined in the action *does not mean* that a prior judgment is conclusive of matters *not in issue or adjudicated,* and which were not germane to, implied in, or essentially connected with, the actual issues in the case, although they may affect the ultimate rights of the parties and might have been presented in the former action. Accordingly distinct rights, claims, or demands of the parties growing out of the same subject matter, but which were not put in issue or necessarily involved or adjudicated in a prior action have been held not to be barred by the judgment therein." Here our Ledingham case is cited along with others from several jurisdictions.

I now desire to call attention to Triska v. Miller, 86 Neb. 503, 125 N. W. 1070, cited but not discussed in the majority opinion. The holding there is: "A judgment on the merits constitutes an absolute bar to a subsequent action founded upon the same *claim or demand,* concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the *claim or demand,* but also as to any other admissible matter which might have been offered for that purpose." It shows that the bar of the former action relates to the "claim or demand" and not the cause of action.

Woodbury v. Porter, 158 F. 2d 194, was an action for damages. Plaintiff in a former proceeding had secured an injunction. The defendant contended that there

was a splitting of causes of action. The court denied that contention. It held: "If the same evidence will support both actions there is deemed to be but one cause of action. Of course, the mere fact *that the same evidence may be admissible under the pleadings* in each action *is not necessarily controlling,* but even though the evidence may be admissible *and is in part the same,* but the subject matter is essentially different, the actions are not identical. *In the final analysis the test would seem to be whether the wrong for which redress is sought is the same in both actions.* (Citing case.) The mere fact that different demands may spring out of the same act or contract does not itself render a judgment on one a bar to a suit upon another. * * * The first suit was an injunction action, while the second suit was for damages. The pleadings in the action for damages would be wholly inadequate as a basis for an injunction. To sustain an action for injunction it would be necessary to plead and prove threatened violations of the act and it has been held that if it is clear that violations will not be repeated, an injunction cannot be obtained as the purpose of an injunction is to prevent continued wrongful acts rather than to redress past grievances. (Citing case.) No such pleading nor proof would be essential in the action to recover damages."

In Morency v. Plourde, 96 N. H. 344, 76 A. 2d 791, the court held: "Where damages in injunction proceedings are neither sought nor granted, the injunctive relief is not a bar to the law actions for damages on account of the thing enjoined." It relied on Woodbury v. Porter, *supra,* and Perdue v. Ward, *supra,* upon which we relied in the Ledingham case.

I now go to the case of Shepard v. City of Friend, *supra,* from which the court quotes and sustains the quotation by quote from Gilbert v. Boak Fish Co., *supra,* which I have discussed above.

The opinion in the Shepard case was written by Judge Yeager. Judge Yeager analyzed the Shepard case in

the, now withdrawn, opinion in this case in 167 Neb. 251, 92 N. W. 2d 708. The court does not now criticize his analysis of that opinion.

The court now quotes from parts of two paragraphs of that opinion. The quote appears in that part of the opinion which related to the following contention. It was used in answer to it: "It then becomes necessary for us to sustain the judgment of the district court unless it may be said, as plaintiffs contend, that this case comes within the rule that, where a party mistakenly chooses a remedy that is not available to him, he is not under the doctrine of res adjudicata barred from availing himself of the proper remedy."

The court ignores the question decided before we reached the above matter—and in doing so overlooks the fact that the issue now presented here was decided in the Shepard case contrary to the present decision.

In the second case the trial court, with reference to the decree in the first case, held: " 'Said decree was more than a judgment that no enjoinable nuisance existed. It was, in effect, a determination that the defendants had a legal right to flowage and that *no liability for damage* therefrom existed in favor of the plaintiffs. This decree disposed of the primary issue of any claim for damages, namely, *liability for* damages, and therefore made it wholly *immaterial* and unnecessary to go into the matter of the *quantum* of the alleged damages.' " The trial court decided that the issue of damages had been determined in the first action. We affirmed on the following basis, citing our decisions: "The defense of res adjudicata becomes available when a question of fact has been put directly in issue in an action between the same parties or their privies *and an adjudication had thereon.* (Citing cases.) Under the doctrine of res adjudicata, when a question of fact *is once determined,* on the merits, that question is settled, so far as the litigants and those in privity are concerned. Such question when decided cannot be relitigated between the same parties

or their privies." Obviously that case is not the instant case, but the rules of law followed there determining the question of res judicata require a denial of the plea here. This is made clear at the conclusion of the opinion where we held *"if there was a finding of fact* in * * * the equity action, or the action at law *on the same issues of fact,* as were presented in the action * * * before the court, such finding would *be res adjudicata."*

I concur with Judge Messmore in his conclusion that the Ledingham case is in effect overruled by the court's present decision. To that I add that the opinion in Shepard v. City of Friend, *supra,* is likewise overruled on the issue here presented.

I now go to the "basis for the breadth of this rule" which the court now adopts. It is that because of the code provision there "has been a complete merger of legal and equitable remedies." The code provision is section 25-101, R. R. S. 1943, which is: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a 'civil action.' "

The court quotes to sustain its rule Hopkins v. Washington County, 56 Neb. 596, 77 N. W. 53. The quoted provision is requoted here to show by emphasis the scope of that decision: "In this state there is but one form of action, to be called a 'civil action,' (Code of Civil Procedure, sec. 2); but the *distinction between law and equity is not abolished.* There is one form of action, in which either relief may be sought and obtained; and if the facts *pleaded and proved* demand, the rules of either law or equity, or both, *may be* enforced." Obviously we are not here presented with a case where facts were *pleaded and proved* in the former action. No one contends that such is the case. It is interesting to note that Wilcox v. Saunders, *supra,* is cited to sustain the rule. I have heretofore analyzed that decision, and

obviously it does not sustain the "breadth" of the rule now adopted. None of our subsequent decisions citing the Hopkins case give it that breadth.

The court says: "See, also, City of Beatrice v. Gage County, 130 Neb. 850, 266 N. W. 777." That case decides that in a "civil action * * * legal and equitable principles, either or both, *may be* enforced according to the facts * * *." It relies on the Hopkins case. I fail to "see" any expression of a "breadth" of a rule in that case nor where it in anywise is supporting the position taken by the court.

The court relies for its sole authority as to the "breadth of this rule" upon a statement taken from Restatement, Judgments, § 66, p. 282. This refers to the impact of code provisions on the questions here. Before discussing section 66 I desire to quote from the same authority: "Where a plaintiff obtains an equitable decree against the defendant by which the defendant is directed to do an act other than to pay money, the plaintiff's claim is not merged in the decree. * * * Since the original cause of action is not merged in a decree in favor of the plaintiff which is not a decree for the payment of money, the plaintiff is not thereby precluded by the doctrine of res judicata from maintaining an action at law or a suit in equity upon the original cause of action. * * * The rule that a judgment, whether in favor of the plaintiff or of the defendant, is conclusive in a subsequent action between the parties upon the *issues actually litigated* in the first action is applicable not only to judgments for the payment of money * * *, but also to judgments in actions other than for the payment of money." Restatement, Judgments, § 46, pp. 178, 180. So the Restatement gives the court no comfort except as to the code provision.

The court quotes from the comment under section 66 of Restatement, Judgments. It emphasizes the last sentence, and evidently accepts it as controlling. I quote the sentence preceding, as it described precisely

the rule sustained by the wealth of our decisions. It is: "In some States, although a court of equity *may award damages,* there is not such a merger of legal and equitable remedies that the plaintiff is compelled to seek damages in the equitable proceeding or be precluded from thereafter seeking damages in an action at law; *in such States if the plaintiff brings a suit in equity to enjoin the continuance of a tort and does not seek damages which he has suffered from the tort, he is not precluded from thereafter maintaining an action at law to recover damages.*"

Section 25-101, R. R. S. 1943, of our code of civil procedure was adopted in 1867. See Laws 1867, § 1, p. 71. There were earlier provisions when this state was a territory. So our code provision is now 92 years old. The parent code was adopted in New York over a century ago. It is a matter of common knowledge that many states have likewise adopted a similar code provision.

I call attention to the age of this provision and the fact that the court has been unable to find one adjudicated case that puts Nebraska and its code within the scope of the more "complete merger" rule which it now adopts. Nor has the court found one single text that does so. Nor has the court found an adjudicated case to support the rule it adopts.

I am aware that the court says "See, also, 2 Freeman on Judgments (5th Ed.), § 593, p. 1250." I have obeyed the mandate and have seen that section. It makes no reference to code provisions. It consists of three paragraphs. The first deals with the rule of Gilbert v. Boak Fish Co., *supra,* which as I have pointed out we have heretofore refused to follow. The second paragraph deals with the rule of Perdue v. Ward, *supra,* which as I have pointed out we followed in the Ledingham case. The third paragraph contains the language to which the court refers. It is: "Assuming that but a single cause of action is involved, whether the granting of equitable relief alone, in a case in

which legal relief is not sought, operates as bar to future legal relief would on principle seem to depend upon whether a court of equity would be bound to grant such relief *if a proper case for it were made.*" 2 Freeman on Judgments, § 593, pp. 1251, 1252. That language assumes a "single cause of action" and a "proper case" being made. That sentence is followed by this: "If the matter be one resting *in the discretion of the court,* in view of the somewhat different modes of procedure followed in law and equity cases and the *absence of a right to jury trial* in the latter, it would seem that the failure of the plaintiff to present his claims for legal relief *should not bar* a subsequent action therefor. On the other hand *if the court would have no alternative but to grant or deny legal relief on the facts presented,* then it would appear to be the plaintiff's duty to present all of his grounds for relief, legal and equitable, in one action, on the general principle that any grounds for relief not urged are barred." 2 Freeman on Judgments, § 593, p. 1252. I see no support for either the "breadth of this rule" or for a construction of the code provision in that citation. The rule from Freeman, upon which the court relies, then depends on whether or not a court has no discretion to grant or deny legal relief *"on the facts presented."* I emphasize this because of the concluding phrase in the quoted rule "if a proper case for it were made." But where a party, as here, neither pleads, claims, or attempts to prove damages, how can it be said that "a proper case" is made or the "facts presented."

The quoted sections of Restatement relate to "equitable claims or defenses." It makes no reference to forms of action.

The court holds that because section 25-101, R. R. S. 1943, provides that there shall hereafter be "one form of action" that there has been "a complete merger of legal and equitable remedies."

But forms of action and legal and equitable remedies are not synonymous. 1 C. J. S., Actions, § 39, p. 1084, states: "Where the codes have done away with the formal aspects of the common-law forms of action and substituted a single form of action for the enforcement of civil rights, the substantive phases of such actions remain untouched."

In 1 C. J. S., Actions, § 1(d), p. 941, remedy is defined as follows: " 'Action' is also distinguishable from 'remedy,' in that the term 'remedy' includes various means of enforcing rights or redressing injuries other than by action."

In 1 Am. Jur., Actions, § 3, p. 405, it is stated: "Causes of action should be distinguished from remedies. The cause of action and the remedy sought are entirely different matters. The one precedes and, it is true, gives rise to the other, but they are separate and distinct from each other and are governed by different rules and principles. The cause of action should be distinguished not only from the remedy but also from the relief sought, which is no part of the cause of action." The same authority, § 5, p. 407, states: "It has been said also that the term 'action' is not as broad and inclusive as the term 'remedy,' which does not necessarily imply an action, being the means employed to enforce a right or redress an injury, usually by action, but not necessarily so."

If there is merit to the court's position it then must depend for the "merger of legal and equitable remedies" on the language in section 25-101, R. R. S. 1943, which provides that the "distinctions between *actions* at law and *suits* in equity * * * are abolished; * * *." Here the statute does not abolish or purport to abolish distinctions between *remedies* at law or in equity. It relates to distinctions between *actions* and *suits*.

I now return to the decision in Wilcox v. Saunders, *supra*. The precise question of the effect of the code provision was there determined, directly contrary to

the construction which the court now gives it. I point out that the verb "merge" now used by the court and the verb "blend" used by the court in the Wilcox case are synonymous.

As I have heretofore pointed out, Saunders sued Wilcox in equity for specific performance of a contract to convey land. He obtained a decree which became final. Saunders then sued Wilcox for damages for trespass committed upon the same premises involved in the former action. Saunders recovered a judgment in a jury trial. We affirmed. Wilcox contended that the former judgment was res judicata, relying on the code provision. Judge Gantt proposed to hold that the code provision was unconstitutional. He analyzed the act as follows: "First. The abolition of the distinction between actions at law and in equity. Second. The abolition of all forms of suits in equity as well as actions at law heretofore existing. Third. The substitution in their place of but one form of action, called a civil action; or in other words, *the merger of the two jurisdictions* and *the blending of law and equity in one form of action, called a civil action.*"

He proposed to hold: "* * * but an attempt to *blend* the two in respect to matters of substance and principle, it seems to me, would not only subvert the jurisdiction of the courts but would also be clearly repugnant to the constitution."

But the court did not agree with him. It held: "In regard to the power of the legislature, under the constitution of 1867, to *blend* law and equity cases in one form of action by the abolition of the distinction formerly existing between them, and authorizing their joinder in the same petition, we entertain no doubt whatever. On the contrary we think the authority to do all that the code provides in this particular is clear. * * * We cannot give assent to the notion that it was the design of the constitution to deprive the legislature of the authority to control the action of these

courts in *matters of mere practice,* so long as *no substantial right of a suitor* was taken from him. Parenthetically I point out here that a substantial right is taken from the plaintiff.)

"The code does not profess to abrogate that distinction, which in the very nature of things must always exist between legal and equitable rights and remedies, nor to deprive any person of as complete redress, for every conceivable wrong done to him in his person or estate, as he formerly could have had. But it does require that, whatever the nature of the right to be enforced, or the wrong to be redressed may be, whether such as formerly would have been cognizable in either a court of chancery, or in a court of law, the simple form of a 'civil action' must be followed, in which a plain statement of the material facts constituting the cause of action, or the defense, must be set forth in concise language, and without repetition. Thus while the ancient forms of action are now abolished, *all the various remedies known to the law still remain,* and are administered through the medium of the single 'civil action' of the code, quite as certainly and much more speedily, than they were under the former practice."

Quoting from Willard on Equity Jurisprudence, p. 43, the court held: " 'Relief may be obtained under the code in all cases where it could be granted before, whether at law or in equity. The subject of rights and wrongs remains unchanged. *The remedy to enforce them, or to prevent their violation, or to obtain satisfaction for their violation, still exists,* but under a different name. A civil action, nomen generalissimum, comprises within itself all the former actions both at law and in equity.' "

Here then is a direct holding that there has been no blending (merging) of the "remedy to enforce" legal or equitable rights. The court went on: "This is sufficient, we think, to show that, notwithstanding the two systems of procedure—the common law with its arbitrarily formal actions, of assumpsit, debt, detinue, tres-

pass, trover, and the like, on the one hand—and the chancery with its next to interminable bills, having their nine distinct sub-divisions on the other, together with their almost endless paraphernalia, have been dispensed with in this state, and by the act of June 19th, 1867, at the first session of the legislature under our former constitution, the two systems united in one single form of action,—still the constitutional jurisdiction of the courts was not thereby in the least abridged, but in complete harmony with both the language and the spirit of the code of civil procedure, yet remains as formerly, and extending to all *rights and remedies* of whatsoever nature, whether of chancery or common law cognizance under the former system. *The mere forms, it is true, have departed, but the entire substance of both jurisdictions is still preserved to us.*"

Here again is a direct holding that "rights and remedies" remain "as formerly"—only "mere forms" have departed.

The above decision was followed in Hart v. Barnes, 24 Neb. 782, 40 N. W. 322, where this statement is found: "The code has simplified the forms of procedure, and provides but one form known as a civil action, *but has not changed the rights and remedies of the common law.*" Contrary thereto the court now holds that legal and equitable "remedies" have been merged. The above decision was again followed in Hopkins v. Washington County, *supra,* from which the court quotes. So there can be no doubt that the court in the Hopkins case was not departing from the rule of Wilcox v. Saunders, *supra.*

The above decision was again followed in State ex rel. Wright v. Barney, 133 Neb. 676, 276 N. W. 676, wherein we held: "'The Code provides that there shall be but one form of action which shall be denominated a civil action. This provision has not changed the substantive rights of the parties. The substance of the common-law rules of legal procedure, and the principles by which the different forms of actions were pre-

viously governed, still remain as before. As it has been said, the abolition of the common-law names has not and *cannot change* the essential character of judicial *remedies.* And the common-law names are still used in Code states for convenience.' " The court now holds that the legal and equitable remedies have been changed and merged.

State ex rel. Wright v. Barney, *supra,* was quoted with approval in First Nat. Bank of Wayne v. Gross Real Estate Co., 162 Neb. 343, 75 N. W. 2d 704, in which we held: "By section 25-101, R. R. S. 1943, this distinction was abolished. The statute however did not abolish either the distinction between legal and equitable rights or the methods necessary to assert or defend respectively those rights."

It was again cited with approval in Fuchs v. Parsons Constr. Co., 166 Neb. 188, 88 N. W. 2d 648.

So we have an unbroken line of decisions beginning with Wilcox v. Saunders, *supra,* decided in 1876, down to and including the opinion in Fuchs v. Parsons Constr. Co., *supra,* written by Judge Boslaugh and decided in 1958, all sustaining a rule contrary to that which the court now adopts.

I do not favor cutting down or overruling all of the established precedents of this state construing and applying section 25-101, R. R. S. 1943. I submit that there has not been a "complete" or even a partial merger of legal and equitable remedies as a result of the adoption of the code provision.

In view of the number and definiteness of our holdings it would not seem necessary to cite texts on the matter. The subject is discussed in 1 C. J. S., Actions, § 55, p. 1168. I venture to quote from that authority: "While there has been some uncertainty and diversity of opinion, particularly in the earlier cases, as to the exact nature and extent of the change thereby effected, it is well settled that it is not so extensive as the broad terms of the provisions might imply. Without question

the mere formal distinctions have been abolished, but this seems to be practically all that has been effected, it being said that the distinction between law and equity is as naked and broad as ever."

Under the latter text statement in 1 C. J., Actions, § 176, p. 1047, the case of Wilcox v. Saunders, *supra,* is cited.

In 1 Am. Jur., Actions, § 56, p. 448, the rule is stated as follows: "In short, the effect of constitutional and statutory provisions for one form of civil action, whether the cause of action is in its nature legal or equitable, is that while all relief is sought in the same way from the same tribunal, the distinction between law and equity is as naked and broad as ever, and the plaintiff, to be entitled to the equitable interposition of the court, must show a proper case for the interference of a court of chancery."

Wilcox v. Saunders, *supra,* definitely decides that section 25-101, R. R. S. 1943, did not create a complete "merger of legal and equitable remedies"—nor any in fact. It is directly contrary to the construction which the court now puts upon the code.

Wilcox v. Saunders, *supra,* now being in effect overruled, I submit the court is now directly confronted with the constitutional contention advanced by Judge Gantt. The court did not criticize that view in Wilcox v. Saunders, *supra,* but held it did not arise under the construction there given to section 25-101, R. R. S. 1943. As a result of the present decision the constitutional question is now here. The court ignores it.

All of our decisions mentioned in this feature of the dissent cover a period of over 80 years and 162 volumes of our reports. They are ignored by the court.

The rule now adopted must necessarily operate in a situation where an action at law is had, followed by an attempt to secure equitable relief.

Suppose in this case plaintiffs had known of their damages to personal property. The amount of the dam-

ages were ascertainable. Damages to land from the trespass were known but the amount not ascertainable until such time as the full effect of the trespass had become a tangible result. Suppose then they had brought an action at law to recover their ascertainable damages to personal property. They would have that right and on that issue have a right of trial by jury. However, not being able to presently ascertain the permanent damages to their land, except on a speculative basis, they withheld that issue. Likewise not knowing the full extent of the effect of the trespass, they withheld seeking an equity decree enjoining the trespass because they might not be presently able to establish a right to an injunction.

Under this decision, by suing for damages to personal property, they would of necessity be held to have forfeited their right to permanent damages to land and a right to enjoin a violation of their property rights. I cannot reconcile our decisions with such a result or deem it to be a proper decision by a court administering justice according to law.

I now return to one sentence from Freeman on Judgments which the court suggests be seen. It is this: "If the matter be one resting in the discretion of the court, in view of the somewhat different modes of procedure followed in law and equity cases, *and the absence of a right to jury trial in the latter,* it would seem that the failure of the plaintiff to present his claim for legal relief should not bar a subsequent action therefor." 2 Freeman on Judgments (5th Ed.), § 593, p. 1252.

I suggest the court should follow the test which it recommends.

It is axiomatic that a remedy at law involves the right of trial by jury. A remedy in equity does not involve that right. These distinctions have been recognized in our decisions without number. They have a constitutional base.

If this decision means what it says, it means that

these distinctions are now wiped out. We no longer have actions at law or suits in equity—they have been *completely* "merged" in a civil action.

Webster's new Twentieth Century Dictionary (2d Ed.), p. 1127, defines merge as "to unite indistinguishably." The rule now adopted makes no exceptions. The court makes no exceptions, and none could be made in the "breadth of this rule" that there has been a complete merger of legal and equitable remedies.

What about the constitutional right of trial by jury in what was formerly an action at law and is now indistinguishably merged in a civil action?

The court is now confronted with not only the constitutional question raised by Judge Gantt in Wilcox v. Saunders, *supra,* but also the constitutional right of trial by jury so vigorously asserted, and as I saw it unduly extended in scope by the court, in Gillespie v. Hynes, *ante* p. 49, 95 N. W. 2d 457. There the court held that where a litigant invoked an equitable remedy (now merely a civil remedy), and a claim for a money judgment was advanced (formerly a law remedy, now merely a civil remedy), and the court denied equitable relief (now merely civil relief), a party could not, by remaining silent, waive his constitutional right of trial by jury as to the law issue (now merely a civil issue).

It is inconceivable that the court intends by this decision to "unite indistinguishably" what were formerly remedies at law and remedies in equity. I challenge its constitutional power to do so. If language means anything by holding that there has been a "complete merger of legal and equitable remedies" in this state, the court now has accomplished that result.

Using the terms which up to now were commonplace, the court now compels a litigant to go into equity, and if equitable relief is granted, he must waive his constitutional right of trial by jury of the law issue; but if he desires to secure a jury trial of the law issue he must thereby waive his equitable rights.

YEAGER, J., dissenting.

I concur in the dissent of Simmons, C. J., which has been filed in this case. I also dissent from that phase of the majority opinion which rejects the opinion originally adopted herein.

I shall direct my remarks first, not in repetition of what has been said in the dissent of Simmons, C. J., but to the disclosure of the reasonably anticipated consequences of the majority opinion. I take the view that this majority opinion, in addition to its own immediate mischief, contains the potential for broad and far-reaching mischief and confusion which will inevitably rise to plague the bench and the bar. This mischief may be readily demonstrated by some pertinent observations and related questions.

If this opinion is allowed to stand, what becomes of the right to trial by jury? Is the right to trial by jury abolished in cases where equitable and legal rights must be asserted in the same action? If a jury is to be called, must there be one hearing without the jury and another with one in attendance? If a jury is to be called, must it be done as a matter of right of the parties, or must there be a demand in order to secure a jury, and if no demand is made, is it necessary that this be regarded as a waiver? These are all questions which have not been answered which will require answers if this departure from traditional, well-established, and long-uninterrupted procedures is allowed to obtain.

Assuming that as regards the matters involved in this case and in Bahm v. Raikes, 160 Neb. 503, 70 N. W. 2d 507, the plaintiffs in Bahm v. Raikes, *supra,* had instituted action at law for damages instead of an action in equity to have destroyed the causative factor and had succeeded in recovering damages, but the causative factor was continued, would they, because they did not join their equitable right with their legal right, be barred from separate action in equity thereafter to have elim-

inated the causative factor? Would the action at law be res judicata of an action in equity?

The majority opinion holds that the decree in Bahm v. Raikes, *supra,* since no claim for damages was presented in that case, is res judicata and prohibits an action for damages caused by the wrongful acts of defendant which were enjoined. Despite this, however, it grants the right to assert that part of the pleaded cause of action relating to the period after February 1954. If the decree became res judicata for the reasons given in the majority opinion, why is it not res judicata as to the period after February 1954 as well as before? If the theory presented by the majority opinion is correct, does not consistency require the application of the rule to all periods? The relief sought in Bahm v. Raikes, *supra,* had reference to a situation involving past, present, and future injury and damage growing out of an existing and continuing condition. Wherein lies the power of this court to make a separation and division of this claim or rather failure to assert a claim? Other questions of related character could be asked but I think these are sufficient to demonstrate my concern.

I do not know what the answers to these questions should be and I decline to try to predict what they will be, but I am sure that the mischief and confusion which they foreshadow can all be avoided, without price or sacrifice in the area of either law or equity, by adherence to the principles set forth in Wilcox v. Saunders, 4 Neb. 569, and consistently and assiduously adhered to thereafter until the adoption of the majority opinion in this case.

From this it becomes clear that I do not think that the majority opinion contains a proper basis for the decision in this case.

I am still convinced that the opinion which has been rejected contains the proper basis for consideration of the case by this court, and further that the ultimate conclusion and decision outlined therein is the only one

which is capable of support on the record made at the trial in the district court.

It was asserted in that opinion that there was no proof of causal connection between the damage alleged by the plaintiffs in their pleaded cause of action and any act or failure to act on the part of the defendant. That assertion is repeated herein. The authenticity of this assertion is challenged by the present majority opinion, but significantly only in general terms. There has been no effort to point to evidence from the witnesses, or otherwise, the legal substance of which is to say that the particular damage occurring within the period not excluded by the statute of limitations was caused by any act or failure to act on the part of the defendant. It is true that there is evidence of damage from water, but there was not even an effort made on the trial to trace the source of the water back to any act or failure to act on the part of the defendant. In this connection the following is repeated from the rejected opinion: "Inexplicably, however, the plaintiffs failed to offer any testimony or other evidence that any of these things were caused or came about by reason of the matters charged against the defendant in Bahm v. Raikes, *supra,* which was prohibited or commanded by the adjudication in that case, or that they were caused by any other act of omission or commission on his part."

Despite the statements made in the majority opinion, with assurance I rest my statements on what appears, or more correctly does not appear, in the bill of exceptions.

It is of course true that there was evidence of a general nature on the trial of the case that over a long period of years works of the defendant caused damage to lands and crops of the plaintiffs. It is likewise true that in Bahm v. Raikes, *supra,* there was evidence, the result of which came into this case under the law of the case theory, that over a long period of years works of the

defendant generally caused damage to lands and crops of the plaintiffs.

It might well be said that these two phases of evidence could be regarded as corroborative in character, provided of course that there was evidence disclosing the source of the thing which caused the particular damage claimed. But here there was not the primary evidence which is the basis for corroborative proof.

I earnestly insist therefore that the present majority opinion should have been rejected and the one rejected should have been allowed to stand.

IN RE APPLICATION OF NEBRASKA LIMESTONE PRODUCERS ASSOCIATION.

NEBRASKA LIMESTONE PRODUCERS ASSOCIATION, APPELLANT, V. ALL NEBRASKA RAILROADS ET AL., APPELLEES.

97 N. W. 2d 331

Filed June 26, 1959. No. 34554.

1. **Public Service Commissions: Motor Carriers.** The power of the State Railway Commission to fix the rates to be charged by common carriers is legislative and not judicial in character.
2. **Public Service Commissions: Appeal and Error.** On appeal from a decision of the State Railway Commission involving the rates to be charged by common carriers it is presumed that the rates prescribed are just, reasonable, and not arbitrary, and are otherwise lawful.
3. **Public Service Commissions: Motor Carriers.** Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited.
4. **Public Service Commissions: Appeal and Error.** On appeal from a decision of the State Railway Commission the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made.
5. **Public Service Commissions: Motor Carriers.** Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recog-

nized factors, the power to resolve such conflicts ordinarily rests with the commission and not the courts.

6. ———: ———. Where it is shown that an order of the State Railway Commission is within the scope of the powers vested in it, and such order is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission.

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

Nelson & Harding, for appellant.

J. A. C. Kennedy, R. D. Neely, Guy C. Chambers, G. C. Holdrege, and *J. W. Weingarten, 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 Nebraska State Railway Commission denying an application to adjust the rail rates and charges on crushed rock and stone to the same level as those applicable to sand and gravel.

The record discloses that the single-car rates on crushed rock and sand and gravel were about to be fixed at identical rates by agreement of all concerned. The real issue before the commission therefore was whether or not the 10-car rates on crushed rock should be reduced to the lesser 10-car rates on sand and gravel. The applicant contends that the issue is whether or not the 10-car rates on crushed rock and sand and gravel should be placed on a parity by either raising or lowering one or the other to accomplish that result. This difference in the statement of the issues is not a material one in determining the questions raised by the appeal. For the purposes of this opinion we shall refer to the 10-car rates on crushed rock and stone and the 10-car rates on sand and gravel as the "crushed rock" and the "gravel" rates.

The evidence shows that the State of Nebraska is

underlaid with vast deposits of sand and gravel which is suitable for building and road construction purposes. This makes it possible to open sand and gravel pits close to large building and road construction projects and to transport sand and gravel by motor truck to such points. Most of the shippers of sand and gravel by rail are located in the eastern edge of the state. In order that the railroads might meet the competition of these roadside operators of sand and gravel pits, and participate in the transportation of sand and gravel, the commission authorized a 10-car gravel rate in 1939 which was substantially less than the rate on crushed rock.

It is the contention of the shippers of crushed rock that, as a result of the fixing of a lesser rate on gravel than on crushed rock, a greater charge is made against crushed rock producers for a like and contemporaneous service and amounts to an unjust discrimination. It is contended also that it amounts to an undue and unreasonable preference and advantage to gravel shippers as compared to shippers of crushed rock, resulting in unjust discrimination.

The evidence shows that although there are outcroppings of rock in various parts of the state, most of the crushed rock is quarried and shipped from substantially the same area from which sand and gravel are shipped by rail. The evidence indicates that gravel and crushed rock are usually transported at the same rate by the railroads of the country. We think this is true, and unless other factors are present justifying the lesser rate on gravel, the latter would clearly be discriminatory.

The appellant urges that crushed rock and gravel are competitive products and that the reduced rate on gravel has the effect of granting to gravel shippers by rail an economic preference over shippers of crushed rock by rail. The evidence shows that 50 percent or more of the crushed rock shipped by rail is sold to state and federal government agencies for use in the construction of roads and airport facilities. Practically all of

these shipments are pursuant to contracts which specify the composition of the aggregates to be used, including the percentage of each and the grade to be used. In such construction projects crushed rock and gravel are not competitive. When alternatives are provided for the use of crushed rock or gravel, they are competitive products. After a consideration of all the evidence we conclude that crushed rock and gravel are not competitive in most instances but they are competitive in many. This is a factor to be considered in determining the factual situation passed upon in dealing with the application for the adjustment of rates in the instant case.

We conclude from a consideration of all the evidence that there is competent evidence to sustain a finding that a reduced rate on gravel is required to meet competition with motor truck transportation. We conclude also that there is evidence to sustain a finding that crushed rock is to some extent competitive with gravel, and to such extent, the lower rate on gravel discriminates against the use of crushed rock. Whether or not the granting of competitive rates on gravel to permit the railroads to continue in the transportation of gravel and to obtain needed revenue therefrom, or to compel a common rate on gravel and crushed rock to prevent economic preference in favor of gravel shippers to the extent shown, raises an issue which is peculiarly within the province of the commission to decide. Unless an unjust discrimination is shown, or the order of the commission is unreasonable and arbitrary in not being supported by evidence, the courts are without authority to interfere.

The fixing of rates for common carriers by the railway commission is legislative in character. At common law a common carrier was not permitted to charge a different rate to different persons for the identical service under the same conditions. Statutes providing for the fixing of rates to be charged by common carriers are in derogation of the common law. The power to

fix rates to be charged by common carriers is therefore a legislative function which has been lodged in the State Railway Commission subject to the limitations of the Constitution and the statutes of the state. Thus a rate put into effect by the railway commission has the force of a statute on the subject. Farmers Union Livestock Commission v. Union Pacific R. R. Co., 135 Neb. 689, 283 N. W. 498.

There is no contention advanced in this case that the established rates on crushed rock and gravel are unreasonable. The contention is that, unless the rates on these products are on a parity, they constitute a preference and unjust discrimination as defined in the statutes. §§ 75-501 and 75-502, R. R. S. 1943.

Our statutes prohibit unjust discrimination and unreasonable preferences. But all discrimination is not unjust discrimination and all preferences are not unreasonable ones. Some discrimination cannot be avoided. Rates must be adjusted on other considerations than that merely of bringing about economic equality. When competitive conditions are different, different rate levels can often be justified. In the instant case the railway commission had authority to consider the necessity of a competitive rate on gravel to meet motor truck competition to obtain needed revenues for railroads. It also was required to eliminate unjust discrimination and unreasonable preferences. Where there is evidence supporting factors which are inconsistent or in conflict with other recognized factors the power to decide ordinarily rests with the railway commission and not the courts. The railway commission determined the necessity for a competitive rate on gravel and its allied products. It determined what it deemed should be a reasonable rate for crushed rock. It in effect held that any discrimination or preference arising therefrom was not unjust or unreasonable under all the circumstances and conditions shown by the evidence. The evidence sustains the findings of fact made by the commission.

The difference in rates in the area where crushed stone and gravel are competitive amounts to an economic discrimination in that they provide a different rate to different persons for identical service. But we cannot say that the discrimination is an unjust one within the meaning of the statute because of differences in the circumstances and conditions surrounding the two products. It is contemplated that the railway commission should exercise its best judgment in resolving the conflicts between the various factors ordinarily followed in the fixing of rates for common carriers. In Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., 164 Neb. 247, 82 N. W. 2d 395, we recognized this rule by quoting the following with approval: " 'Although a common carrier is bound to carry at equal rates for all customers in like condition, * * * mere discrimination does not render a rate illegal; only such rates as are unreasonably or unjustly discriminatory are inhibited. In other words, mere inequality of charge does not necessarily constitute undue or unreasonable preference or advantage, and cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or other transportation conditions. Further, any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge, since common carriers are only bound to give the same terms to all persons alike, under the same conditions and circumstances. Accordingly, no claim of illegality can be sustained if, in view of all the circumstances, the discrimination is fair and reasonable, and not inconsistent with the public interest, and, subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, * * *.' "

The evidence shows that the rate on crushed rock is reasonable. It is in substantial accord with crushed

rock rates for shippers in other states and avoids charges of discrimination against interstate rates. The evidence shows that a lower rate on gravel is necessary for railroads to compete with motor truck competition. It shows also that gravel is competitive with crushed rock only to a limited extent. Under the circumstances and conditions shown, there is evidence to support the order of the commission.

It is the established rule in this state that, on appeal to the Supreme Court from an order of the railway commission fixing rates for common carriers, the only questions for determination are whether or not the railway commission acted within the scope of its authority, and whether or not the order made is reasonable and not arbitrarily made. Hooper Telephone Co. v. Nebraska Telephone Co., 96 Neb. 245, 147 N. W. 674; Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756; Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., *supra*.

Since the record discloses competent and relevant evidence in support of the findings of the railway commission upon the questions of fact presented, and, the order made being within the scope of the powers of the commission and not shown to be arbitrary or unreasonable, this court may not properly substitute its views for that of the commission. An affirmance of the order of the commission is required.

AFFIRMED.

ALLEN W. KRONE ET AL., APPELLANTS, V. PATRICK J. LACY ET AL., APPELLEES.
97 N. W. 2d 528

Filed June 26, 1959. No. 34577.

1. **Mines and Minerals.** By the terms of an entirety clause the parties thereto agree that in the event the mineral interests under the leased premises shall become separately owned the royalties

shall nevertheless be treated as an entirety, the separate owners participating pro rata.

2. ———. This voluntary provision in a lease has the effect of placing a restriction upon the power of the lessor to alienate his mineral and royalty interests therein contrary thereto as long as the lease containing such clause remains in force and effect.

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

Wright, Simmons & Harris, for appellants.

Van Steenberg, Myers & Burke and *Fritzler & Brower,* for appellees.

Russell Moore and *Morris, Laing, Evans & Brock,* amici curiae.

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

WENKE, J.

Allen W. Krone and his father Francis Krone brought this action in the district court for Kimball County against Elsie F. Heidemann, a widow; Melba V. and Patrick J. Lacy, wife and husband; Marion G. and Ruth K. Heidemann, husband and wife; Llera A. and Gardner A. Nott, wife and husband; Edward Paul and Patsy Heidemann, husband and wife; Harold R. and Elda Heidemann, husband and wife; and Bernard G. Heidemann, a single person. The purpose of the action is to obtain a declaratory judgment fixing the rights of plaintiffs and defendants in and to the royalties that will accrue from certain lands by reason of the production of oil therefrom, such rights being based on certain instruments executed and delivered to the plaintiff Allen W. Krone by the defendants, and for an accounting of the royalties already received by the defendants therefrom. Francis Krone died while the action was pending and it was revived in the name of his heirs and the administrator of his estate.

The defendants all joined in two motions for summary judgment which the trial court sustained. Plaintiffs thereupon filed a motion for new trial and this appeal has been taken from the overruling thereof.

On December 17, 1949, Herman L. Heidemann owned in fee all of Sections 15 and 22 in Township 15 North, Range 56 West of the 6th P. M. in Kimball County, Nebraska, and, with his wife Elsie F. Heidemann, owned as joint tenants Section 14 and the north half and the southwest quarter of Section 23, in Township 15 North, Range 56 West of the 6th P. M. in Kimball County, Nebraska, being a contiguous tract of 2,400 acres. On that day Herman L. Heidemann and Elsie F. Heidemann, husband and wife, executed an oil and gas lease on these premises to R. C. Leake for a primary term of 10 years, which lease is still in full force and effect, in consideration of which the lessee, insofar as oil was produced from said premises, was to deliver to the lessors, free of cost, a ⅛th part thereof. This lease contained the following: "If the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is expressly allowed, the covenants hereof shall extend to their heirs, executors, administrators, successors or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof; and it is hereby agreed in the event this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them on an acreage basis, such default shall not operate to defeat or affect this lease in so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payments of said rentals. If the leased premises are now or hereafter owned in severalty or in separate

tracts, the premises, nevertheless, may be developed and operated as an entirety, and the royalties shall be paid to each separate owner in the proportion that the acreage owned by him bears to the entire lease area. There shall be no obligation on the part of the lessee to offset wells on separate tracts into which the land covered by this lease may hereafter be divided by sale, devise, or otherwise, or to furnish separate measuring or receiving tanks for the oil produced from such separate tracts."

The foregoing provision came into being primarily to avoid the hardships often imposed upon lessors, and their successors in interest, by reason of the rule of non-apportionment of royalties generally imposed by the courts in the absence of such a provision and, in turn, created benefits for the lessee and its assignees by defining with certainty its duties and responsibilities thereunder, thus avoiding many of the difficulties that were likely to arise under a lease without such a provision. It avoided any necessity of the lessee providing separate measuring or metering devices and separate receiving tanks for each separate tract developed; it made it possible for the lessee to develop the leased tract as a whole without causing injury to any of the separate owners of mineral rights therein by so doing; it thus created a basis for good will between the lessee and lessors and also between the lessors themselves by doing away with the usual causes of litigation; and it made certain that the lessee had no duty to offset wells. It would seem that it is a provision in a gas and oil lease that is beneficial to all who are parties thereto and certainly not against public policy.

Thereafter, on April 14, 1950, Herman L. and Elsie F. Heidemann, husband and wife, conveyed the southwest quarter of Section 23 to Melba V. Lacy, their daughter, and Patrick J. Lacy, her husband, as joint tenants subject to the oil and gas lease above referred to, thus conveying to the Lacys all the mineral rights

in this 160-acre tract. On December 20, 1950, Herman L. and Elsie F. Heidemann conveyed to the Lacys as joint tenants the north half of Section 23 subject to the oil and gas lease above referred to but reserving to themselves one-half of the minerals, thus conveying to the Lacys 160 mineral acres in this 320-acre tract.

Acceptance of the conveyance "subject to an oil and gas lease" implies agreement by the grantee to the application of the entirety clause in the lease.

On December 20, 1950, Herman L. Heidemann, together with his wife Elsie F., conveyed the south half of Section 22 to Marion G. Heidemann, his son, and Ruth K. Heidemann, Marion's wife, as joint tenants but subject to the oil and gas lease above referred to, but reserving to Herman L. Heidemann one-half of the minerals. Thereafter, on January 26, 1951, Herman L. Heidemann together with his wife conveyed to Marion G. Heidemann, his son, and Ruth K. Heidemann, Marion's wife, the north half of Section 22 and the south half of Section 15 subject to the oil and gas lease above referred to, but reserving to Herman L. Heidemann a one-half interest in the minerals. Thus Marion G. and Ruth K. Heidemann became the owners of 480 mineral acres in the lands conveyed to them.

Herman L. Heidemann died testate on July 23, 1953, and by reason thereof his wife, either as a joint tenant or under the terms of his will, together with their six children became the owners of all the mineral interests in the 2,400-acre tract hereinbefore described which had not been conveyed during his lifetime, as hereinbefore set forth. Thus, Elsie F. Heidemann, the widow, Melba V. Lacy and Patrick J. Lacy, wife and husband, Marion G. Heidemann and Ruth K. Heidemann, husband and wife, Llera A. Nott, a daughter, Bernard G. Heidemann, a son, Edward Paul Heidemann, a son, and Harold R. Heidemann, a son, became the owners of all the mineral rights in the 2,400-acre tract upon the death of Herman L. Heidemann, but subject to the lease orig-

inally given by Herman L. Heidemann, now deceased, and Elsie F. Heidemann, his wife, to R. C. Leake.

R. C. Leake assigned the oil and gas lease he had obtained from the Heidemanns to the Sinclair Oil and Gas Company on December 21, 1949. On September 25, 1956, Sinclair Oil and Gas Company assigned or farmed out its interest under the lease in the south half of the northeast quarter and the north half of the southwest quarter of Section 23 to Petroleum Incorporated; on December 23, 1957, it assigned to or farmed out its interests under the lease to the south half of the northwest quarter of Section 23 to Lark Oil Company; and it either assigned or farmed out its interests under the lease in the east half of the southeast quarter of Section 14 to the Mid America Drilling Company.

On April 18, 1956, the Lacys, by "Mineral Deed," conveyed to Allen W. Krone an undivided one-half interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the southwest quarter of Section 23, but subject to the gas and oil lease already referred to. And on the same day the Lacys conveyed to Allen W. Krone a one-fourth interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the north half of Section 23, but subject to the oil and gas lease hereinbefore referred to.

The provision in the oil and gas lease hereinbefore set out, and which is generally referred to as an "Entireties Clause," had the following effect: "By the terms of an entirety clause, such as here, the parties thereto agree that in the event the mineral interests under the leased premises shall become separately owned the royalties shall nevertheless be treated as an entirety, the separate owners participating pro rata. * * * this voluntary provision in a lease has the effect of placing a restriction upon the power of the lessor to alienate his mineral interests therein contrary thereto as long as the lease containing such clause remains in

force and effect." Rauner v. Jones, 159 Neb. 385, 67 N. W. 2d 347. See, also, Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N. W. 2d 139. Standing alone these two deeds would have given Allen W. Krone a 160/2,400th or a 1/15th interest in and to the ⅛th royalty provided for in the lease and produced from all the lands covered thereby. That is what the trial court held appellants were entitled to.

However, in connection with the execution of each of the mineral deeds the Lacys executed a memorandum, which Allen W. Krone accepted. Thereafter, on April 23, 1956, all of the other defendants having any interest in the minerals in and under these lands signed a "Ratification" of each of the mineral deeds. While many objections are made by the appellees to the sufficiency and validity of these instruments we shall assume, for the purpose of our holding herein, that the parties thereto sought, by means thereof, to convey to Allen W. Krone one-half of all the royalties that might accrue from any gas, oil, or other minerals that might be produced from the southwest quarter of Section 23 and one-fourth of all the royalties for any gas, oil, or other minerals that might be produced from the north half of Section 23, and nothing from any production thereof from the balance of the entire tract of 2,400 acres, and that is what appellants here contend they are entitled to.

As stated in Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99: "'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 course of the same transaction, are, in the eye 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.'"

It will be observed that the lessee was neither a party to the agreements here sought to be enforced nor made a party to this action.

On April 23, 1956, Allen W. Krone conveyed to his father whatever interests he had obtained in these premises.

Petroleum Incorporated developed two producing oil wells on the south half of the northeast quarter of Section 23 and one on the north half of the southwest quarter of Section 23; Lark Oil Company produced one oil well on the south half of the northwest quarter of Section 23; Mid America Drilling Company produced one oil well on the east half of the southeast quarter of Section 14; and Sinclair Oil and Gas Company produced one oil well on the north half of the northeast quarter of Section 23. As of August 1, 1957, Sinclair Crude Oil Company had become the purchaser of all oil produced from these wells.

The appellants put the question as follows: Is an assignment of royalties which may accrue by reason of the production of oil from a specific piece of land, which land is included in an oil lease, together with other lands, containing an entirety clause, enforceable? The question is stated by appellees as follows: The plaintiffs contend that even though a lease contains an entirety clause, the lessor and his grantees, without the lessee consenting, can contract to the effect that royalties shall be paid to separate owners in other than the proportion that the mineral acreage owned by the separate owners bears to the entire leased area. The question is, may the owners of all royalty interests under a lease containing an entirety clause agree among themselves for a different division of the royalties accruing thereunder than that fixed by the entireties clause and, if they do, is such an agreement enforceable among themselves?

After an oil and gas lease has been executed and delivered to the lessee, as was here done, the lessors therein have and retain three separate and distinct interests in the lands covered thereby and which are all part of the land itself. The first is the right to the sur-

face subject to the lessee's right of ingress and egress for the purpose of carrying out the lease itself; the second is the right to a reversion of the minerals in case the lease, or any part thereof, should be terminated for any reason; and the third is the right to receive accruing royalties, if any, under the lease by virtue of the removal of any minerals therefrom. Ordinarily such interests would all be subject to alienation by the owners in any manner that they might see fit to do so. See, 3A Summers, Oil and Gas (Perm. Ed.), § 572, p. 5; 42 Am. Jur., Property, § 52, p. 229.

Royalties may be accrued or unaccrued. Accrued royalty is merely a chose in action and personal property. It does not pass to the grantee of the land subject to the lease and may be transferred and assigned the same as any other personal property. On the other hand unaccrued royalty is an interest in the land and real property. See, Sullivan's Handbook of Oil and Gas, § 120, p. 222; Garza v. DeMontalvo, 147 Tex. 525, 217 S. W. 2d 988; Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 P. 244. As stated in Garza v. DeMontalvo, *supra:* "It is settled in this state that the interests retained by the landowner, under an oil and gas lease, including royalty, are interests in land." And, as stated in Broderick v. Stevenson Consolidated Oil Co., *supra:* "Oil remaining in the ground before recovery is a part of the land, and belongs to the owner of the land; * * *."

The entireties clause is a valid burden imposed upon the interests in the property retained by the lessors. As we said in Hafeman v. Gem Oil Co., *supra:* "A covenant in an oil and gas lease to pay rent or royalties is not personal or collateral but runs with the land." In 7 Oil and Gas Reporter, p. 70, in discussing Hafeman v. Gem Oil Co., *supra,* it was submitted that the above rule was sound, stating: 'The entirety provision should be treated as a covenant running with the land and as such, binding upon lessor and his grantees." The lessors, by executing the lease, placed a restriction upon their

power to alienate any part of their estate in the land covered by the lease except in accordance with the provisions of the lease itself. That they had the right to do so and that such restriction is not against public policy has already been determined by this court. See, Rauner v. Jones, *supra;* Hafeman v. Gem Oil Co., *supra.* Such provision, being a covenant running with the land, imposed the same burden on any interest acquired by anyone from the lessors to the lease as upon the lessors themselves. As stated in Hafeman v. Gem Oil Co., *supra*: "The correct interpretation of the lease under the rule referred to above is that the entirety clause was not intended to be and is not divisible. * * * The obligation to pay royalties of necessity includes the duty to pay them as required by the entirety clause. This duty is extended, not divided, by an assignment of a portion of the leasehold."

We have come to the conclusion that by the terms of an entirety clause, such as is here contained in the gas and oil lease, the parties thereto agree that in the event the mineral interests under the leased premises become separately owned that the royalties shall nevertheless be treated as an entirety, the separate owners to participate pro rata, and that, by reason of the provisions of the entireties clause, the separate owners cannot convey any interest in their royalty rights therein contrary thereto.

We recognize there are holdings in other states contrary to the foregoing. However, we do not agree with the reasons those courts adopted for so holding. This is particularly true of cases which base their holdings on the fact that the lessee will not be harmed by the result arrived at because of the extent to which the leasehold has been developed. As stated in Iskian v. Consolidated Gas Utilities Corp., 207 Okl. 615, 251 P. 2d 1073: "In Gypsy Oil Co. v. Schonwald et al., supra, there was production from other portions of the lease, than that portion under which the royalty interest was

granted, and, in Eason v. Rosamond, supra, the matter of production from other portions of the lease was taken care of by stipulation. Thus, these cases are factually distinguishable from the instant case. In the instant case, the interests of the lessees are not involved and nothing in this opinion is intended to apply to or limit their rights under the provisions of the entirety clause. *In the event production is obtained from other portions of the lease, a different rule would apply.*" (Emphasis ours.) We do not think the extent to which the leasehold has been developed is in any way controlling for if the provisions of an entireties clause are not against public policy, and they are not, and the parties voluntarily enter into a lease so providing then the provisions thereof should be and, in our opinion, are in effect at all times as to all parties thereto as long as the lease remains in force and effect.

Since the entirety clause is binding on the lessors, lessees, and all holding under them, it necessarily follows that all parties affected must consent to any change in the apportionment required by the clause in order to make such change effective.

There are other issues raised by appellees but in view of our holding herein we do not find it necessary to deal with them.

Having come to the conclusion that the lessors, and all parties holding under or through them, could not, by agreement entered into among themselves, make a change affecting the apportionment of the royalties provided for by the entireties clause in the lease, we affirm the trial court's judgment holding that appellants had a 1/15th interest in the ⅛th royalty from oil produced from the entire 2,400-acre tract.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, AND THE DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, APPELLANT, V. ASSOCIATES DISCOUNT CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES, THEODORE L. RICHLING, RECEIVER, APPELLANT.

97 N. W. 2d 583

Filed July 3, 1959. No. 34398.

SUPPLEMENTAL OPINION

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. On motions for rehearing. See ante, p. 298, 96 N. W. 2d 55, for original opinion. *Former opinion modified. Motions for rehearing overruled.*

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

Shotwell, Vance & Marchetti, for appellant Richling.

John W. Delehant, Jr., for appellees.

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

WENKE, J.

In view of the motions for rehearing filed herein by the appellees Associates Discount Corporation and John F. Kemnitz and the appellant Theodore L. Richling, receiver, we find a supplemental opinion to be necessary.

In our original opinion we allowed the receiver fees of $12,000 for all ordinary services performed, and to be performed, by him in connection with the receivership from November 12, 1957, up until it is closed and also allowed fees for his counsel of $4,380 during this same period of time providing, however, that: "If extraordinary and unusual services are required in connection therewith the receiver may apply to the district court for additional compensation to cover such services." State ex rel. Beck v. Associates Discount Corp., *ante* p. 298, 96 N. W. 2d 55.

We have now come to the conclusion that in doing so we were premature and therefore set aside and vacate that part of our opinion so holding. The amount of fees which should be allowed the receiver and his counsel for services rendered in connection therewith subsequent to November 12, 1957, should be fixed by the trial court at a hearing provided for that purpose by it after the purposes for which the receivership was created have been fully carried out. At this hearing all interested parties, including the receiver, should be given an opportunity to present any relevant evidence relating to the services actually rendered by the receiver and his counsel subsequent to November 12, 1957, that will be of assistance to the trial court in determining what the amount of the fees should be. However, when determined, they should be taxed to the appellee Associates Discount Corporation as part of the costs of this proceeding.

Appellees now contend that the Installment Loan Act governs only loans of money and that we judicially broadened the scope of the language thereof to include renewals, which they contend are not loans within the meaning of the act. While we think the renewals, as handled by appellees, resulted in each case in a new debt or loan we think the language of the act is broad enough to cover an installment loan when the consideration therefor is the unpaid balance of a preexisting debt. See particularly §§ 45-137, R. R. S. 1943, 45-138, R. S. Supp., 1955, 45-155, R. R. S. 1943. It will be noted that the effect of any "violation" of the act relates to "any indebtedness, however acquired."

Appellees now contend the civil penalties and forfeitures provided for by the act cannot be imposed without Associates or any of its officers or employees having been charged with, tried for, and convicted of violating the act as provided for in section 45-128, R. R. S. 1943. We do not think such is a prerequisite to the state or any interested persons enforcing the provisions

of the act as they relate to the civil penalties and provisions therein provided for because of violations thereof. As stated in section 45-155, R. R. S. 1943: "*Violation* of sections 45-114 to 45-155 *in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible.*" (Emphasis ours.) See, also, §§ 45-137, R. R. S. 1943, 45-138, R. S. Supp., 1955, and 45-157, R. R. S. 1943; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122.

In view of the foregoing both motions for rehearing hereinbefore referred to are overruled.

FORMER OPINION MODIFIED.

MOTIONS FOR REHEARING OVERRULED.

STATE OF NEBRASKA EX REL. GAME, FORESTATION AND PARKS COMMISSION, APPELLEE, V. CLINT HULL ET AL., APPELLANTS.

RAT LAKE CLUB, INC., APPELLEE, V. CLINT HULL ET AL., APPELLANTS.

97 N. W. 2d 535

Filed July 3, 1959. No. 34547.

1. **Easements: Adverse Possession.** The use and enjoyment which will create title by prescription to an easement are substantially the same in quality and characteristics as the adverse possession which will give title to real estate. The use and enjoyment must be adverse, under claim of right, continuous, notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, must continue for the full prescriptive period, and must be substantially identical.
2. **Easements.** To establish a prescriptive right to an easement, all of the elements of a prescriptive use and enjoyment must be established by clear, convincing, and satisfactory evidence.
3. ———. If an easement is acquired by prescription, the extent of the right is fixed and determined by the use in which it originated. To establish an easement by prescription the evidence must show the extent of the use for a period of at least 10 years.

4. **Highways.** If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it.
5. **Easements: Adverse Possession.** If a claimant has shown notorious, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse use, it will be presumed to have been under a claim of right. The owner of the servient estate, in order to avoid the acquisition of an easement by prescription, has the burden of rebutting the presumption by showing the use to have been permissive.
6. ———: ———. If the use of an easement has been adverse, notorious, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied.
7. **Highways.** To establish a highway by prescription there must be use by the general public under a claim of right, adverse to the owner of the land, of some particular or defined line of travel and uninterruptedly without substantial change for a period of time necessary to bar an action to recover the land.
8. ———. It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of travel has remained substantially unchanged for the full period, it is sufficient even though at times, to avoid encroachments, obstructions, or the like upon the road, there have been slight changes in the line of travel.
9. ———. If the owner of land over which a road extends changes the route for his convenience or advantage, and if the public continues the use of the highway as changed and public authorities expend public funds on the improvement of the highway, the owner of the land cannot question the identity of the line of travel. The public right therein does not become extinguished but exists in the highway as changed and the owner of the land may not question the identity of the course of the highway.
10. ———. Change in the course of a road after the right of the public is established by use for the statutory period does not defeat the public right to the use of the road as previously established.
11. ———. A public highway may be established by implied dedication in this state for use as a public highway if there is present an intent to appropriate an easement for such public use. The intent may be expressed in the visible conduct and acts of the owner if they are such as would cause ordinarily

prudent men to infer an intent to dedicate a right-of-way for a public highway; and if they are so received and acted upon by the public, the owner cannot after the acceptance recall his appropriation.

12. ———. In order to constitute a highway by implied dedication it is not necessary that the offer be accepted by public authorities but it may be accepted by the public, and such acceptance may be shown by the public entering upon and using the land and thereby enjoying the privilege offered.

13. **Easements: Highways.** The extent and nature of an easement is determined from the use made of the property during the prescriptive period. The width of a public highway acquired by prescription or dedication must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use. It may be more or less than the width of a public highway as prescribed by statute.

14. **Highways.** If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel.

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

William B. Quigley, Healey, Davies, Wilson & Barlow, and *Patrick W. Healey,* for appellants.

Clarence S. Beck, Attorney General, *Homer G. Hamilton, Perry, Perry & Nuernberger, Edwin C. Perry,* and *John Evans,* for appellees.

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

BOSLAUGH, J.

The controversy in this litigation concerns the existence or nonexistence of a sandhill trail road across the land of appellants in Cherry County as a public road by prescription or implied dedication. Appellees assert that the sandhill trail road, hereafter referred to as the road, has been a thoroughfare used by the public for more than 10 years prior to September 19, 1956, under claim of right, adversely, openly, and continuously; that the road was and is clearly defined and was

during the period above mentioned used uninterruptedly and in substantially the identical location; that Cherry County has recognized the existence of the road as a public highway by contributing to its maintenance, by making improvements to it, and by keeping it in condition for travel during and following periods of adverse weather; that Clint Hull and Gretchen Hull on or about September 19, 1956, erected a barrier across the road where it entered their land in its course from the east towards the west and illegally obstructed and prevented the use of the road by the public, including appellees; and that Kurt Wendler and Agnes O. Wendler were intending, as appellees were informed, to prevent them from having the use of the road across the land of the last-named persons and that they would prevent appellees from having access to and from property owned by them to their irreparable harm and injury. The relief appellees sought was that appellants be enjoined from continuing the barrier across and the obstruction of the road; that they be required to remove them from the road; and that they be barred from interfering with the right of the public in the use of the road as a public highway.

Appellants denied generally except they admitted that Hull erected the barrier and prevented the public, including appellees, from entering upon and trespassing on the land owned by appellants. They alleged that any travel by anyone on and across their land was with the express permission of appellants and was not adverse or under claim of right; that no claim of right by prescription or otherwise to a way across the land of appellants was claimed or asserted by appellees or any other person prior to the commencement of this litigation; and that any right claimed by appellees to a road across the land of appellants has been abandoned and forfeited. Appellants ask that the petition of appellees be dismissed; that the trial court find and adjudge that there was no public road or easement for a right-of-way

of a public road on or across the land of appellants; and that appellees be enjoined from trespassing upon the land of appellants. The issues in the case were completed by a reply which was essentially a denial of any new matter in the pleading of appellants.

The district court found generally in favor of appellees; that the road was by virtue of adverse use for more than 10 years and was by dedication a public highway 40 feet wide, the center line of which was specifically detailed in the findings; that the course of the road has had slight deviations to avoid sand blowouts, mud holes, natural obstructions, and as a result of action by the respective landowners in the relocation of cattle gates or the grading of the road but that the course of it has remained substantially the same for the period of its adverse user and has been in existence in the area which it traversed for as much as 60 years; that the deviations in the course of the road were not substantial considering the nature of the area crossed by it and were less than in many sandhill routes; that there had been dedication by the respective owners of the road; that the deviations specifically described in the findings were caused by or participated in by the respective landowners; that the dedication of the road occurred simultaneously with the deviations or have since been acquiesced in by the owners to an extent greater than passive permission of the user of the way and the dedication has been concurred in by the authorities of Cherry County and it has exercised control of and expended public funds in the construction and maintenance of the road; and that the width of the road was fixed by the court at 40 feet because of the statute that public roads shall not be less than that width. The judgment was appropriate to the findings and the relief asked by appellees. The motion for new trial by appellants was denied. The result of the trial and the final action of the trial court were the occasion of this appeal.

The two cases identified in the caption were by stipulation of the parties consolidated in the trial court and in this court. They were in all respects treated in the district court as one case and they will be so considered herein. The contestants to this appeal are Clint Hull, Gretchen Hull, Kurt Wendler, and Agnes O. Wendler who will be collectively designated as appellants except if it is necessary to speak of them as individuals. The name Hull will be used to identify Clint Hull and Gretchen Hull and the name Wendler will be used to designate Kurt Wendler and Agnes O. Wendler. Appellees as used herein refers to the State of Nebraska ex rel. Game, Forestation and Parks Commission and the Rat Lake Club, Incorporated, collectively. Appellants are the only defendants in the trial court who appeared and contested the case. There is no cross-appeal.

U. S. Highway No. 83, hereafter referred to as Highway No. 83, extends north and south through the east half of Section 25, Township 29 North, Range 28 West of the 6th P. M., in Cherry County. There is a Federal Wildlife Refuge in the northern part of Section 26. Hull owns Sections 27 and 28 and a part of Section 33. Wendler owns parts of Sections 33, 32, and 31 in that township and range. Rat Lake Club, Incorporated, a Nebraska corporation, owns a part of Sections 31 and 30. The State of Nebraska owns a part of Section 30 in the township and range above described and a part of Section 25 in Township 29 North, Range 29 West of the 6th P. M., in Cherry County. Rat Lake is in a part of Sections 30 and 31, Township 29 North, Range 28 West of the 6th P. M. The land of the Rat Lake Club is adjacent to the lake. Beaver Lake is generally in Section 25, Township 29 North, Range 29 West of the 6th P. M. The land of the State of Nebraska has not been improved by any structures or services thereon but is used to some extent by the public for recreation. The Rat Lake Club is a private organization and has existed since 1930. Its property is used for the recreation of its mem-

bers and guests. The number of the membership is not shown by the record.

The eastern terminus of the road originates at Highway No. 83 in the northern part of Section 25, Township 29 North, Range 28, and extends in a northwesterly direction through Section 26, through the southwest part of Section 23, and into the southern part of Section 22. A short distance east of the quarter corner between Section 22 and Section 27 it enters the Hull land and proceeds in an irregular course to the west and southwest into and through the southeast quarter of Section 28. It passes from that section a short distance east of the southwest corner of the southeast quarter of that section and proceeds in a southwesterly direction where it leaves the Hull land and enters the Wendler land. It then continues in a generally western or northwesterly direction across the north half of Section 32, into Section 31, and in a northwesterly direction along the south of Rat Lake and Beaver Lake. Near the west point of Beaver Lake it divides, one trail going to the northwest and one to the southwest. The government of the United States located and opened a post office on the road near the center of the north half of Section 32 at a place called Conterra. The post office was discontinued in 1938 but the location on the road still has the name of Conterra. Sweetwater Valley mentioned in the record is generally east of the Hull land. The description of the land and the location of various things mentioned herein are specifically detailed in the record. They are not required to be repeated.

The primary issue in this case is whether there is and has existed an easement for a road across the land of appellants which appellees are entitled to claim as a public highway by prescription or implied dedication. The technical distinction between the terms is not important in this case because it is recognized that both require long, continued use under claim of right and that evidence with respect to the issue of implied dedi-

cation may also be applicable to the contention of a prescriptive easement and vice versa.

Burk v. Diers, 102 Neb. 721, 169 N. W. 263, rejected a claim that a public highway existed and in doing so declared: "If a public highway, it was acquired either by prescription or implied dedication. Both are urged. The law on this subject is not always clearly stated and is frequently difficult of application. Evidence to show dedication may also bear on the question of prescription, and vice versa. No express dedication, either oral or written, is claimed." Likewise, Smith v. Nofsinger, 86 Neb. 834, 126 N. W. 659, emphasized substantial identity between the two concepts by this observation: "Whether we say that ten years' continuous adverse user raises a presumption of dedication, or that it vests the public with an easement of the right to travel the way, is not material, the same conclusion is reached by either process of reasoning."

The record contains evidence as follows:

Neil Hanna, about 80 years old, who came to the area east of the Hull land when he was 7 years of age and who owned a ranch in that vicinity for about 20 years, said he was familiar with the Rat Lake and Beaver Lake road, the name that has been applied to the road involved in this litigation, and that the road went from Highway No. 83 up by Homestead and Campbell Lakes north of the refuge and then turned south and went up along there. He first went over the road when he was 11 years of age and has used it ever since. He has traveled it many times. He has gone fishing over there in many of the years. He followed the same route and the road has been there during these years. He did not ask permission to travel the road. There were other people who used it. Everybody was using it until the road was blocked. The road went in the same general direction as he has known it and traveled it. There have been divergences in the course of the road just like any other sandhill road.

Herman Holmes of Mason City testified he homesteaded in 1900 the land on which the Rat Lake Club is situated. He was a member of the club during a period of time but was not at the time of the trial. He sold the land in about 1904 and the purchaser sold it to the club. The road was used to get in and out of the place the 3 years when he homesteaded and lived there. There was a trail from there east up Sweetwater Valley. There was some travel south through Brownlee but most of the travelers used the Rat Lake Club road sometimes known as the Sweetwater Valley road. The road took him through part of the game reserve land. Since he moved to Mason City he had traveled over the Rat Lake and Beaver Lake road mostly for fishing and hunting. He has seen other persons use the road. The witness did not ask permission to use it. It was the road he used many years commencing in 1884 and is substantially the same that exists in that area now. More than 20 years ago at least there was a post office at Conterra. There has not been any material change in the route of the road. It just went about the same place and the same direction as it does now. It is the same road.

Guy Vian, a rancher in central Cherry County, has used the road from the game refuge to Rat Lake and Beaver Lake. It was and is the only road in that area. He remembers of being taken over the road when he was a child and recalls the road distinctly since 1906, or for more than 50 years. He used the road to go fishing, to go to the neighbors, or on business occasions. He homesteaded west of there. His father lives east and his brother homesteaded on part of the same land. It was the only road into that area from what is now Highway No. 83 and before that highway existed the Rat Lake and Beaver Lake road was the only route from Sweetwater Valley to Rat Lake and Beaver Lake. The road was a trail which had in places been graded. It had auto gates in places and there were

places travelers had to go around. The road was hayed at times in places and at times there were places too sandy to travel over or through. It is a typical sandhill road. There has been no substantial variation in the road during the 50 years the witness has been traveling it. The inlets and the outlets have been the same as he remembered them during this long period. It has been open continuously through the more than 50 years until it was barricaded in 1956. The witness asked no permission to use the road during this period.

Mr. Beed, a resident of Valentine who has lived in that area 62 years, was an electrician but at the time of the trial he was a feed salesman. It was then and had been necessary as a part of his business for him to travel over the area of Cherry County to a very considerable extent. He called on ranchers and he has used the Rat Lake and Beaver Lake road since in 1916 when he first traveled it on a hunting trip. The road extended from the Hull land on the north line of Section 27 at the auto gate where it did at the time of the trial. Where the road left the game refuge that was about the entrance into the Hull land. If there has been any change in the road it has been slight. The road was about the only way to get through the hills. The witness was over the road every year commencing in 1916 except 1½ years when he was in the army. He hauled feed to Rat Lake and Beaver Lake. He went fishing out there and he hauled a cattle chute over the road. He had been to the Wendler place using this road. The entrance to the Hull land has been in the same place for more than 10 years. The witness did not ask permission to use the road. The road as it leaves the game refuge angles across the Hull land, across the Wendler land, and then on to Rat Lake and Beaver Lake. It is just a sandhill road. Sometimes a traveler on it had to turn out and go outside of the general trail around sandy places that had not been hayed recently but the general track has always been about in the same place.

There has not been much change in the road from the time he first used it to the time of the trial. He saw two yellow graders, county equipment, working on the road at the Wendler place. He saw a couple new auto gates put in on the road and that it had been hayed from time to time. He has seen other persons using the road. The general public, everybody who has to go out there for anything, has to travel that road. The witness said there might have been variations from the regular route of the road at times for as much as about 100 feet when travelers were forced to avoid holes or sandy places but they came back into the road in a very short distance. Everyone thought it was a county or a public road and everybody traveled it. There were blowouts that hay would have helped if the county had cared for the road. The witness thought it was a county road. Most of the land on the route of the road is range land. He saw no cultivated land on the Hull place of at least 1,000 acres. He saw places in the road where the county had regraded, remade, and hayed the road.

Clarence H. Holmes, a resident of Mason City and of the Sand Hills for 56 years, said he first traveled the road involved in this case in the fall of 1916. He was duck hunting in the Sweetwater Valley and went from there to the Gus Wendler place. (Gus Wendler bought the land on which the Rat Lake Club is situated from Herman Holmes who homesteaded it.) The witness located Sweetwater Valley which extends from the southeast to the northwest and crosses Highway No. 83 at about 2 miles east of the east side of the Hull land. The witness used the road in question commencing in the fall of 1916 and continued until the game refuge was established. He was over the road at least once or twice each year. He did not use the road after the refuge was put in until 1946 and he then traveled it from two to eight or ten times each year until 1956. He has seen haying and some grading done on the road. There were cattle gates and auto gates so that travelers could drive

through. He followed the same course during the years he used the road, with slight deviations resulting from natural causes. When a traveler went around these places that were out of condition he came back into the original trail in a very short distance. The road was barricaded in 1956. Clint Hull then refused the witness use of the road. The witness sought no permission to use the road at any time before 1956 when it was obstructed. The witness used the road commencing in 1916 because it was the main traveled way. Everybody used it. He had seen others using the road from 1916 to 1956. The public used the road and there was quite an amount of traffic on it. The witness would see as many as five or six cars a day coming in or going out of that area. The witness saw poles in the road at places on the Hull land at mud holes and blowouts to direct traffic from them. Travelers turned out at such places, passed the out-of-condition locations in the road, and then returned to it. The width of the trail or road was the width of one automobile. About 1951 there was a change at one place in the road a distance of probably 100 feet from the course of the road as it had been for the benefit of the Hull meadow. The county machines were out there and did some grading. There were places where conditions made it necessary to divert from the usual course of the road for a short distance which had not been hayed or regraded and the traffic then again followed the original course of the road. Vehicles traveling in different directions met, turned out of the trail sufficiently for them to pass, and returned to the road.

Everett Stillwell, who resided in the south central part of Cherry County, had lived in the county 55 years. He traveled the road from the game refuge to Rat Lake and Beaver Lake when he was 15 years of age, 40 years before the trial. He has been over the road at least an average of once each year. The road has been used by the general public, it has had the same course during the years above described, and it has been graded some

on the land of Hull and Wendler. It was maintained by putting hay on it and by grading it in some places. There were auto gates all the way through and they were installed by the county. The witness helped put in one of them and the others were made of pipe and cement and were of the type the county installs. There was one change in the road the witness could recall and that was from the road out of the low ground up along the edge of the hills. The distance the road was moved was about 50 feet. He knows of no other change made during the years he traveled the road.

F. J. Fahrenderger now lives in Mason City. He was an original stockholder of the Rat Lake Club. He testified the road commencing at Highway No. 83 to the Rat Lake area goes through the game refuge area and the land of Hull. Witness traveled the road since 1919. He was over it about April 1956. It went from the same point to the same point then as it did in 1919 and the road was located in the same area. It has been used by the public. Places in the road were hayed almost every time he used it. There were auto gates on the road. On a trip from Rat Lake to the game refuge witness would pass six or eight cars and he would see two or three in the rear following him. It was the only road he knew in that area. Many hunters and fishermen used it. He had seen county graders on the road. The Rat Lake clubhouse was constructed in 1927. During the years the witness used the road he traveled in the same trail.

Bert Fillpot has lived in Mason City for 11 years and is a member of the Rat Lake Club. He drove the road from the game refuge to Rat Lake and Beaver Lake since 1946 until it was barricaded in 1956. He used it first in 1925. It has been the same road and it followed the same route through the same area. He saw county equipment used on the road and he saw one of the county's patrols grading the road east of and on the Wendler land. He has seen the county maintainer

working on the Rat Lake and Beaver Lake road. The witness never asked permission to use the road. He saw lots of people using it, mostly strangers. One weekend in 1952 there were 15 cars stuck on that road. There was an old auto gate at a place now located by a tree. That was 12 or 15 years ago. It was discontinued in 1949. Thereafter an auto gate 100 to 200 feet from the original one was used as a part of the road. There was not much variance along the road. He could not detect much difference in the road he traveled in 1946 and the one he traveled in 1956.

Marvin W. Heth has lived in Valentine during his lifetime. He has been an electrician and in his business he has traveled in the vicinity. He first used the road from the game refuge to Rat Lake and Beaver Lake in 1918. He used it on a fishing trip and on business. He was over the road the last time in December 1955. The road has been about the same during the years. It had hay on it in places at different times. There were auto gates on it. No permission was required to use the road. Other people used it and witness thought it was a public road. The road was the width of a car.

James W. Gray first used the road in question in 1929 when he hauled fence material for the property of the state on Rat Lake and Beaver Lake. He used the road quite regularly since then. He did not ask permission to use it. Where it was hilly it had to be hayed. The road was used by fishermen, ranchmen, and people hauling feed. The principal maintenance of the road was putting hay on the sandy places to prevent blowouts. If this is done such a road can be traveled over a period of many years. The road in question was fairly well maintained. Witness did not recall any wide variance in it.

Aerial photographs were taken of the area concerned in this case in the year 1946, a field check was made in 1949, and a map was published by the Geological Survey as a part of the Department of the Interior program

for the development of the Missouri River Basin. A map therefrom was produced and published by the Department of the Interior in 1951. The map shows the existence of a road in substantial agreement with the evidence produced by appellees concerning the road in issue in this case. Appellants concede that for a substantial period of time travel has been possible over the road from the Sweetwater Valley in the vicinity of what is now Highway No. 83 and along the south side of Rat Lake, passing over the land of appellants; and that for a substantial period of time, probably 40 years or more, there has been something in the nature of a sandhill trail across the land in question. The essential fact question they say is whether the nature and extent of the user establish a prescriptive right to a particular road which appellees may lawfully assert is a public road. Appellant Kurt Wendler testified that there had been a road across his land and the Hull land for as much as 30 years; that the road proven by appellees as existing in 1946 was the main traveled road; that the trail was first there about 1916; that the road of 1946 was the old road; and that the road was there when the witness moved there in 1918. He also testified that this road was for some time a mail route. When appellant Clint Hull was asked how long the old trail was traveled he said 10 years. There was substantial corroboration of the claims of appellees in the concession and testimony of the appellants.

Appellants assert that a claimed easement by adverse user is not favored by the law and all elements must be proved by clear, convincing, and satisfactory evidence. They argue the evidence of appellees concerning the easement claimed in this case is insufficient to establish it within the requirements of the stated rule. Appellants have correctly stated the applicable law. It has often been stated and was recently repeated by this court. The use and enjoyment which will give title by prescription to an easement is substantially the same

in quality and characteristics as the adverse possession which will give title to real estate. The use must be adverse, under claim of right, continuous and uninterrupted, open and notorious, with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period. To prove a prescriptive right to an easement, all of the elements must be established by clear, convincing, and satisfactory evidence. Wemmer v. Young, 167 Neb. 495, 93 N. W. 2d 837.

Appellants have incorrectly appraised the proof concerning the prescriptive easement claimed by appellees. There is evidence that a road has existed for at least 50 years across the land of appellants. Appellants offered evidence of the existence of such a road for as much as 30 years. The point of its entrance on the land of Hull has been continuous. It has traversed the identical general area of the land of appellants and has been used by the public freely without objection or interference of or by the owners of the land. No traveler who desired to use the road was molested or denied the privilege until 1956 when the road was barricaded by Clint Hull. There was substantial identity of origin, course, location, and use of the road on the land of appellants for a great many more years than the statutory period of 10 years. The road was maintained for travel thereon by all who desired to use it except when there was heavy snowfall and accumulation of snow on the road or in a few instances when low places were too wet for travel by vehicles. Any deviation in the road was caused by the action and demonstration of nature, the act of the landowner, or with his consent and acquiescence. On no occasion was the continuity of the road disturbed or obstructed by any deviation from its course.

The road was equipped at its entrance to the land of appellants and along its course through the land with what is called in the record "auto gates." These were an invitation to travelers to use the road. They permit-

ted continuous travel without stopping or inconvenience and they were at all times maintained. In Hansen v. Green, 275 Ill. 221, 113 N. E. 982, the court said: "The fact that the owner of a tract of land, when enclosing it with a fence, puts a gate in the fence at the place where a right of way is claimed across the tract, is evidence that he recognizes the right of those who use the road to continue to use it * * *."

If a bad place in the road developed, such as a blowout of sand, the condition was indicated by timber put upright therein as a warning and also as a suggestion to travelers to go around the place that was out of condition for travel. There was not during the more than half a century referred to above any attempt to obstruct, close, or accomplish an abandonment of the road or to eliminate or prevent travel thereon. On the contrary, many things were done by or with the consent or acquiescence of the landowners to have and keep the road in condition for use by all travelers who desired to use it. Appellants were paid by the county for many things done and furnished by them. The county performed acts and expended funds, some at the request of at least one of the appellants, to improve and maintain the road suitably for public use. There is evidence that the county paid Kurt Wendler for labor performed and materials furnished by him on account of the road and its improvement and maintenance on claims presented by him for the years 1943 to 1954 the sum of $184.20. Likewise, there is proof that the county paid Clint Hull for labor performed and materials furnished on account of the road and its improvement and maintenance for the years 1943 to 1955 the sum of $730.40 on claims presented by him. These expenditures by the county were in addition to the work done and the materials and equipment furnished by the county for the improvement and maintenance of the road.

The declaration of Clint Hull in 1952 to the county

that he was going to attempt to close the road if the county did not do some grading of it which he wanted done is of more than passing significance. The county did the grading and the road continued to be used until Clint Hull obstructed it 4 years later. In the early years the travel thereon was light and infrequent. It increased with the passing of time to the extent that by 1956 it was such that Clint Hull wanted to stop all travel on the road. That was presumably his motive for barricading the road in that year. The United States established and maintained a post office at Conterra on this road for a number of years. The exact length of time is not fixed in the record. The road from Sweetwater Valley to and across the land of appellants and on to Rat Lake and Beaver Lake was and is the only road through that area for what was and is, generally speaking, east-and-west travel.

The use and enjoyment required to establish by prescription an easement for the road was clearly, convincingly, and satisfactorily shown. The use and enjoyment were, because of the circumstances shown, adverse, under claim of right, continuous, exclusive, notorious, and with the knowledge of appellants for more than the full prescriptive period.

Hopkins v. Hill, 160 Neb. 29, 68 N. W. 2d 678, contains the following: "Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under a claim of right. The owner of the servient estate, in order to avoid acquisition of easement by prescription, has the burden of rebutting the prescription by showing the use to be permissive. * * * If the use of an easement has been open, adverse, notorious, peaceable, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied."

There is no convincing evidence that the use of the

road was, in a legal sense, permissive and not adverse under a claim of right. The evidence of the many persons who appeared at the trial who had used the road was direct and without exception that no permission to travel there was asked or given; that none of them were interfered with; and that many of them thought, as was generally believed, that it was a public or county road.

Appellants contend evidence is lacking of continuing use by the public of a substantially identical road, without deviation, for the prescriptive period. Any deviation in the course of the road was because of the inherent nature of the area traversed, natural causes and conditions, the acts of the landowner, or his acquiescence in what was done by others. In this connection it should be said there was no variation shown that impaired the identity of the road. It was testified by Clint Hull, one of the appellants on whose land the principal variations were claimed, that except the moving of one gate for a distance of 85 feet it was natural causes which made necessary any deviation in the road from the original course and location of it. He said the gate referred to which was moved was necessarily moved because he moved and changed the road for a short distance for his benefit, the improvement of his meadow, and the improvement of the road. His testimony contains statements of this nature: In 1952 he changed the road and later further changed it again to benefit his meadow. In doing this he got the county to come out to do some work on the road. In another instance he said that is where he changed the road. Previously in his testimony he said he changed the road and brought it "around here." Likewise, he said he did some leveling and some haying and he changed the road himself. He was asked if there was a road through a certain auto gate into his land and he said there was but when it got wet he had to move it. There is undenied evidence that when the commencement of a survey was about to begin on the Hull land, he showed the men who were there because

of the impending survey where he claimed there had been changes in the road from the original to the existing road and he said the changes were made to benefit or to please him better.

The district court found that any deviations in the road were participated in or were acquiesced in by the respective landowners to an extent greater than passive permission of the use of the road; that slight deviations had occurred in the course of the road because of its sandy nature and to avoid sand blowouts, mud holes, and natural obstructions and as a result of the acts of landowners but the course of the road has remained substantially the same; that a road has been in existence in that area for as much as 60 years; and that such deviations were not substantial considering the nature of the area traversed by the road and are less than is usual in many sandhill routes. The findings of the court in these respects are justified by the evidence.

Kendall-Smith Co. v. Lancaster County, 84 Neb. 654, 121 N. W. 960, contains the following: "In this connection plaintiff invokes the following rule announced in Engle v. Hunt, 50 Neb. 358, and followed in other cases: 'To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land.' * * * Slight variances to avoid mud, pools, encroachments or obstructions are frequent on roads acquired by user, and are exceptions to the rule quoted * * *. The deviations relied upon by plaintiff fall clearly within the following doctrine announced by this court in Nelson v. Jenkins, 42 Neb. 133: 'It is not indispensable to the establishment of a highway over lands by prescription, or adverse user, that there be no deviation in the line of travel. If the point of travel has remained substantially unchanged for the full period, it is sufficient,

even though at times, to avoid encroachments or obstructions upon the road, there may have been slight changes in the line of travel.' "

Carpenter v. Schnerle, 91 Neb. 806, 137 N. W. 850, states: "Slight deviations from the line of public travel to avoid mud, pools, or natural obstructions will not necessarily prevent the establishment of a highway by prescription * * *."

Lindsay Land & Livestock Co. v. Churnos, 75 Utah 384, 285 P. 646, states: "Though public cannot acquire right by use to pass over tract of land generally, but only in certain line or way, it is not indispensable that there should be no deviation in use from a direct line of travel, and if travel has remained substantially unchanged and practical identity of road preserved, it is sufficient, although there may have been slight deviations from common way to avoid encroachments, obstacles, or obstructions upon road."

Berger v. Morton County, 57 N. D. 305, 221 N. W. 270, states: "The plaintiff, down to the bringing of this action, has continuously recognized the right of the public to use the trail or road in question across his land. He recognized it in 1916 when he desired the road relocated. Having acquiesced in its relocation and having stood by while the public authorities expended public funds in the improvement of the road as thus located, he is not in a position to question either the identity of the line of travel or the continuity of the use."

Dortch v. Sherman County (Tex. Civ. App.), 212 S. W. 2d 1018, states: "Location of a public easement may be changed with express or implied consent of both interested parties, and an estoppel to claim a former location to be the true one arises from acquiescence in a change. * * * Landowner who has acquiesced in relocation of a road over such land and stood by while public authorities expended public funds on improvement of road as thus located cannot question the identity of the

line of travel. * * * A change of location of road made by owner of land for his own convenience after the right of public in the road has become established through use does not defeat such right."

In Mudge v. Wagoner, 320 Ill. 357, 151 N. E. 276, it is stated: "Where the owner of land over which a road extends changes the route for his own convenience and the public continue the use of the highway as changed, the public right therein does not become extinguished but exists in the highway as changed, and a change in the course of the road after the right of the public is established by user for the statutory period does not defeat the public right to use the road as previously established."

In Central Pacific Ry. Co. v. Alameda County, 284 U. S. 463, 52 S. Ct. 225, 76 L. Ed. 402, the court said: "The original road was formed by the passage of wagons, etc., over the natural soil, and we know, as a matter of ordinary observation, that in such cases the line of travel is subject to occasional deviations owing to changes brought about by storms, temporary obstructions, and other causes. But, so far as the specific parcels of land here in dispute are concerned, we find nothing in the record to compel the conclusion that any departure from the line of the original highway was of such extent as to destroy the identity of the road as originally laid out and used. Even in the case of highways sought to be established by prescription, where the user must be confined to a definite line, slight deviations are not regarded as material."

An implied dedication of the road by appellants was pleaded by appellees. It was found to exist by the trial court. A public highway may be established by implied dedication in this state for use as a public highway if it is established that there was present the intent to appropriate an easement for such public use. The intent may be expressed in the visible conduct and acts of the owner if they are such as would lead ordinarily pru-

dent men to infer an intent to dedicate; and if they are so received and acted upon by the public, the owner cannot after acceptance recall his appropriation. In order to constitute a highway by implied dedication it is not necessary that the offer be accepted by the public authorities but it may be accepted by the public itself and its acceptance by the public may be shown by its entering upon the land and enjoying the privilege offered by user. City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396. The circumstances of this case as recited above were sufficient to constitute an implied dedication of an easement across the land of appellants to the public for its use as a public highway.

The pleadings are silent as to the extent of the easement claimed in the land of appellants by appellees as a right-of-way for the road they sought to have established by action of the district court. The word "extent" is in this respect used as meaning width. The direct evidence concerning it is very meager. One witness said a trail across the land was the width of an automobile and when the road was out of condition because of a mud hole or blowout the traveler would go around but not out of the road very far, and that when two cars would meet approaching from opposite directions they would each pull to the side enough to pass and then turn right back into the road. The testimony of the county surveyor was that when the trail was surveyed by him in July of 1956 a car was operated on it and the trail was the width of the car. The trial court found that the road was, because of use and by dedication, a public highway 40 feet wide, the central line of which was specifically described and that the width of it was fixed at 40 feet because of a statute which said that public roads should not be less than that width. § 39-104, R. R. S. 1943. The statute of which that section was a part is not applicable to or important in the consideration of this case. It was repealed in 1957.

Laws 1957, c. 155, art. VIII, § 1, p. 562. Section 39-104, R. R. S. 1943, related only to roads laid out in pursuance of any law of the state and roads located and opened by the county board of any county and traveled for more than 10 years. § 39-101, R. R. S. 1943.

Donovan v. Union P. R. R. Co., 104 Neb. 364, 177 N. W. 159, states: "The width of a public highway, acquired by adverse user or dedication, is to be determined as a question of fact by the character and extent of the user, or the amount actually dedicated to public use. It need not be 66 feet in width, as prescribed by statute."

Mulch v. Nagle, 51 Cal. App. 559, 197 P. 421, discusses the subject in this manner: "While it is provided in section 2620 of the Political Code that all public highways shall be not less than forty feet wide * * *, this restriction has application to such highways only as are laid out by formal act of the proper public authorities and after the initiation of the requisite preliminary proceedings, and has no application to such highways, roads, or lanes as have been created by dedication or abandonment."

The Iowa court said in Davis v. City of Clinton, 58 Iowa 389, 10 N. W. 768: "Counsel for the appellant insist where the public acquires a highway by prescription or use, the width thereof is sixty-six feet, whether the whole of such width has been used by the public or not. * * * We suppose the claim is made that such a highway must be sixty-six feet wide, because if it had been established in pursuance to the statutes in force * * *, it would have been that width, unless a different width was fixed by the authority directing its establishment. * * * But we do not think it follows that a right obtained by use must necessarily equal in all respects that which might have been obtained under the statute. Besides this, under the statute a highway might be of any width between thirty-three and sixty-six feet. * * * The court cannot, as a matter of law, say that a road

acquired by prescription or use is of any particular width beyond such portion as is actually used by the public."

In Wayne County Savings Bank v. Stockwell, 84 Mich. 586, 48 N. W. 174, 22 Am. S. R. 708, the Michigan court said: "It is not necessary that a highway established by user should be of the statutory width of four rods. A highway by user becomes such to the width and extent used."

Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N. W. 606, referred to section 47, chapter 13, General Statutes of 1878, which prescribed that certain highways, therein mentioned, should be 4 rods wide, and said: "We regard these two sentences of section forty-seven (47) as wholly disconnected, and have no hesitation in holding that the boundary lines of a road secured by user or prescription have not been regulated by statute, but remain as at common law. As the right to the highway in this case depends solely upon an adverse user by the public, its width, and the extent of the servitude imposed upon the plaintiff's land, are measured and determined by the character and extent of the user, for the easement cannot, upon principle or authority, be broader than the user. This is the gist of the decisions upon the subject, where the right to the road is not made referable to or founded upon a claim or color of right furnished by some proceedings instituted for the purpose of laying out and establishing the same."

Whatever may be the width in any particular case, the easement, when acquired by user, cannot be limited to the actual beaten path. It is generally a question of fact to be determined under the circumstances of each case and the easement may be as broad as the public requires for passing as well as traveling in one direction.

It is said in Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N. W. 556: "An easement acquired by prescription is limited in extent to adverse use during the ten-year period."

In Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843, it is said: "A decree, to the extent that it purports to extend the right of a dominant tenant in an easement for a roadway acquired by prescription beyond reasonable use thereof as it was used over the period when the right was being acquired, is invalid and no rights flow therefrom."

Kendall-Smith Co. v. Lancaster County, *supra,* states: "The land used for a county highway is not confined to the wagon track. Teams usually pass wherever they meet, and necessarily depart from the beaten path. When they leave the roadway to pass each other, the public asserts dominion over and uses land outside of the line of travel, and prescriptive rights are not confined to the graded roadway." See, also, Wemmer v. Young, *supra;* Whitesides v. Green, 13 Utah 341, 44 P. 1032, 57 Am. S. R. 740; Campbell v. Covington County, 161 Miss. 374, 137 So. 111; Arndt v. Thomas, 93 Minn. 1, 100 N. W. 378, 106 Am. S. R. 418; Hamp v. Pend Oreille County, 102 Wash. 184, 172 P. 869, L. R. A. 1918E 400.

The judge of the trial court inspected the premises and location of the road on two occasions. The evidence on some material matters is irreconcilably conflicting. The manner in which this court considers and determines an equity case in such a posture has been often stated. Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602; Wemmer v. Young, *supra;* Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542.

The use of the road was for travel over it by ordinary vehicles in the usual manner in which they are generally employed. The circumstances of the case do not justify an easement 40 feet wide across the land of appellants. The record supports an easement across the land of appellants of 20 feet wide, 10 feet on either side of the center line of the road as described in the findings of the district court, as a right-of-way of the road for use by the public as a highway. The findings of the

district court are correct and are adopted by this court except as above modified and stated as to the width of the easement across the land of appellants.

The language in the judgment that "* * * the title to * * * said road is hereby granted to the public" is too broad and it should be and is modified to provide that the public has an easement across the land of appellants as a right-of-way for the road 20 feet wide, 10 feet on either side of the center line of the road as described in the findings, for the use as a public highway, and the judgment as modified should be and it is affirmed.

AFFIRMED AS MODIFIED.

EARL F. JENNINGS, APPELLANT, v. RUSSELL N. LOWREY, APPELLEE.

97 N. W. 2d 345

Filed July 3, 1959. No. 34570.

1. **Negligence: Trial.** A verdict should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross.
2. ———: ———. Where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence then the determination of that question is for the jury.

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

McCown, Wullschleger & Baumfalk, 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 where plaintiff, a guest passenger,

seeks to recover damages for injuries received when a car which defendant was driving and in which plaintiff was riding overturned at a highway intersection. The right to recover is based on alleged gross negligence of the host driver under the provisions of section 39-740, R. R. S. 1943. At the close of all the evidence the court sustained a motion of the defendant to dismiss plaintiff's cause of action. A motion for a new trial was overruled. Plaintiff appeals.

We reverse the judgment of the trial court and remand the cause.

The evidence is here stated under the established rule that such a motion admits the truth of all competent evidence favorable to the party against whom the motion is directed; that every controverted fact must be resolved in his favor; and that he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

Defendant by answer admitted that the accident occurred; that plaintiff was injured; and that plaintiff was a guest. Defendant pleaded contributory negligence and assumption of risk.

As the matter is presented here the sole question for determination is whether there was evidence of gross negligence sufficient to present a jury question.

Court Street in the city of Beatrice is paved and runs east and west. Near the western limits but within the corporate limits of the city, the highway forms a "Y." The paved portion curves to the south and leads towards Fairbury. The street also goes directly west. That portion after the beginning of the curve is a graveled highway. The accident happened at the juncture of the two roads.

The maximum speed limit on Court Street, within the city, is 30 miles per hour. At the time the accident happened, about 2:30 a.m. on August 14, 1955, the maximum prima facie lawful speed limit on the highways of this state outside a city or village was 50 miles per

hour, subject to the further limitation that the speed shall not be greater than is reasonable and prudent under the conditions then existing, and that prima facie lawful limits do not relieve a driver from the duty to decrease speed "when approaching and going around curves." § 39-7,108, R. R. S. 1943.

Plaintiff alleged negligence in the following particulars: "(a) That defendant drove at a rate of speed of fifty-five miles per hour which was unreasonable and improper under the conditions, and in excess of the maximum speed allowed by law at said time and place. (b) That defendant failed to keep a proper lookout for what was ahead, within the range of his headlights. (c) That defendant failed to slow down before attempting to make the turn. (d) That defendant failed to heed the warning given to him by the plaintiff."

Plaintiff and defendant met at Fairbury about 10:30 p.m. on August 13, 1955. They, with another passenger, drove to Jansen where they visited dance halls. They left about 12:30 a.m. to return to Fairbury. In the meantime defendant had given a ride to a man and wife whom he was taking and did take to Beatrice. The original third party in this evening's events got out of the car near Fairbury. On the last portion of this trip plaintiff drove because defendant was "tired." They reached Beatrice, unloaded the man and wife, and started for Fairbury, going west on Court Street. There are two witnesses who testified that in their opinion defendant was driving in excess of 60 miles per hour as he approached the scene of the accident. Defendant fixed his speed at 35 to 45 miles per hour as he approached the scene of the accident. There is testimony that the speed was 65 to 70 miles per hour when 4 and then 2 blocks from the scene of the accident. About 4 or 5 blocks from the point of the accident plaintiff asked the defendant, "What's your hurry?" Defendant replied, "It's a little late; I should be getting home." About 2 blocks from the point of the accident plaintiff

said to defendant, "Remember * * * there's a corner coming up." Defendant answered, "Yes, I know it." Plaintiff noticed no speed change or slowing up.

There was a car coming from the south with its lights on. It was in or leaving the curve going east as defendant reached the curve to go south. About one-half block from the beginning of the curve defendant "touched" his brakes. The front wheels of defendant's car left the pavement. Defendant made an effort to turn the car to the left. In a sidewise movement, the car skidded 10 feet, hit a stop sign, and threw the plaintiff from the car. The car rolled over and came to a rest some 30 or more feet beyond. Plaintiff was seriously injured.

We discussed the rules of law and the statute here involved in O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322. There is no need to repeat what was there stated. We stated this concluding rule: A verdict should not be directed, or a cause of action dismissed, or a judgment entered notwithstanding the verdict, unless the court can definitely determine that the evidence of defendant's negligence, when taken as a whole, fails to reach such degree of negligence that is considered gross. Where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence then the determination of that question is for the jury.

There is evidence here of a rate of speed that, under defendant's testimony, was an illegal rate of speed. The jury could well have found under this evidence that the speed was dangerous, improper, and unreasonable under the circumstances. But evidence of speed does not stand alone.

The defendant obviously saw the approaching car. He took no action to control or stop the speed of his car to assure a safe passage around it save the "touching" of his brakes. The lights of an approaching car at night on a curve could well be found to be a potent

warning of the need of care. He was warned verbally. Defendant asserts that the question, "What's your hurry?" is not a protest of speed. This is the caution which we held was sufficient in O'Neill v. Henke, *supra.* Defendant was not only warned about approaching the corner but stated he knew about it. The evidence would sustain a finding of reckless disregard of the safety of the guest.

We conclude that the evidence is sufficient to bring the case within the rule that reasonable minds could differ as to whether or not it constituted gross negligence and brings the cause within the area of determination reserved for the jury.

The defendant in his brief here argues the admissibility of certain evidence, and the effect of evidence impeaching the testimony of plaintiff as to the speed of defendant's car. There is no cross-appeal and there are no assignments of error made by the defendant. Those questions are not here and are not determined.

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

REVERSED AND REMANDED.

DONALD E. BROWN, APPELLEE, V. ARMOUR & COMPANY, APPELLANT.

97 N. W. 2d 342

Filed July 3, 1959. No. 34578.

1. **Workmen's Compensation.** The burden of proof in a claim for compensation under the Workmen's Compensation Act of this state is upon the plaintiff to establish his right thereto by a preponderance of the evidence.
2. ———. Awards of compensation cannot be based upon possibilities or probabilities but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of the employment.
3. ———. Under the statutory definition of an occupational disease contained in section 48-151, R. R. S. 1943, the evidence

must establish that the disease is due to causes and conditions which are characteristic of and peculiar to the employment out of which the disease is alleged to have arisen.

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

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

Marks, Clare, Hopkins & Rauth, for appellee.

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

CARTER, J.

This is an appeal from a judgment of the district court for Douglas County awarding compensation for 16 weeks temporary total disability, and medical and hospital expenses in the total sum of $2,067.10. The amount of the award is not in dispute, the sole question being whether or not liability exists.

The plaintiff, Donald E. Brown, was an employee of the defendant Armour & Company from August 18, 1954, to August 6, 1957. Brown became ill on August 6, 1957, and was hospitalized the following day. In January 1958, he was informed that his illness had been diagnosed as leptospirosis. It is contended by the plaintiff that the disease was contracted through cuts or abrasions incurred while working as a tail skinner in defendant's packing plant and that leptospirosis is an occupational disease acquired while in the employ of the defendant. The defendant asserts that leptospirosis, particularly the type thereof contracted by the plaintiff, was incurred prior to his employment by the defendant and that, in any event, it is not an occupational disease in that it is not characteristic of and peculiar to the particular occupation of slaughtering and processing livestock. Before discussing the issues raised by the appeal it appears necessary to generally discuss the dis-

ease of leptospirosis as revealed by the medical evidence offered in the instant case.

The general conclusion reached as to the disease of leptospirosis is that it is not a new disease in this country but is apparently a newly recognized disease. None of the medical experts who testified had ever treated or come in contact with the disease previous to the present case. Leptospirosis is primarily a disease of rodents. Man and domestic animals have become infected with the disease where external environment is favorable. There are 32 or more known varieties of the disease which have been isolated and each appears to have a different place of origin and, generally speaking, a different host or carrier. The disease is contracted primarily from the excreta of animals. We are here concerned primarily with five types of leptospirosis. Three are found generally in this country. They are: icterohaemorrhagiae usually associated with rats, the canicola usually associated with dogs, and the pomona usually associated with cattle and other domestic livestock. The other two varieties with which we are primarily concerned are the semeranga and sejroe strains usually found in tropical or sub-tropical areas and generally not common to domestic animals. It is shown by the medical evidence that infection in humans caused by one variety of the disease will cause a weaker reaction to several other varieties. In determining the type of leptospirosis, the one showing the strongest reaction by recognized tests is presumed to be the offending variety.

In the instant case blood tests were made by Dr. Norman G. Miller, Assistant Professor of Microbiology at the College of Medicine, University of Nebraska. The evidence of Dr. Miller is that the determination of the strain or variety of leptospirosis is by the agglutination-lysis test. The basis of the test is to measure the antibodies that are produced to combat the antigens that have been placed in the blood stream for the purposes of the test. The greater the proportion of antibodies

thus developed to the type of antigens used, the more significant is the type of leptospirosis allied to the antigen used in the test. Dr. Miller had available the antigens to test for ictero, canicola, and the pomona varieties of leptospirosis. In the use of these three antigens the tests indicated by the titer thus arrived at that the plaintiff was infected with the pomona variety usually found in cattle and other domestic livestock. Dr. Miller gave as his conclusion in the matter that it is a possibility that plaintiff was infected while employed as a tail skinner by the defendant but that "I can't say, I just can't say that he was infected there."

The evidence shows that Dr. Miller caused the blood of plaintiff to be tested for leptospirosis by the Walter Reed Army Institute of Research, admittedly the best laboratory in the country for determining the strain of leptospirosis with which a person is infected. In making the tests the Walter Reed Research Laboratory used 18 of the 32 antigens rather than only the three used by Dr. Miller. The tests pointed definitely to the semeranga and sejroe strains as being the varieties with which the plaintiff was infected, although weaker reactions were indicated as to other varieties, including the pomona. The semeranga and sejroe strains have their origins in the Far East and are not generally associated with cattle and domestic livestock.

The evidence shows that plaintiff was inducted into the army in 1947. He was hospitalized for a period of 4 months and discharged from the army at the end of 6 months. After his discharge from the army plaintiff was employed by the Dubuque Packing Company and the John Deere Dubuque Tractor Works, both of Dubuque, Iowa. His record in the army, with the two former employers in Dubuque, Iowa, and with the defendant, was one of continued absenteeism and sick leave. The symptoms evidenced on those occasions were similar to those indicating leptospirosis. His illness in the army and the symptoms to which he testified,

plus the fact that the army afforded a means of carrying or communicating Far Eastern types of leptospirosis, such as semeranga and sejroe, affords some measure of corroboration of the findings of the Walter Reed Research Laboratory. This evidence also supports the contention that plaintiff was infected with leptospirosis before he was employed by the defendant.

The evidence shows that plaintiff was working for defendant in an environment conducive to the contracting of leptospirosis of the pomona variety. On the other hand, the evidence shows that plaintiff had symptoms of the disease long before he was employed by this defendant. The conclusions of the medical experts were based on the favorable working conditions for communicating the disease and on the reports of the tests made by Dr. Miller and the Walter Reed Research Laboratory. It is clear from the evidence that the tests made by the Walter Reed Research Laboratory were far more extensive than those made by Dr. Miller. In testing with three antigens for the strains more commonly found in this country and generally associated with animals, the reactions reported would not necessarily include those of other varieties of the disease. The use of 18 of the 32 antigens of all generally known varieties of leptospirosis would necessarily discover reactions indicating other strains of the disease which Dr. Miller could not find in his limited tests. It is not disputed in the medical evidence that the more extensive tests made by the Walter Reed Research Laboratory indicate that plaintiff was infected with the semeranga or sejroe varieties of leptospirosis. Since these types may be carried from overseas by military forces and the plaintiff having demonstrated symptoms of the disease while hospitalized in the army, a possible source of infection of the semeranga and sejroe varieties of leptospirosis is shown by the record. The medical history of the plaintiff, the nature of the various environments in which plaintiff had worked, and the unimpeached findings of the Walter

Reed Research Laboratory indicate that the finding that plaintiff was infected with leptospirosis pomona while employed by the defendant is highly speculative and conjectural.

This court has held in a long line of cases that the burden of proof in a compensation case is upon the plaintiff and that an award of compensation cannot be based on possibilities, probabilities, or speculative evidence. Snodgrass v. City of Holdrege, 166 Neb. 329, 89 N. W. 2d 66; McCall v. Hamilton County Farmers Telephone Assn., 135 Neb. 70, 280 N. W. 254; Townsend v. Loeffelbein, 123 Neb. 791, 244 N. W. 418. The evidence adduced in the case at bar falls within the inhibitions of this rule.

It is urged also that leptospirosis is an occupational disease common to packing houses. Our statute defines an occupational disease as follows: "(3) The term 'occupational disease' shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." § 48-151, R. R. S. 1943.

Assuming that the disease of leptospirosis pomona was established as the cause of plaintiff's illness, the record will not sustain a finding that it is an occupational disease within the meaning of the foregoing definition. There is no evidence that this disease was ever previously contracted by a packing-house employee. The doctor who testified, including the company physician, had never previously come in contact with the disease. There is no evidence in the record that leptospirosis or any of its varieties are characteristic of or peculiar to the meat-packing industry or the particular work in which plaintiff was engaged while in the employ of the defendant.

We necessarily conclude that the plaintiff failed to establish by a preponderance of the evidence that plain-

tiff contracted leptospirosis pomona, that it was contracted while in the employ of the defendant, or that it is an occupational disease within the meaning of section 48-151, R. R. S. 1943. The judgment of the trial court is based on evidence which is speculative and conjectural, and, consequently, insufficient to sustain an award under the Workmen's Compensation Act.

REVERSED.

IRENE GOODMAN, APPELLANT, V. CHARLES H. GOODMAN, APPELLEE.

97 N. W. 2d 336

Filed July 3, 1959. No. 34580.

1. **Divorce.** It is provided by section 42-335, R. R. S. 1943, that no decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.
2. ———. This statute means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce.
3. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
4. ———. The marriage relation is designed to continue as long as both the parties shall live, and is not to be dissolved for light or trivial causes.
5. ———. Mere rudeness of language is not of necessity extreme cruelty. In order to constitute extreme cruelty it must have the effect of so grievously wounding the feelings or destroying the peace of mind of the plaintiff as to impair health or utterly destroy the legitimate ends of matrimony.
6. **Trial.** An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it and is therefore a limitation of the issues.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Fitle & Stehno, Eugene L. Wohlmer, and *Gerald E. Kiltz,* for appellant.

Peter E. Marchetti, for appellee.

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

SIMMONS, C. J.

This is a divorce action. The action went to trial on allegations of extreme cruelty, a general denial by defendant as to those allegations, and a cross-petition by defendant seeking a divorce from plaintiff. At the close of plaintiff's case the defendant announced that he would offer no evidence and moved to dismiss his cross-petition without prejudice. Plaintiff made no objection. The court sustained the motion. The court then sustained a motion of defendant to dismiss plaintiff's petition.

Plaintiff appeals. The cause is here for trial de novo. We affirm the judgment of the trial court.

We have repeatedly stated the rules of law that apply, and do so again: It is provided by section 42-335, R. R. S. 1943, that no decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose. This statute means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. See Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321.

Plaintiff pleaded acts which she alleged, separately and collectively, constitute extreme cruelty. We relate the evidence as to each in the order the acts were pleaded.

Plaintiff was 52 years of age at the time of the marriage. At the time here involved she was regularly employed at general duty and nursing in a hospital. She had been married twice before. She had six children by the first marriage, only one of whom need be particularly mentioned here—a son, Philip, 24 years of age at the time of the trial. We refer to him as Philip. Philip is married. His wife's name is Joan. We refer to her by that name. There is also mentioned in the record a niece of the defendant named Frieda. She lived in the home of the parties almost a year. She paid for her board and room. Those payments went to pay for groceries and family expenses. Frieda is not otherwise involved in this situation.

Defendant was 55 years of age at the time of the marriage in January 1957. Joan was living with the plaintiff at that time and continued to do so until sometime in February. Philip was then absent as a member of the armed forces. Joan next lived in St. Joseph, Missouri. Joan again lived in the family home during May and June 1957, and a few days after Thanksgiving. After that Joan and Philip lived in an apartment in the vicinity. They came to the family home to visit, and Joan came once a week to do washing. Philip came to visit on occasion also. Philip and Joan separated in June 1958, and a divorce action is pending. At the time of the trial Philip was living with his mother in the home of the parties. During the times that Joan was at the family home and the times when both Joan and Philip were there, there was no payments made, and no evidence of payments requested, for their care.

Plaintiff's first alleged ground of cruelty is that defendant allowed members of the negro race to come upon the premises to purchase produce and borrow money. Defendant was a laborer in a mill. Fellow employees were negroes. Defendant had a business of buying eggs by the crate, and retailing them. He bought chickens, and dressed and sold them. He loaned money to some

of the negroes. Plaintiff testified at one time at 1:30 at night some negroes came to borrow money, and disturbed plaintiff's sleep. She testified the callers were drunk, but on redirect examination clearly disclosed that was an assumption on her part. Plaintiff testified she wanted the coming of negroes to the premises stopped. The only corroboration of the above is the evidence of Philip that on two occasions, once in the afternoon and once after dark, negroes came to the premises and transacted business with the defendant. Manifestly this evidence is insufficient, as a matter of fact or law, to constitute cruelty.

The second alleged ground of cruelty is that defendant regularly and violently argued with plaintiff regarding the children, failed to allow them to come upon the premises, and struck Philip on July 4, 1958, "without cause or provocation." The record is convincing that there was no particular discord about either Philip or Joan until sometime in the spring or summer of 1958. There is some testimony of arguments but no effort to reduce them to a statement of fact or corroborate them except as to one instance. Plaintiff drove her car to St. Joseph and brought Joan and her baby to the home. Plaintiff testified that defendant became quite angry because she did so. Joan testified that when she arrived at the home at breakfast time, defendant came to the table, referred to the plaintiff as the "little woman" and expressed surprise that Joan had returned. Defendant then ate his breakfast. Such is the corroboration of the quarrel at that time.

There is evidence also that defendant objected and quarrelled with plaintiff about Joan doing her washing at the home. The incident testified to must have occurred after Joan and Philip were living separately from the home of the parties. Plaintiff in testifying as to this one event said that the quarrel arose after defendant took Joan home.

There is also corroborated evidence that at one time

plaintiff and Joan were in the car ready to leave the home of the parties. Defendant became quite angry and apparently undertook to prevent their leaving by holding onto the car. The cause of this situation was an assertion by defendant, as testified to, that plaintiff had to stop giving money, groceries, and other things to Joan and Philip. The truth of the charge that plaintiff was doing that is not denied. We refer to this incident in connection with the next charge of cruelty.

There is evidence that defendant objected to Philip "sponging" off of plaintiff and defendant. In early May 1958, Philip brought his car to the premises of the parties and began to wash it. Defendant ordered Philip to leave the premises and not return. Philip left. On the morning of July 4, 1958, Philip came to the home to see a sister who was there. Defendant was home. Defendant ordered Philip to leave. A fight ensued. Philip testified that he was victor. Philip departed after the fight.

Plaintiff offered as corroboration of the quarrels the testimony of a neighbor. She testified that on occasions when Philip and Joan were at the home of the parties the witness heard loud voices "quarreling like" coming from the house. She was not asked to identify any of the voices. It is not shown that the defendant was even present on those occasions.

We find no corroborated evidence that defendant ordered Joan to stay away from the premises.

Plaintiff testified that these events made her very nervous and when she heard about the fight on July 4, 1958, it made her "very nervous all that day." She testified that she was under a doctor's care for nervousness caused by the acts of the defendant. However, she also testified that she was going through the menopause and had been under a doctor's care for nervousness since June 1957, a date long prior to the acts of the defendant about which she complained. The above is the sole evidence offered as to any effect upon plain-

tiff's health. It is entirely uncorroborated.

The next allegation is that the defendant regularly cursed and used profane language from the date of the marriage. There are general statements that he did it several times. It is corroborated that he used profane and foul language at the time of the car incident involving plaintiff and Joan. It does not appear that the language was directed at the plaintiff. Similar language was used when defendant became angry in a telephone conversation with some third party. Joan testified that at times when this language was used the plaintiff was not present. It appears also that Philip used profanity about the home. Plaintiff testified that on occasion when she was angry with defendant she would also use profanity, being perhaps a bit more selective in the language used. We find no evidence that the use of such language had any adverse effect on plaintiff.

This question was before the court in Shuster v. Shuster, 3 Neb. (Unoff.) 610, 92 N. W. 203, where the trial court denied a divorce. The denial was affirmed in a Commissioner's opinion. We adopt and approve the language there used: "While habitual use of rough and vile language may amount to cause of divorce, much must depend upon the character of the parties, their situation in life, and the degree of cultivation and refinement they exhibit. The marriage relation is designed to continue as long as both the parties shall live, and is not to be dissolved for light or trivial causes. * * * Language which would so wound the sensibilities of a woman of cultivation and refinement as to amount to cruelty, might occasion little or no discomfort to one accustomed to rougher surroundings. Where the testimony adduced in a suit for divorce tends to show that each party was addicted to the use of profane language about the home and in addressing the other, the court is certainly justified in refusing to grant a divorce to either on that ground. Mere rudeness of language is not of necessity extreme cruelty. * * * in order to

constitute extreme cruelty it must have the effect of so grievously wounding the feelings or destroying the peace of mind of the plaintiff as to impair health or utterly destroy the legitimate ends of matrimony. Where both parties habitually indulge in such language toward each other, they can scarcely claim that their sensibilities have been unduly disturbed."

The final allegation which plaintiff claims was proven is that defendant threatened to cause the plaintiff serious bodily harm on July 5, 1958. Plaintiff testified that defendant threatened to strike her, made no effort to do so, and never did do so at any time. The evidence is entirely uncorroborated.

Plaintiff testified that when she returned home on July 5, 1958, she saw a piece of iron lying by the bed. She picked it up and put it under the mattress where it remained until she produced it at the trial. It appears to be a rusty tire iron. She does not testify as to who put the iron by the bed, nor how it got there. She does not connect the defendant with it in any way. Save for the fact that she produced the iron, the evidence is without corroboration.

We have refrained, up to this point, from mentioning the final contention of the plaintiff in this case.

Plaintiff's sixth allegation of extreme cruelty was as follows: "6. By making accusations that were intended and did, in fact, infer that the plaintiff had violated her marriage vows regarding fidelity to the defendant in the month of October, 1957 when said inferred fact was, in truth and in fact, false." She offered no evidence to sustain the allegation. Her counsel prevented cross-examination of the plaintiff as to that allegation. It was abandoned at the trial and is not urged here.

Defendant in his cross-petition alleged among other things that: "Plaintiff after said marriage has exhibited an abnormal tendency to be unduly familiar with other men, in particular on the 19th day of November, 1957, with one Luther, whose full and real name is unknown

to the defendant, and another individual whose name is unknown to the defendant, in the home of the parties, indulged in excessive familiarity with both of said men; that throughout said marriage, said plaintiff repeatedly engaged in intimacies and undue familiarity with her son Philip Fewins, permitted said son to take liberties with her person and participating in an unnatural relationship with said son, inconsistent with the conventional maternal relationship between mother and son to such an extent that the defendant forbid said Philip Fewins from coming upon the premises occupied by the parties as a home; * * * plaintiff has subjected the defendant to ridicule concerning defendant's ability in marital relations by comparing said abilities unfavorably with that of her son, Phil Fewins; * * *."

We have held: "A party may at any time invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable. * * * An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it and is therefore a limitation of the issues." Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831.

So it stands here that the defendant admits making the charge. It was not necessary to offer it in evidence. The admission does not go beyond the language of the pleading.

The question is: What is the effect of the admission?

Plaintiff relies largely on McNamara v. McNamara, 93 Neb. 190, 139 N. W. 1045, and on the following language in the opinion: "* * * it has been held by courts of high authority that to falsely and maliciously charge a virtuous woman with crimes of this character, *even if those charges are contained in the pleading and alleged* as a matter of defense, if wholly unsupported by the evidence, would be regarded by the court as cruelty, and as aggravating other charges of cruelty

relied upon as ground for divorce." The statement cites no authority and is obviously dictum.

In the McNamara care plaintiff sued her husband for divorce on grounds of extreme cruelty. The cause was tried, resulting in a decree for the plaintiff. On appeal here it was reversed and remanded for further proceedings. In the meantime defendant wrote the letter involved making false and malicious charges against the wife. Before the second trial plaintiff amended her petition, charged the writing of the letter as a further act of cruelty, and alleged the publication of the charges. There an issue of that fact and its impact as an act of cruelty was alleged and proven. No such issue was presented here. In fact here plaintiff did allege in part the making of the false allegation to which defendant referred. She failed to produce evidence of that fact and prevented cross-examination about it.

The question, then, is: Did a charge by the defendant in his cross-petition, in and of itself, constitute an act of extreme cruelty which requires the granting of a divorce, where there was no allegation that it constituted cruelty and where there is neither allegation nor proof of any of the results which we have held must flow from an act before it can be held to be extreme cruelty?

It is manifest that this pleading, filed after the parties had separated and a divorce action was pending, had no possible cause or effect on the issues presented.

We need not explore the other questions that would arise, such as the rule requiring corroboration, and collusive pleadings to enable a party to secure a divorce decree, were we to hold otherwise on the matter above discussed.

The plaintiff seeks an allowance of attorneys' fees here. The request is denied.

All costs in this court and the trial court are taxed to the plaintiff.

The judgment of the trial court is affirmed.

AFFIRMED.

MARGHERITE J. SULLIVAN, APPELLANT, V. RALPH W. SULLIVAN, APPELLEE.

97 N. W. 2d 348

Filed July 3, 1959. No. 34585.

1. **Judgments.** Under the Uniform Enforcement of Foreign Judgments Act, at any time after registration and regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained, a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to execution or other judicial process for satisfaction of judgments.
2. ———. The proper process to obtain garnishment under the terms of the Uniform Enforcement of Foreign Judgments Act is the filing of an affidavit by the judgment creditor, his agent or attorney, that he has good reason to and does believe that some person, partnership, or corporation has property of or is indebted to the judgment debtor.
3. **Judgments: Garnishment.** The process to obtain garnishment by the terms of the Uniform Enforcement of Foreign Judgments Act is substantially the same as that for obtaining garnishment after judgment on a domestic judgment.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded with directions.*

McGowan & Troia, for appellant.

Richling & Shrout, for appellee.

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

YEAGER, J.

Margherite J. Sullivan, plaintiff and appellant here, in the circuit court of Multnomah County, Oregon, on November 4, 1953, secured a decree of separation from bed and board from her husband, the defendant and appellee herein. By decree she was awarded $80 a month for support and maintenance for herself and a like amount for the support and maintenance of each of the two minor children, the custody of whom had been committed to her.

The plaintiff, claiming that the defendant was in arrears of payments under the decree, on December 30, 1958, filed, pursuant to sections 25-1587 to 25-15,104, R. R. S. 1943, commonly known as the Uniform Enforcement of Foreign Judgments Act, a petition for the registration of her judgment in the district court for Douglas County, Nebraska. In the petition it was alleged that the defendant was in arrears of payments in the amount of $5,745 and of costs in the amount of $31.75.

On December 30, 1958, a summons was duly issued which by its terms required the defendant to answer on or before February 2, 1959. It was served on January 2, 1959. On December 30, 1958, an affidavit for garnishment was filed and garnishment summons was issued. The named garnishee was the United States National Bank. It was served on the garnishee on December 31, 1958. On January 8, 1959, the garnishee made a return in which it reported that it had $183.95 in a checking account in the name of the defendant and $5,149.67 in a checking account in the name of Sullivan Improvements. On December 30, 1958, an execution was issued commanding a levy on property of the defendant. No information as to the execution beyond its issuance is disclosed by the transcript.

On January 2, 1959, the defendant filed a motion as follows: "Comes now the defendant and moves the Court for an order to dissolve and quash a garnishment, attachment and execution in the above entitled cause for the reason that plaintiff is not entitled to the same under the laws of the State of Nebraska."

On January 5, 1959, the plaintiff filed a motion as follows: "Comes now the plaintiff and moves the Court for an order requiring the defendant to make the 'Motion to Quash and Dissolve Garnishment, Attachment and Execution' more definite and certain by stating the precise nature of the defense which is not apparent to the plaintiff, or in the alternative, by stating wherein

the proceedings are contrary to the laws of Nebraska."

In this state of the record, without any disposition of either of the motions, the case came on for hearing to the court on January 8, 1959. A record of that hearing has come to this court in a bill of exceptions. The bill contains no record of evidence taken. For the most part it is made up of an interchange of comments of the trial judge and the attorneys representing the respective parties. The matter which was before the court for consideration was defined and declared in this interchange by stipulation and agreement of the attorneys.

It was stipulated that the defendant's motion to quash and dissolve was based solely upon a contention that the Uniform Enforcement of Foreign Judgments Act is unconstitutional. Following this stipulation the plaintiff withdrew her motion to require the defendant to make his motion to quash more definite and certain. This left for consideration only the question of constitutionality.

At the conclusion of the hearing on January 8, 1959, the motion to quash was sustained. On the same day a motion to vacate and set aside the order and to grant a new trial was overruled. From the adjudication made the plaintiff has appealed. There is some question raised relative to the validity of the motion for new trial on account of time of filing, more particularly on the ground that it was filed before the court rendered its order, and therefore may not be considered. The contention is without merit. The bill of exceptions discloses that in open court the court rendered and announced the order. The transcript discloses that thereupon on the same day a motion for new trial was filed. The transcript shows further by recital of proceedings that on the same day after the order was rendered the court overruled the motion for new trial. The appeal was then perfected in accordance with and in the time provided by statute. See, § 25-1912, R. R. S. 1943; Brasier v. Cribbett, 166 Neb. 145, 88 N. W. 2d 235.

There is but one substantial assignment of error. It is as follows: "The court erred in holding the Uniform Enforcement of Foreign Judgments Act unconstitutional."

It appears from the face of the assignment that the matter involved is constitutionality generally of the entire act. In the light of the presentations made by the parties, and particularly by the defendant, this is not exactly true. The attack is not based actually on the contents of the act but rather on what it fails to contain.

The theory of the defendant appears to be that the act permits garnishment before judgment on affidavit alone, as he contends was done in this case, whereas in an original action instituted in this state garnishment before judgment is not permissible, except by compliance with sections 25-1001, 25-1002, 25-1003, and 25-1010, R. R. S. 1943, the effect of which is to unlawfully and unconstitutionally discriminate in favor of the holder of a foreign judgment and against the plaintiff in an original action.

This contention is substantially groundless. The statutory provisions relating to garnishment before judgment have no application.

Pertinent provisions of the act are sections 25-1588, 25-1590, 25-1591, 25-1592, and 25-1593, R. R. S. 1943 as follows:

"On application made within the time allowed for bringing an action on a foreign judgment in this state, any person entitled to bring such action may have a foreign judgment registered in any court of this state having jurisdiction of such an action." § 25-1588, R. R. S. 1943.

"At any time after registration the plaintiff shall be entitled to have summons issued and served upon the judgment debtor as in an action brought upon the foreign judgment, in any manner authorized by the law of this state for obtaining jurisdiction of the person." § 25-1590, R. R. S. 1943.

"If jurisdiction of the person of the judgment debtor cannot be obtained, a notice clearly designating the foreign judgment and reciting the fact of registration, the court in which it is registered, and the time allowed for pleading, shall be sent by the clerk of the registering court by registered mail to the last known address of the judgment debtor. Proof of such mailing shall be made by certificate of the clerk." § 25-1591, R. R. S. 1943.

"At any time after registration and regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained, a levy may be made under the registered judgment upon any property of the judgment debtor which is subject to execution or other judicial process for satisfaction of judgments." § 25-1592, R. R. S. 1943.

"If the judgment debtor fails to plead within thirty days after jurisdiction over his person has been obtained, or if the court after hearing has refused to set the registration aside, the registered judgment shall become a final personal judgment of the court in which it it is registered." § 25-1593, R. R. S. 1943.

Section 25-1587, R. R. S. 1943, contains the following: " 'Foreign judgment' means any judgment, decree or order of a court of the United States or of any state or territory which is entitled to full faith and credit in this state."

In the present proceeding before the court there is no contention that the registered judgment does not fall within the purview of this description. It was therefore a judgment and required to be so regarded and recognized on and after registration. There is nothing in the act to indicate an intention that it should be considered otherwise.

It is true that it lacked finality for the purpose of full enforcement on registration but the statute recognizes it as a judgment and grants to the judgment creditor the right of levy and the establishment of a lien

upon the property and rights of the "judgment debtor."

It appears from this that the legislative intent was to grant to the judgment creditor by the right of levy the same right which the holder of a domestic judgment has with reference to the property and rights of a judgment debtor. This right would flow from the procedure, in a situation such as this, appropriate to garnishment after and not before judgment. This procedure is contained in section 25-1056, R. R. S. 1943. The section provides that after a judgment has been entered an affidavit may be filed by the judgment creditor, his agent or attorney, that he has good reason to and does believe that some person, partnership, or corporation has property of or is indebted to the judgment debtor, whereupon garnishment may issue. This was the procedure followed by the plaintiff in this case. The act is therefore not subject to the attack made upon it.

In the view thus taken the conclusion reached is that the district court erred in quashing the garnishment. Accordingly the order quashing the garnishment is reversed and the cause remanded with directions to vacate the order and cause the garnishment to be restored to full force and effect.

REVERSED AND REMANDED WITH DIRECTIONS.

EARL YEOMAN, APPELLANT, V. NORVAL HOUSTON, APPELLEE.
97 N. W. 2d 634

Filed July 3, 1959. No. 34593.

1. **Statutes.** In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act.
2. **Elections.** Under the provision of the several legislative acts discussed in the opinion it is held that if an elector desires to vote for a candidate whose name is not printed on the ballot, he must write in the name of the person in the blank space on

the ballot under the proper office and must make a cross or other clear intelligible mark in the square opposite the written name. If these two prescribed requirements are not complied with then the ballot is not to be counted so far as the vote for the candidate whose name is written in is concerned.

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

Paul Rhodes and *Townsend & Youmans,* for appellant.

James L. Macken, for appellee.

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

SIMMONS, C. J.

This is an election contest. Earl Yeoman, contestant, is hereinafter referred to as plaintiff. Norval Houston, contestee, is hereinafter referred to as defendant.

The action involves the election for the office of sheriff of Morrill County, Nebraska, held on November 4, 1958. The sole question decided by the trial court and submitted here arises from this fact which is set out in a pretrial order: There were 106 ballots with the name of plaintiff written in the blank space provided therefor which did not have any marking in the square to the left of the name so written in. If the ballots are to be counted then plaintiff should be declared elected. If they are not to be counted then defendant should be declared elected.

The trial court held that the ballots which had no marking in the square opposite the written name were not to be counted as votes for the plaintiff. The court declared the defendant elected. Plaintiff appeals.

We affirm the judgment of the trial court.

The plaintiff relies here largely on our decision in State ex rel. Lanham v. Sheets, 119 Neb. 145, 227 N. W. 457. We refer herein to it as the Lanham decision.

In the Lanham decision we held certain provisions of the election laws were directory and that: "The writing

in, at the proper place on a ballot, of the name of a person is a sufficient indication of the intention of the elector to vote for such person, so as to entitle such ballot to be counted, though no cross is made opposite such written name."

Our task, then, is to determine the changes made in the applicable statutory provisions since the Lanham decision, and to determine the legislative intent as it now exists.

In the Lanham decision we pointed out that prior to 1917 the law provided that an elector could fill in the name of the candidate of his choice and by "marking a cross (X) with ink opposite thereto." That provision was repealed in 1917 as set out in the opinion. There remained in the act this provision from instructions to voters: " 'If you wish to vote for any person whose name does not appear upon the ballot, write or insert his full name in the blank space on the ballot under the proper office you wish him to hold, and make a cross mark in the proper margin opposite the same.' "

By the provisions of section 1945, Comp. St. 1922, it was provided: "In each division, and beneath all candidates placed there by nomination or petition, a blank space shall be provided, into which electors may write the name of any person for whom they wish to vote and whose name is not printed upon the ballot."

In 1951 in a general revision of the code relating to elections, this sentence was added: "Such written in name shall be counted as if printed on the ballot, and if the voter makes a cross in the square opposite the written name." Laws 1951, c. 99, § 129, p. 325.

This sentence was again amended in 1953 to provide, so far as important here, that: "The vote for a person whose name is so written in shall be counted as if printed on the ballot, if the voter makes a cross or other clear intelligible mark in the square opposite the written name; * * *." Laws 1953, c. 106, § 12, p. 323. It is now section 32-428, R. S. Supp., 1957.

The rule is: In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act. Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582.

One of the declared purposes as recited in the title of the 1953 act was "to permit voting by a cross or other intelligible mark *as prescribed.*" (Emphasis supplied.) The method prescribed was to write in the name and make a cross or other clear intelligible mark in the square opposite the written name. The prescribed method was not followed in the instant case.

Section 1969, Comp. St. 1922, in force when the Lanham case was decided, provided in part as recited in the Lanham decision: " 'If the voter does not wish to vote a straight ticket he shall make a cross in the square to the left of every candidate for whom he desires to vote.' "

This was amended in 1951 to provide: "The elector shall proceed alone into a compartment, if there be one then unoccupied, and prepare his ballot by marking it in the following manner: He shall make a cross in the square to the left of every candidate for whom he desires to vote, and in case of a question to be submitted to the vote of the people, by making a cross in the square to the left of the answer he wishes to give." Laws 1951, c. 99, § 154, p. 332.

This section was again amended in 1953 to provide: "The elector shall proceed alone into a compartment, if there be one then unoccupied, and prepare his ballot by marking it in the following manner: He shall make a cross or other clear intelligible mark in the square to the left of every candidate for whom he desires to vote, and in case of a question to be submitted to the vote of the people, by making such a cross or mark in the square to the left of the answer he wishes to give. If the elector desires to vote for any person whose name is not printed on the ballot, except where not permitted by law,

he shall write the name of the person in full in the blank space on the ballot under the proper office and make such a cross or mark in the square opposite the written name." Laws 1953, c. 106, § 16, p. 326.

It is now section 32-453, R. S. Supp., 1957. We call attention to the legislative intent applicable here as indicated by the title of the act as discussed with reference to section 32-428, R. S. Supp., 1957. We also call attention to the broadened prescribed method of indicating the voter's choice.

Section 13 of the Laws of 1891 referred to in the Lanham decision became section 32-715, R. S. 1943, and was repealed in 1951. Laws 1951, c. 99, § 439, p. 448.

Sections 2025 to 2030, Comp. St. 1922, became sections 32-485 to 32-490, R. R. S. 1943. Plaintiff here relies on sections 32-488 and 32-489, R. R. S. 1943. Section 2028, Comp. St. 1922, provided: "In the canvass of the votes any ballot which is not endorsed upon the back thereof as provided by law by the signature of two judges, shall be void and shall not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted: Provided, when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part." It now appears as section 32-488, R. R. S. 1943, in this language: "In the canvass of the votes, any ballot which is not endorsed upon the back thereof as provided by law by the signature of two judges or any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted; Provided, when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part." It is obvious that the principal provision above relates to the endorsement of ballots by the judges. It is a question not involved here. The proviso relates to the duty of the judges of election

to make effective a part of a ballot where the voter's intention can be gathered therefrom. It has no bearing on the prescribed method by which the voters shall express their intention.

Section 2029, Comp. St. 1929 (now section 32-489, R. R. S. 1943, with amendments not material here), prescribes a method of counting or rejection of ballots where the described name problems are involved. It has no bearing on the question of the prescribed method by which the voter shall express his intention.

Section 7 of the card of instructions to voters at the time of the decision in the Lanham case provided: " 'If you wish to vote for any person whose name does not appear upon the ballot, write or insert his full name in the blank space on the ballot under the proper office you wish him to hold, and make a cross mark in the proper margin opposite the same.' " This provision as it appears in section 1951, Comp. St. 1922, did not include the words "or insert." Those quoted words were omitted in Laws 1925, c. 116, § 1, p. 309. It was this provision that we held directory in the Lanham decision. However, as above pointed out, at that time the provision of the statute with reference to the marking of the ballot by "a cross with ink" after the name of the candidate has been repealed. Such a provision has now been re-enacted and is now section 32-453, R. S. Supp., 1957, which provides that the elector "shall write the name of the person in full" for whom he desires to vote, and "make such a cross or mark in the square opposite the written name."

The language used is the mandatory "shall" in this and other provisions of the act.

The Legislature has also provided: "Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows: (1) When the word 'may' appears, permissive or discretionary action is presumed. When the word 'shall' appears,

mandatory or ministerial action is presumed." § 49-802, R. R. S. 1943. This constitutes legislative sanction of a sound rule of statutory construction.

It is quite apparent from a study of the various acts passed since the Lanham decision that the Legislature intended two results with reference to the problem here.

First they intended to liberalize the restrictive provisions of earlier acts which required the use of a "cross," writing on or marking the ballots "with ink" or "blue pencil" and other expressions. The Legislature authorized the use of a "cross or other clear intelligible mark." The Legislature further made mandatory the use of such a mark as a condition to be performed to make the ballot one which could be counted. That was a condition "prescribed." As we said in the Lanham decision: "The legislature must have had some purpose in adopting the amendment; but if the law was to remain the same notwithstanding such adoption the amendment would be of no effect."

We call attention also to the provision of section 32-420, R. S. Supp., 1957, which provides for an official ballot which "shall" conform as nearly as possible to the enacted form. The form provides a blank line and a square to the left to be used for write-in names.

We conclude that the Lanham decision is no longer controlling and that the statutory requirements herein discussed are mandatory. The requirements of the statute are twofold. If an elector desires to vote for a candidate whose name is not printed on the ballot, he must write in the name of the person in the blank space on the ballot under the proper office and must make a cross or other clear intelligible mark in the square opposite the written name. If these two prescribed requirements are not complied with then the ballot is not to be counted so far as the vote for the candidate whose name is written in is concerned.

The judgment of the trial court is affirmed.

AFFIRMED.

WATSON BROS. TRANSPORTATION CO., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. KENNETH JACOBSON ET AL., APPELLEES AND CROSS-APPELLANTS.

97 N. W. 2d 521

Filed July 3, 1959. No. 34603.

1. **Trial: Appeal and Error.** The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial if it may have influenced the verdict.
2. **Automobiles.** Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. However, the above 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.
3. **Trial.** The trial judge's statement of the issues to the jury should state the issues as the case is being finally presented to the jury on the pleadings and the evidence adduced.
4. **Negligence: Pleading.** In a case where a plaintiff has charged a defendant with negligence which he claims was the proximate cause of a particular accident and the defendant by cross-petition charges the plaintiff with negligence which he contends was the proximate cause of the same accident and the plaintiff fails in response to the cross-petition to affirmatively charge the defendant with contributory negligence but the case was tried and the jury instructed on the theory that he had so pleaded, the original petition will be regarded as an affirmative charge of contributory negligence as to the cross-petition.
5. **Automobiles.** A driver should have his motor vehicle under such reasonable control as will enable him to avoid a collision with other vehicles or pedestrians, assuming that the drivers of other vehicles and pedestrians exercise due care. Reasonable control by drivers of motor vehicles is such as will enable them to avoid a collision with other vehicles operated without negligence in the 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 the absence of notice, warning, or knowledge, is not required.

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

Archibald J. Weaver and *Bayard T. Clark,* for appellant.

Frank A. Hebenstreit, 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 Richardson County. The action appealed was commenced in the district court for Richardson County by Watson Bros. Transportation Co., a Nebraska corporation with its principal place of business in Omaha, Nebraska. Its purpose is for the recovery of damages suffered by one of its trucking units, consisting of a tractor and semi-trailer, and the loss of the use thereof, which damage and loss of use resulted from the trucking unit being involved in an accident with a car driven by the defendant Kenneth Jacobson but which was owned by his father, the defendant Dr. Leo Jacobson. We shall hereinafter refer to this trucking unit as a truck. The defendants filed a cross-petition whereby they sought to recover from the plaintiff for the damage suffered by the father's car in this same accident. The jury found for the defendants on plaintiff's petition and for the plaintiff on defendants' cross-petition; that is, that neither party was entitled to recover on their respective causes of action. Judgment was entered accordingly. Plaintiff filed a motion for new trial and has perfected this appeal from the overruling thereof. Defendants have cross-appealed.

The accident in which the truck and car were both badly damaged occurred about 3:45 p. m. on June 24, 1957, on a bridge running north and south across the north fork of the Nemaha River in Richardson County. The bridge is located on U. S. Highway No. 75 south of

Dawson, Nebraska. It is a standard 20-foot bridge that is 220 feet long. The day was clear and hot. The driving surface of both the highway and bridge was black-top or oil-mat.

James Hammers, an employee of the appellant, was driving its truck north along U. S. Highway No. 75. He was hauling a load of frozen eggs from Topeka, Kansas, to Omaha, Nebraska. Appellee Kenneth Jacobson was driving his father's car, a 1957 four-door Buick sedan, south along U. S. Highway No. 75 from Sioux City, Iowa, to Pittsburg, Kansas, where he was to meet his parents.

The approaches to the bridge on which the accident occurred are both slightly down grade and around a curve although each approach, just before it enters the bridge, straightens out. The impact between the car and truck occurred just east of the double line running along the center of the black-top surface of the bridge and some 12 feet south of the north end thereof. The left front of the car came in contact with the left rear of the tractor, which is 7 feet 3 inches wide, whereas the semitrailer was 8 feet wide. After the accident the car remained standing upright on the bridge but at an angle, the front being just across the double center line located thereon while the rear was to the northwest and close to, if not against, the west bannister. The impact of the car and truck knocked the tandem drive axle of the tractor loose and caused it to drop to the pavement. It also caused a break in the air lines so that the brakes on both the tractor and semitrailer no longer operated. After the impact the truck, being out of control, continued toward the north some 290 feet where it entered the ditch on the lefthand (west) side of the road and upset.

The foregoing is a general statement of when and where the accident occurred. We shall discuss in detail the evidence as to the operation of the truck and car by the respective drivers thereof in connection

with the parties' assignments of error. It should be remembered, in considering the evidence adduced by both sides, that: "In a case where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury." Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804.

Appellant contends the trial court prejudicially erred in admitting appellees' exhibit No. 11 over its objection. "Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party." Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497. See, also, Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660.

Exhibit No. 11 is a picture taken of and showing the bridge on which the accident occurred and the approaches thereto on U. S. Highway No. 75 from both the north and south. It was taken from a point on U. S. Highway No. 75 some 300 feet south of the bridge. There are several other pictures in the record covering this same area, some of which were taken from points various distances north of the bridge while others were taken from points various distances south of the bridge. However, in addition to showing the bridge and the approaches thereto, exhibit No. 11 shows a truck just about to enter onto the bridge from the south.

"The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings and the admission of improper evidence is prejudicial if it may have influenced the verdict." Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170. See, also, Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141; State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593.

In offering exhibit No. 11 counsel for the appellees stated: "We offer it in evidence for the sole purpose of showing the approaches from both the north and the south to the bridge and, specifically, state that the truck entering the south part of the bridge is not the Watson Brothers truck in question here, and it's not offered for the purpose of showing that this truck is a Watson Brothers truck, or, the truck entering on the date of the accident." Counsel for appellant objected thereto as follows: "Plaintiff objects to the introduction of Exhibit No. 11 for the reason there are already adequate photographs in evidence here to show the approaches to this bridge—both from the north and from the south—and that the introduction of a picture or photograph showing a picture of a truck crossing that bridge does not tend to prove or disprove any of the issues in this lawsuit, and is incompetent, irrelevant and immaterial." The trial court ruled as follows: "Overruled, I think we'll receive Exhibit No. 11 in evidence, with the exception that you will pay no attention to the truck that is in this picture, picture No. 11."

Exhibit No. 11, as offered and received, is only cumulative of other evidence adduced and the trial court, in its discretion, could have properly sustained the objections made thereto on that basis. However, its refusal to do so was not error. In view of appellee Kenneth Jacobson's testimony as to where he first saw the truck involved in the accident as it approached the bridge from the south we think the court would have been justified in admitting the exhibit in evidence even if it had been offered with no limitations attached. We find appellant's contention as to exhibit No. 11 to be without merit.

Appellant questions the sufficiency of the pleadings and the evidence adduced to justify the trial court's submission of the "Emergency Doctrine" as it did by its instructions Nos. 3 and 13. It contends that neither the

pleadings nor the evidence justified the instructions given by the court in relation thereto.

"In the realm of negligence cases, an emergency has become the basis for a rule of law which is dependent for application upon two factual elements. This court has held that: 'Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong.' * * * However, the above 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. "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." Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

Appellees, both in their amended answer and cross-petition, alleged to the effect that when appellee Kenneth Jacobson was at a point just north of the bridge that the appellant's truck was approaching said bridge from the south and as it proceeded onto the bridge the truck was swinging back and forth on both sides of the highway. The bridge, as already stated, was 20 feet wide and 220 feet long, the accident occurring near the north end thereof. There was evidence adduced to the effect that appellee Kenneth Jacobson, who had never been over this road before, first saw the bridge as he was coming out of the curve north of the bridge and entering the straight of way approaching it; that he

was then going 40 miles an hour; that as he was straightening out onto the straight of way, at a point some 200 feet north of the bridge, he first saw appellant's truck coming off of the grade south of the bridge and onto the bridge; that the truck was coming down the center of the highway but swaying back and forth with the semi-trailer zigzagging across the center line; and that it continued to do so as it entered onto the bridge, when it seemed to accelerate its speed.

" 'The trial judge's statement of the issues to the jury should state the issues as the case is being finally presented to the jury on the pleadings and the evidence adduced.' * * * And, 'It is reversible error to instruct the jury upon a question not raised by the pleadings nor applicable to the evidence, when such instructions have a tendency to mislead the jury or have a prejudicial effect upon the party complaining.' " Chard v. New York Life Ins. Co., 145 Neb. 429, 16 N. W. 2d 858.

Under the pleadings and the evidence adduced we think the question of whether or not appellee Kenneth Jacobson was, under the circumstances as hereinbefore set forth, confronted with a sudden emergency was a question for the jury and an issue which the trial court was, under the circumstances, correct in submitting.

Appellant goes on to say that: Should the court be of the opinion that the trial court was justified in giving instructions No. 3 and No. 13, then it is submitted that the trial court should have gone further and instructed the jury that if the jury found that the negligence of the defendant caused the events which gave rise to the emergency, it should nevertheless find and hold the defendants liable for all of the consequences resulting from the original negligence of the defendants. For the purpose of disposing of this issue it is necessary to set out instruction No. 13. It is as follows: "You are further instructed that where the operator of a motor vehicle by a sudden emergency *not due to his own negligence* is placed in a position of immediate danger, and has in-

sufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required under ordinary circumstances, and if he pursues a course of action to avoid an accident, such as a person of ordinary care and prudence placed in a like position might choose, he is not guilty of negligence, even though he did not adopt the wisest choice. *So, you will consider the foregoing rule, along with other instructions, and determine whether under the evidence and the conditions then existing such driver used ordinary care.*" (Emphasis ours.)

In Hughes v. Omaha & C. B. St. Ry. Co., 143 Neb. 47, 8 N. W. 2d 509, we said: "* * * the rule of sudden emergency cannot be successfully invoked by one who has brought that emergency upon himself by his own acts, * * *." And in McClelland v. Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384, we said: "The more general application of the emergency rule is that of an ancillary yardstick tempering the standard rule of due care. * * * an essential element of the rule is that the party claiming the benefit of it must not by his own negligence have created or contributed to create the emergency. * * * 1 Blashfield, Cyc. of Automobile Law and Practice (Perm. ed.) 480, sec. 669, states the qualification thus: 'The rule of sudden emergency as above stated cannot be invoked by one who has brought that emergency upon himself by his own wrong or who has not used due care to avoid it.' This qualification should be included in the statement of the rule." The foregoing qualification was included in the statement of the rule as submitted to the jury by the trial court's instruction No. 13. If the jury found no sudden emergency existed, or if it did and it was due to the conduct of appellee Kenneth Jacobson and that the sudden emergency rule had no application, then the other instructions given by the court and referred to in instruction No. 13, fully covered the rights of both appellant and appellees. They submitted appellant's right

to recover on its cause of action as stated in its amended petition and did the same as to appellees on the rights they claimed under their cross-petition, together with the question of contributory negligence as it related thereto. We think the question of a sudden emergency, as it related to appellee Kenneth Jacobson, was properly submitted. In this regard it should be stated that his negligence, if any, was properly imputable to appellee Dr. Leo Jacobson as the latter's car was admittedly being driven by the son for a family purpose and with the father's knowledge and approval.

Appellees have filed a cross-appeal. They state appellant did not allege or charge that appellee Kenneth Jacobson was guilty of contributory negligence. Technically that is true. However, in its amended petition appellant alleged: "* * * that said Kenneth Jacobson was operating and driving said automobile at a rate of speed greatly in excess of that which was reasonable and proper having regard for the traffic on said road and at such a rate of speed as to endanger the life and limb and property of others using said highway and especially the property of this plaintiff; that said defendant failed to have his car under control * * *." The trial court submitted the question of appellee Kenneth Jacobson being guilty of contributory negligence and, if so, the effect thereof to the jury by its instructions Nos. 7 and 8. In this situation the following applies: "In a case where a plaintiff has charged a defendant with negligence which he claims was the proximate cause of a particular accident and the defendant by cross-petition charges the plaintiff with negligence which he contends was the proximate cause of the same accident and the plaintiff fails in response to the cross-petition to affirmatively charge the defendant with contributory negligence but the case was tried and the jury instructed on the theory that he had so pleaded, the original petition will be regarded as an affirmative charge of contributory negligence as to the cross-petition."

Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604.

But appellees contend that appellee Kenneth Jacobson was entirely free of any contributory negligence. "Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107.

Section 39-7,108, R. R. S. 1943, provides in part that: "The fact that the speed of a vehicle is lower than the foregoing prima facie limits (60 miles an hour) shall not relieve the driver from the duty to decrease speed * * * when approaching and going around curves, * * * when traveling upon any narrow or winding roadway, or when special hazards exist with respect to * * * traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with * * * vehicle or other conveyance on * * * the highway in compliance with the legal requirements and the duty of all persons to use due care; * * *."

"A driver should have his car under such reasonable control as will enable him to avoid a collision with other vehicles or pedestrians, assuming that the drivers of other vehicles and pedestrians exercise due care. Reasonable control by drivers of motor vehicles is such as will enable them to avoid a collision with other vehicles operated without negligence in the 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 the absence of notice, warning, or knowledge, is not required." Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

There is evidence in the record to the effect that appellant's truck approached and proceeded across the bridge at 40 miles an hour and that it was on its own or right side of the center of the road at all times. There

is evidence that the appellee Kenneth Jacobson, who was unfamiliar with the highway, approached the bridge around a curve while proceeding at a speed of from 50 to 60 miles an hour; that due to the extreme heat the oil-mat was soft and at a point 100 feet north of the bridge there was a "messy-gooey" area some 25 to 30 feet long on the west side of the road; that when he first saw the truck, which was from a point some 200 feet north of the bridge, appellee Kenneth Jacobson applied his brakes but the car skidded sideways so he disengaged his brakes and straightened out the car; that when he had straightened out the car he again applied the brakes but he was then in the "messy-gooey" area above referred to and the car again skidded sideways, with the front to the southeast and the back to the northwest; that the car continued to skid sideways until the left front of his car hit the left rear of the tractor of the appellant's truck; that this impact took place on the bridge at a point just east of the double line running across the bridge on the center line thereof; and that the car left continuous skid marks, 175 feet in length, north from the point where it ran into the truck on the bridge.

Based on the foregoing we do not think it can be said that, as a matter of law, appellee Kenneth Jacobson was free of being guilty of negligence which contributed to the accident. The evidence is in conflict and a situation upon which different minds may reasonably draw different conclusions or inferences as a matter of fact.

We think the evidence adduced presents a question of fact as to all issues presented by the trial court to the jury and, in view thereof, we affirm the judgment of the trial court in refusing to grant appellant a new trial and appellees either a new trial or judgment notwithstanding the verdict.

AFFIRMED.

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3. Where both legal and equitable relief is sought and equitable relief is denied, the cause of action at law must be determined as any other law action and should be retained by the court and tried to a jury. *Buck v. Village of Davenport* 250
4. If a statute commands or prohibits certain things, the person for whose benefit the statute was enacted has a remedy under the statute. It is not necessary to the maintenance of an action that the statute in terms expressly imposes a civil liability. *Baer v. Schaap* 578
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23. On an appeal from an order of the county court removing a guardian of a minor, the county court has power to designate a representative for the guardianship for the purposes of the appeal. *Workman v. Workman* 408

24. In order that assignments of error as to the admission or rejection of evidence may be considered by the Supreme Court, appropriate reference must be made to the specific evidence against which objection is urged. *Hutchens v. Kuker* 451

25. In an action at law where a jury has been waived it is not within the province of the Supreme Court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence the Supreme Court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. *Hutchens v. Kuker* 451

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29. The Supreme Court on the trial of a cause de novo takes cognizance of only legal evidence in the record and gives no consideration to incompetent or irrelevant matters therein. *Krell v. Sanders* 458

30. All presumptions exist in favor of regularity and correctness of orders and judgments of courts of general jurisdiction. He who asserts the contrary

is required to establish a claimed defect or error by an exhibition of the record. *Shepperd v. State* 464

31. In order that assignments of error as to the admission or rejection of evidence may be considered, it is required that appropriate reference be made to the specific evidence against which objection is made. *Barton v. Wilson* 480

32. Evidence erroneously received may not be treated as being without prejudice to the party against whom it was admitted if it may have influenced the result adversely to him. *Barton v. Wilson* 480

33. In the absence of an abuse of discretion, a ruling by the trial court on the admission or rejection of evidence will not require reversal by the Supreme Court. *Westover v. Kerr* 494

34. The Supreme Court takes judicial notice of the mandatory requirements of the statute as to the necessity and time of filing a notice of appeal, and the effect of failure to comply with them. *Campbell v. Campbell* 533

35. The Supreme Court is without jurisdiction to entertain an appeal from the rendition of a final judgment or decree by the district court unless a notice of appeal is filed in the office of the clerk of the district court from which such appeal is being taken within 1 month after the rendition of such final judgment or decree. *Campbell v. Campbell* 533

36. The striking of a motion for a new trial, timely filed in the district court, is the equivalent of overruling the same and finally disposing of the cause upon the merits, from which appeal may be taken to the Supreme Court. *Campbell v. Campbell* 533

37. The Supreme Court is without jurisdiction to entertain an appeal from the overruling of a motion for new trial by the district court unless a notice of appeal is filed in the office of the clerk of the district court within 1 month from the denial of a motion for a new trial timely filed in the cause. *Campbell v. Campbell* 533

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40. In the absence of a bill of exceptions it is presumed that issues of fact presented by the pleadings are established by the evidence and that they were correctly decided. The only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. *Johnson v. School Dist. No. 3* 547
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41. An affidavit used as evidence in the district court cannot be considered on an appeal of a 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. *Peterson v. George* 571
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42. 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 the Supreme Court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by the Supreme Court. *Peterson v. George* 571

43. A judgment of the district court brought to the Supreme Court for review is supported by a presumption of correctness and the burden is upon the party complaining of the action of the district court to show by the record that it is erroneous. It is presumed that an issue decided by the district court was correctly decided. *Peterson v. George* 571

44. It is not the province of the Supreme Court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. *Baer v. Schaap* 578

45. It is presumed in a law action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *Baer v. Schaap* 578

46. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. *Baer v. Schaap* 578

47. A question not presented and ruled on by the trial court will not be considered on appeal. Neither does a motion, which was never presented and ruled upon

below, present anything for review. *Lange v. Kansas Hide & Wool Co.* 601

48. Any assignment of error that requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions. *Lange v. Kansas Hide & Wool Co.* 601

49. 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 to the Supreme Court. The same rule applies to requests for admissions and answers thereto, if any. *Lange v. Kansas Hide & Wool Co.* 601

50. A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error. *Wylie v. Czapla* 646

51. Where claims have been filed in a proceeding to administer an estate, and later the administrative proceeding is abated and dismissed for want of jurisdiction by the county court, which abatement and dismissal is vacated on appeal, the claims stand for trial on their merits in the county court. *Cox v. Kresovich* 673

52. An order issued by the railway commission takes effect from the time prescribed therein and continues in force unless the order is annulled, revised, or modified by the commission, or set aside by a court of competent jurisdiction. *Miller v. Consolidated Motor Freight, Inc.* 712

53. On an appeal to the Supreme Court from an order of the railway commission granting a certificate of public convenience and necessity, the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or not the order complained of is reasonable and not arbitrary. *Miller v. Consolidated Motor Freight, Inc.* 712

54. To be considered in the Supreme Court, an affidavit used as evidence in the district court must be preserved in a bill of exceptions. *Brierly v. Federated Finance Co.* 725

55. A litigant is entitled to have the jury instructed as

to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error. *Wischmann v. Raikes* 728

56. On appeal from a decision of the railway commission involving the rates to be charged by common carriers, it is presumed that the rates prescribed are just, reasonable, and not arbitrary, and are otherwise lawful. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

57. On appeal from a decision of the railway commission, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

58. The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings. The admission of improper evidence is prejudicial if it may have influenced the verdict. *Watson Bros. Transp. Co. v. Jacobson* 862

Attorney and Client.

1. Attorneys' fees in divorce proceedings will ordinarily be denied where there appears no reasonable justification for the position taken by the party claiming them. *Williams v. Williams* 135

2. Reasonable fees for necessary legal services performed by attorneys for a receiver may be properly allowed as an expense of a receivership. *State ex rel. Beck v. Associates Discount Corp.* 298

3. A reasonable attorney's fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned. *State ex rel. Beck v. Associates Discount Corp.* 298

4. The opinion evidence of expert witnesses, as to the value of an attorney's services, is not conclusive or binding on the court. Such evidence is to be taken into consideration, with all the other evidence in the case, in arriving at a conclusion as to the just value of the services performed. *State ex rel. Beck v. Associates Discount Corp.* 298

Automobiles.

1. If a person in a place of safety is aware of the approach of a motor vehicle and suddenly moves from the place of safety into the path of the vehicle, his conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery by him. *Larsen v. Omaha Transit Co.* 205
2. Liability of owner or operator of motor vehicle under guest statute stated. *Pester v. Nelson* 243
3. Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. *Pester v. Nelson* 243
4. In an action for damages to an automobile, where the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. *Wylie v. Czapla* 646
5. Material elements in computation of damages to an automobile, where automobile cannot be placed in substantially as good condition as before injury, stated. *Wylie v. Czapla* 646
6. When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages. However, the necessity for and the reasonable cost of such repairs must be factually proved by competent and relevant evidence. *Wylie v. Czapla* 646
7. Generally, in an action to recover damages to an automobile, the rule or rules as to measure of damages to be applied and submitted depend upon the competent and relevant evidence adduced at the trial in support of the damages claimed. *Wylie v. Czapla* 646
8. Damages to an automobile should be proved by factual evidence rather than by the mere conclusions of witnesses. A party's mere statement or assumption that his automobile has been damaged in a certain amount, without appropriately adducing any facts on which such estimate is made, is insufficient to support a verdict and judgment therefor. *Wylie v. Czapla* 646
9. A motorist is justified in assuming that highway signs, having the appearance of regularity, were erected by proper authority. *Bell v. Crook* 685
10. If a motorist knows of the through character of a

highway, the presence or absence of warning signs is immaterial as respects his negligence in failing to yield the right-of-way. *Bell v. Crook* 685

11. A motorist traveling on a favored highway may assume that traffic on an intersecting secondary highway will yield the right-of-way, and the effect of his right to rely on this assumption is not lost because warning signs have been temporarily misplaced or removed. *Bell v. Crook* 685

12. Duty of motorist entering an intersection of two highways stated, and effect thereof on failure to see a motor vehicle not shown to be in a favored position determined. *Bell v. Crook* 685

13. The effect of the failure to look rule is subject to certain limitations. It was not intended to make a person entering a favored intersection an insurer against a collision irrespective of the negligence of the other party. *Bell v. Crook* 685

14. The driver of a motor vehicle approaching a highway protected by stop signs must stop before going upon it, look to his left and to his right, and permit vehicles to pass which are at a distance and traveling at a speed that it would be imprudent for the motorist to proceed into the intersection. *Bell v. Crook* 685

15. There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching and entering a favored highway intersection acted with due care. *Bell v. Crook* 685

16. Restrictions are placed by statute upon the prima facie lawful speeds fixed for any highway outside of a city or village. A duty is imposed to decrease speed to less than the prima facie lawful speeds when the conditions described exist. *Bell v. Crook* 685

17. An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question. *Bell v. Crook* 685

18. In an action which involves issues of negligence and contributory negligence arising out of the collision of motor vehicles at a highway intersection the jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the motor vehicles in approaching and crossing the intersection. *Bell v. Crook* 685

19. Doctrine of sudden emergency in driving of automobile stated. *Watson Bros. Transp. Co. v. Jacobson* 862
20. Rules governing reasonable control of a motor vehicle by the driver thereof stated. *Watson Bros. Transp. Co. v. Jacobson* 862

Bailments.
1. Basis of liability of the supplier or bailor of a scaffold stated. *Baer v. Schaap* 578
2. Under statute, when a scaffold is constructed by a supplier or bailor and rented to a bailee to be used in repairing a building, the scaffold must be safe, suitable, and proper for the purpose for which it is used. Generally, the bailor is liable if it does not meet that requirement. *Baer v. Schaap* 578

Bills and Notes.
1. An agreement to extend the time of payment of a note must possess all the elements essential to the execution of a valid contract. *McGrath v. Paul Logan Motor Co.* 254
2. An agreement for extension of time of payment of a note must be supported by a good and sufficient consideration in order to be binding upon the parties. *McGrath v. Paul Logan Motor Co.* 254

Boundaries.
The boundary between Missouri and Nebraska fluctuates with changes made by accretion and reliction, not with changes made by avulsion. *Durfee v. Keiffer* 272

Chattel Mortgages.
Where an owner of personal property is in default on a note secured by a chattel mortgage, the holder of the mortgage is entitled to possession of the property to enforce the payment of the note when the chattel mortgage so provides. *McGrath v. Paul Logan Motor Co.* 254

Commerce.
1. The fact that goods shipped from a point of origin in a foreign state to a point of destination in another foreign state are stored in transit in Nebraska does not ipso facto require a finding that such goods are in interstate commerce. *United States Cold Storage Corp. v. Stolinski* 513

2. Whether or not goods being transported in interstate commerce with stop-over privileges in Nebraska come to rest and acquire a tax situs in Nebraska involves a complicated question of law and fact. *United States Cold Storage Corp. v. Stolinski* 513
3. Conditions stated under which the continuity of transit remains unimpaired and the immunity of goods from state or local taxation is unaffected. *United States Cold Storage Corp. v. Stolinski* 513
4. If the interruption in transit occurred for purposes connected with the business convenience or profit of the owner of the property, the continuity of the transit must be regarded as having been so disturbed as to destroy the immunity of the property from state and local taxation. *United States Cold Storage Corp. v. Stolinski* 513
5. The contention that statute impedes the free flow of and is an unlawful burden upon interstate commerce is unavailing, even if pertinent to the issue, where the evidence does not conclusively establish that the goods in question were in interstate commerce on the tax assessment date. *United States Cold Storage Corp. v. Stolinski* 513

Constitutional Law.

1. The legislative power to tax is a plenary one, limited only by the restrictions upon it contained in the Constitution. The provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power lodged in the Legislature. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166
2. The section of the Constitution providing for the allocation of tax proceeds from motor vehicles means that they shall be allocated in the same proportion that the levy of each bears to the total levy in each tax district in the county on intangible personal property. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166
3. Statute providing for distribution of proceeds of motor vehicle taxes makes definite that which is implied in the Constitution. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166
4. In construing a provision of the Constitution that is subject to more than one construction, the court should adopt the meaning which is consistent with rules of law and established legislative policy on the

subject involved rather than a meaning in conflict therewith, unless a contrary intent is otherwise indicated by its terms. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166

5. Where no additional grounds are presented, prior determination of constitutionality of a legislative act will be adhered to in future cases. *State v. Nelson* 394

6. A legislative act which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *State v. Nelson* 394

7. The dividing line in a statute between what is lawful and unlawful cannot be left to conjecture. *State v. Nelson* 394

8. Statutes prohibiting an officer of a municipality from entering into a contract with it are not unconstitutional. *Arthur v. Trindel* 429

9. The Legislature has plenary power over taxation and matters incidental to such power within the limits of the Constitution. *United States Cold Storage Corp. v. Stolinski* 513

10. The mandate of the Constitution that all tangible property shall be taxed uniformly and proportionately includes the right of the Legislature to enact any reasonable legislation that appears necessary in accomplishing that purpose. *United States Cold Storage Corp. v. Stolinski* 513

11. Statute requiring warehousemen to list and file return of all tangible property in their warehouses on assessment day is a reasonable exercise of legislative power to secure compliance with the constitutional provision that all tangible property shall be taxed uniformly and proportionately. *United States Cold Storage Corp. v. Stolinski* 513

12. Warehouse Reporting Act is not unconstitutional in that it places warehousemen in a different classification from other businesses, since the Legislature may properly classify persons, organizations, or corporations according to their businesses, and may apply different rules to those which belong to different classes. *United States Cold Storage Corp. v. Stolinski* 513

13. A statute requiring warehousemen to furnish the tax assessor with lists of property in their warehouses without compensation therefor is not a denial of due process of law, nor a taking of private prop-

erty for a public use. *United States Cold Storage Corp. v. Stolinski* 513

14. An act requiring a warehouseman to furnish the tax assessor with a list of property stored in his warehouse is not violative of the constitutional prohibition against unreasonable searches and seizures. *United States Cold Storage Corp. v. Stolinski* 513

15. Private rights must to a reasonable extent yield to the public necessity, and where the limitation on private rights is within the bounds of reasonableness the wisdom of the legislation is a legislative matter and not a judicial one. *United States Cold Storage Corp. v. Stolinski* 513

16. Statute requiring warehouseman to file information return and exempting therefrom household goods creates an arbitrary classification of warehousemen and grants privileges and immunities to some which it denies to others, and is therefore unconstitutional. *United States Cold Storage Corp. v. Stolinski* 513

17. The question of whether or not the defendant has had a speedy trial is to be determined by what is fair and reasonable under the facts and circumstances in each case. *Svehla v. State* 553

18. The constitutional provision requiring a speedy trial in a criminal case has been interpreted by both the Legislature and the courts as to a maximum time in which a defendant may be brought to trial. The Legislature has not fixed a minimum time. What is a fair and reasonable time in each particular case is within the discretion of the court. *Svehla v. State* 553

Contempt.

1. A successful party acting upon a judgment rendered by the Supreme Court during the pendency of a motion for rehearing does take some risk in proceeding in accordance with the judgment, but is not necessarily in contempt of court in so doing. *Save the Trains Assn. v. Chicago & N. W. Ry. Co.* 180

2. Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged contempt. An attachment or order to show cause will then be issued, and the party accused brought before the court. *State ex rel. Beck v. Lush* 367

3. A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings but,

strictly speaking, it is neither. *State ex rel. Beck v. Lush* 367
4. A contempt proceeding is neither a criminal case nor a criminal prosecution within the meaning of provisions of the Constitution. *State ex rel. Beck v. Lush* 367
5. Contempt, being without any particular form of action, is not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions. *State ex rel. Beck v. Lush* 367
6. The rules of evidence in civil cases are applicable in criminal contempt cases. *State ex rel. Beck v. Lush* 367

Continuances.

An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby. *Svehla v. State* 553

Contracts.

1. 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. *Williams v. Williams* 135
2. A contract should be supported if possible, rather than defeated. There is no presumption against the validity of contracts. *State ex rel. Beck v. Associates Discount Corp.* 298
3. Within the scope of the rule of construction for contracts each case must depend upon its own facts and circumstances. *State ex rel. Beck v. Associates Discount Corp.* 298
4. In determining the nature of an oral agreement which has been partially performed, the acts and conduct of the parties thereto before a dispute arose are entitled to great weight and are ordinarily conclusive of the intention of the parties in entering into the agreement. *Jensen v. Manthe* 361
5. Public policy is defined. *United Seeds, Inc. v. Hoyt* 527
6. Public policy forbids the enforcement of an illegal or immoral contract, but it equally insists that those contracts which are lawful and contravene none of its rules shall be enforced, and that they shall not be set at naught or be held invalid on a suspicion of illegality. *United Seeds, Inc. v. Hoyt* 527

Corporations.

Prior to 1955, there was no specific remedy for recovery of money paid out for the purchase of securities sold in violation of the Blue-Sky Law. *Savorelli v. Stone* 419

Costs.

The cost of preparation of a bill of exceptions is fixed by statute and an official court reporter may not charge in excess of that amount. *Anderson v. Evans* 373

Counties.

1. The statutory provision that a zoning resolution adopted by a county board shall be published in book or pamphlet form or in a newspaper published and of general circulation in the county is mandatory. *Board of Commisisoners v. McNally* 23
2. The entire zoning resolution, including any map, plat, or zoning plan attached to, made a part of, or referred to in the resolution, must be published. *Board of Commissioners v. McNally* 23
3. A failure to comply with a statutory provision for publication of a zoning resolution prevents the resolution from becoming valid, effective, or enforceable. *Board of Commissioners v. McNally* 23
4. It cannot be presumed that a county zoning resolution was published in the manner provided by law when the proof establishes it was not. *Board of Commissioners v. McNally* 23

Courts.

1. State courts of general jurisdiction will not, as a rule, take judicial notice of municipal ordinances or private statutes, unless required to do so by charter or general law. *Dell v. City of Lincoln* 174
2. In a hearing before the juvenile court the customary rules of evidence must be adhered to and a finding of fact may not rest upon hearsay or unsworn testimony. *State ex rel. Fitzgerald v. Barkus* 247
3. In the absence of proper foundation, reports of an ex parte investigation made by a county attorney or a probation officer are not competent evidence and may not properly be considered by the court in determining issues of fact in a contested proceeding before a juvenile court. *State ex rel. Fitzgerald v. Barkus* 247
4. The essential processes, rules, and procedure of the law established and observed to aid courts in the in-

vestigation and adjudication of contested issues of fact are not discarded or permitted to be disregarded because a pertinent statute refers to the proceeding as a summary one. *State ex rel. Fitzgerald v. Barkus* 247

5. A court of one state cannot directly affect or determine the title to land in another state. *Weesner v. Weesner* 346
6. In an action for divorce, a court of competent jurisdiction in one state, with all necessary parties properly before it, generally has the power and authority to render a decree ordering the execution and delivery of a deed to property in another state in lieu of alimony for the wife. *Weesner v. Weesner* 346
7. On appeal in a probate proceeding from the county court to the district court, the party who stands in the relationship of plaintiff to the proceeding should file his petition within 50 days after the date of rendition of the judgment in the county court. *Workman v. Workman* 408
8. The answer or responsive pleading to a petition on appeal to the district court in a probate proceeding from the county court should be filed on or before the third Monday after 50 days from the rendition of the judgment of the county court. *Workman v. Workman* 408
9. An appeal from a finding and adjudication of the district court that a child is a delinquent is disposed of in the Supreme Court by trial de novo upon the record. *Krell v. Sanders* 458
10. A complaint under the Juvenile Court Act must allege facts as distinguished from conclusions showing that the accused is a neglected, dependent, or delinquent child. *Krell v. Sanders* 458
11. A complaint under the Juvenile Court Act which alleges that the accused child committed, without legal provocation, an assault and battery upon another person and that the accused is a delinquent child is sufficient. *Krell v. Sanders* 458
12. The Juvenile Court Act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of issues of fact in that court. *Krell v. Sanders* 458
13. The duties imposed by the Juvenile Court Act on the district court are judicial and not administrative. *Krell v. Sanders* 458

14. An issue of fact in a proceeding authorized by the Juvenile Court Act concerning the alleged delinquency of a child must be heard and determined by substantial observance of the rules of evidence and procedure applicable in civil cases in the district court. *Krell v. Sanders* 458
15. The essential processes, rules, and procedure of the law established and observed to aid courts in the investigation and adjudication of contested issues of fact are not discarded or permitted to be disregarded because a pertinent statute refers to the proceeding as a summary one. *Krell v. Sanders* 458
16. A single violation of a law of the state by an infant does not always permit of a conclusion that the transgressor is a juvenile delinquent. *Krell v. Sanders* 458

Criminal Law.
1. A motion for a new trial in a criminal action must be filed within 10 days after the verdict or judgment is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days. *Stanosheck v. State* 43
2. The words "unavoidably prevented" are equivalent in meaning to circumstances beyond the control of the party desiring to file a motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground. *Stanosheck v. State* 43
3. In a criminal case it is not error to exclude evidence which is not substantive proof of any fact relative to the issue. Evidence which does not tend to establish the guilt or innocence of a defendant of a crime charged is immaterial and should be excluded. *Scherer v. State* 127
4. A bill of exceptions preserving the evidence is a prerequisite to a review of the action of the trial court in overruling a plea in abatement. *Bradehorst v. State* 203
5. A crime must be defined with sufficient definiteness. There must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. *State v. Nelson* 394

6. One charged with a crime, who becomes a witness in his own behalf upon his trial, is subject to the same rules that govern other witnesses and may, on cross-examination, be interrogated as to matters brought out on direct examination. *Shepperd v. State* 464
7. If a witness is permitted to be cross-examined as to matters not brought out on his direct examination, a judgment in the case will not be reversed if it appears that no prejudice could have resulted therefrom. *Shepperd v. State* 464
8. Where the trial court has by its instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, it is not required to give further or additional instructions requested by the defendant. *Shepperd v. State* 464
9. Where several persons participate in the actual commission of a crime, the acts and declarations of any one of them, while so participating, are admissible against all the others. *Shepperd v. State* 464
10. A trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant. *Svehla v. State* 553
11. By statute, a plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto. *Svehla v. State* 553
12. By statute, to any plea in abatement the county attorney may demur if it is not sufficient in substance, or he may reply setting forth any facts which may show that there is no defect in the record as charged in the plea. *Svehla v. State* 553
13. By failure to object at the proper time, a defendant may waive statutory provision to the effect that the county attorney may demur or reply to the facts which defendant claims constitute a defect in the record. *Svehla v. State* 553
14. The district court may, in its discretion, permit the amendment of an information charging a criminal offense where the nature or identity of the offense is not changed and where the information as amended does not charge an offense other than the one on which the accused had his preliminary examination. *Svehla v. State* 553
15. The receiving, over objection, of evidence of an im-

material fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party. *Svehla v. State* 553

16. In a criminal prosecution, mere errors in rulings on evidence or in giving or refusing instructions, if without prejudice to accused, are not grounds for reversing a conviction. *Svehla v. State* 553

17. The question of whether or not the defendant has had a speedy trial is to be determined by what is fair and reasonable under the facts and circumstances in each case. *Svehla v. State* 553

18. The constitutional provision requiring a speedy trial in a criminal case has been interpreted by both the Legislature and the courts as to a maximum time in which a defendant may be brought to trial. The Legislature has not fixed a minimum time. What is a fair and reasonable time in each particular case is within the discretion of the court. *Svehla v. State* 553

19. In the absence of statute, a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination. *Svehla v. State* 553

20. Rule stated as to right of party to ask his own witness as to prior statements inconsistent with his testimony. *Svehla v. State* 553

Crops.

1. In case of the destruction of a perennial crop the measure of damages is the difference between the value of the land immediately before the injury, with the crop growing thereon, and the value of the land immediately after the destruction of the crop. *Wischmann v. Raikes* 728

2. The measure of damages, when a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another, is the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing. *Wischmann v. Raikes* 728

Damages.

1. In a proceeding under the power of eminent domain, the measure of damages where land is not taken is the difference in the reasonable market value before

and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable. *Sump v. Omaha Public Power Dist.* 120

2. In determining the reasonable market value of land in a condemnation proceeding, it is proper to consider the condition of the property and all its surroundings, as well as its adaptability for any particular use. If it has a peculiar adaptation for certain uses which adds to its value the owner is entitled to the benefit of it. *Sump v. Omaha Public Power Dist.* 120

3. Words spoken imputing an indictable offense are actionable per se, and no special damage need be proved. The jury has a right to award such damages as in its judgment would fairly compensate the plaintiff for the injury sustained. *Hutchens v. Kuker* 451

4. It is proper in a slander action for the court to instruct the jury that in fixing the amount of damages it may take into consideration the present and future injury to the plaintiff. *Hutchens v. Kuker* 451

5. In determining compensatory damages in a slander action, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error. *Hutchens v. Kuker* 451

6. There is no absolute test of damages in a slander action. It is peculiarly a matter for the jury to determine. The Supreme Court cannot interfere with a jury's verdict unless it appears that the verdict was induced by passion and prejudice or some consideration other than the evidence. *Hutchens v. Kuker* 451

7. The condition and situation in life of one injured by a slander may be shown in evidence, and may be considered by the jury upon the question of the amount of damages. *Hutchens v. Kuker* 451

8. 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, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or controlling rules of law. *Baer v. Schaap* 578

9. In an action for damages to an automobile, where

the automobile cannot be placed in substantially as good condition as it was before the injury, the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident. *Wylie v. Czapla* 646

10. Material elements in computation of damages to an automobile, where automobile cannot be placed in substantially as good condition as before injury, stated. *Wylie v. Czapla* 646

11. When, at reasonable cost, a damaged automobile can be repaired and restored to substantially its original condition, such cost is a proper measure of damages. However, the necessity for and the reasonable cost of such repairs must be factually proved by competent and relevant evidence. *Wylie v. Czapla* 646

12. Generally, in an action to recover damages to an automobile, the rule or rules as to measure of damages to be applied and submitted depend upon the competent and relevant evidence adduced at the trial in support of the damages claimed. *Wylie v. Czapla* 646

13. Damages to an automobile should be proved by factual evidence rather than by the mere conclusions of witnesses. A party's mere statement or assumption that his automobile has been damaged in a certain amount, without appropriately adducing any facts on which such estimate is made, is insufficient to support a verdict and judgment therefor. *Wylie v. Czapla* 646

14. It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict. *Wischmann v. Raikes* 728

15. If the owner of lands is prevented from planting any part or all thereof by reason of conditions caused by the unlawful or negligent conduct of another, his measure of damages on that account may be either the reasonable rental value or use value thereof for the season or seasons when he cannot do so because of such conditions. *Wischmann v. Raikes* 728

16. In case of the destruction of a perennial crop the measure of damages is the difference between the value of the land immediately before the injury, with the crop growing thereon, and the value of the land immediately after the destruction of the crop. *Wischmann v. Raikes* 728

17. The measure of damages, when a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another, is the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing. *Wischmann v. Raikes* 728

Death.

In this jurisdiction a cause of action for wrongful death is a sufficient estate to justify the appointment of an administrator. *Cox v. Kresovich* 673

Deeds.

1. An ordinary quitclaim deed vests in the grantee only such title or interest as the grantor had at the time of the execution and delivery of the deed. *Smith v. Berberich* 142
2. A quitclaim deed purports to convey nothing more than the interest or estate in the property described of which the grantor was seized or possessed at the time, rather than the property itself. *Smith v. Berberich* 142

Divorce.

1. No decree of divorce and of the nullity of a marriage should be made solely on the declarations, confessions, or admissions of the parties, but the court should, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose. *Kinch v. Kinch* 110
   Goodman v. Goodman 842
2. Charges by a husband made in good faith that his wife is insane are not ordinarily cruelty, within the meaning of that term as grounds for divorce, but if they are false they may furnish grounds therefor. *Kinch v. Kinch* 110
3. Rules for determination of alimony in divorce case stated. *Kinch v. Kinch* 110
   Abel v. Abel 488
4. Attorneys' fees in divorce proceedings will ordinarily be denied where there appears no reasonable justification for the position taken by the party claiming them. *Williams v. Williams* 135
5. Any unjustifiable conduct by either husband or wife which destroys the legitimate ends and objects of

matrimony constitutes extreme cruelty. *Schalk v. Schalk* 229

6. Where a husband, having sufficient ability, without just cause, fails and absolutely refuses to contribute anything to the support of his wife, the court may grant her a decree of divorce. *Schalk v. Schalk* 229

7. Where a husband, without cause, fails to support his wife, she may maintain an action for separate maintenance unless she has forfeited her right. *Schalk v. Schalk* 229

8. To defeat a wife's claim for support and maintenance on the ground of voluntary abandonment of the husband's domicile, the fact of such abandonment must be established by cogent proof. *Schalk v. Schalk* 229

9. Upon an application for divorce where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill. *Schalk v. Schalk* 229

10. The granting of alimony and the allowance of support money in divorce actions are always determined by the facts and circumstances in each case relating to and in accord with the many factors and elements heretofore announced by this court. *Schalk v. Schalk* 229

11. The amount of alimony to be granted a wife is not to be determined alone from the property possessed by the husband. Many other factors enter into the determination such as the husband's age, health, earning capacity, future prospects, and social standing. *Schalk v. Schalk* 229

12. In a divorce action, the custody of a child is to be determined by its best interests, with due regard to the superior rights of fit, proper, and suitable parents. *Schalk v. Schalk* 229

13. In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse. *Schalk v. Schalk* 229

14. In an action for divorce, a court of competent jurisdiction in one state, with all necessary parties properly before it, generally has the power and authority to render a decree ordering the execution and delivery of a deed to property in another state in lieu of alimony for the wife. *Weesner v. Weesner* 346

15. An order entered in a divorce action where personal service of process has been had is personam in character, and when final it is generally res judicata. *Weesner v. Weesner* 346
16. Where all necessary parties are before a competent court in the state where land is situated, an order of such court will be given force and effect under the full faith and credit clause of the Constitution of the United States. *Weesner v. Weesner* 346
17. The courts of this state will presume that the public policy of another state with regard to division of real property in a divorce action is the same as our own in the absence of a showing to the contrary. *Weesner v. Weesner* 346
18. Where by decree of divorce the custody of minor children has been established, the court thereafter, by statute, is empowered to change the custody on its own motion or on petition, if the circumstances of the parties change, or if a change will be in the best interests of the children. *Stohlmann v. Stohlmann* 401
19. In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration. *Stohlmann v. Stohlmann* 401
20. Upon the granting of an absolute divorce the trial court has a legal right to assign the property, both real and personal, acquired during the marriage by the joint efforts of the parties, between the parties as the equities require. *Abel v. Abel* 488
21. Statute prescribing proof required in divorce action means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce. *Goodman v. Goodman* 842
22. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances. *Goodman v. Goodman* 842
23. The marriage relation is designed to continue as long as both the parties shall live, and is not to be dissolved for light or trivial causes. *Goodman v. Goodman* 842
24. Mere rudeness of language is not of necessity extreme cruelty. In order to constitute extreme cruelty it must have the effect of so grievously wounding

the feelings or destroying the peace of mind of the plaintiff as to impair health or utterly destroy the legitimate ends of matrimony. *Goodman v. Goodman* 842

Domicile.

A wife is not prevented, for good cause shown, from having a domicile or residence separate and apart from that of her husband. *Schalk v. Schalk* 229

Easements.

1. Quality and characteristics of acquisition of an easement by prescription are substantially the same as those applying to acquisition of land by adverse possession. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
2. To establish a prescriptive right to an easement, all of the elements must be established by clear, convincing, and satisfactory evidence. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
3. If an easement is acquired by prescription, the extent of the right is fixed and determined by the use in which it originated. To establish an easement by prescription the evidence must show the extent of the use for a period of at least 10 years. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
4. Where adverse user has continued for more than statutory period, it will be presumed to have been under a claim of right. The landowner, to avoid the presumption, must show the use to have been permissive. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
5. If the use of an easement has been adverse, notorious, and uninterrupted, the owner of the servient tenement is charged with knowledge of such use, and acquiescence in it is implied. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
6. The extent and nature of an easement is determined from the use made of the property during the prescriptive period. It may be more or less than the width of a public highway as prescribed by statute. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805

Elections.

If an elector desires to vote for a candidate whose name is not printed on the ballot, he must write in the name of the person in the blank space on the ballot

under the proper office and must make a cross or other clear intelligible mark in the square opposite the written name. *Yeoman v. Houston* 855

Eminent Domain.

1. In a proceeding under the power of eminent domain, the measure of damages where land is not taken is the difference in the reasonable market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable. *Sump v. Omaha Public Power Dist.* 120
2. In determining the reasonable market value of land in a condemnation proceeding, it is proper to consider the condition of the property and all its surroundings, as well as its adaptability for any particular use. If it has a peculiar adaptation for certain uses which adds to its value the owner is entitled to the benefit of it. *Sump v. Omaha Public Power Dist.* 120
3. Evidence as to the value of property for a particular use is not competent. Its adaptability for certain uses may be considered only in determining the reasonable market value of the land at the time it is taken or damaged. *Sump v. Omaha Public Power Dist.* 120
4. The evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future. *Sump v. Omaha Public Power Dist.* 120
5. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged. *Sump v. Omaha Public Power Dist.* 120
6. An instruction which fails to properly limit the consideration of future uses to reasonable uses in the immediate future is prejudicially erroneous. *Sump v. Omaha Public Power Dist.* 120
7. In proving the reasonable market value of property, it is improper to admit testimony of an alleged offer of a particular price as tending to show its value. *Sump v. Omaha Public Power Dist.* 120
8. In an action for damages for the taking of an easement for a right-of-way, it is error to permit testi-

mony as to the value of the land as a site for a filling station. *Sump v. Omaha Public Power Dist.* 120

9. Ordinarily a party is estopped from asserting error where he subsequently elicits similar evidence on the same subject. *Sump v. Omaha Public Power Dist.* 120

Equity.

1. Where no equitable relief is granted in a suit to foreclose a mechanic's lien, a court of equity is without authority to enter a personal judgment in favor of the mechanic's lien claimant. *Gillespie v. Hynes* 49
2. If a cause of action for equitable relief and a legal cause of action at law are joined and equitable relief is entirely denied, the court is without authority to determine the issue of personal liability and render a judgment on the cause of action at law. *Buck v. Village of Davenport* 250
3. The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is rendered. *State ex rel. Beck v. Associates Discount Corp.* 298
   Wischmann v. Raikes 728
4. If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary. The maxim that "he who seeks equity must do equity," should be applied in suits to quiet title. *Weesner v. Weesner* 346
5. 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. *Wischmann v. Raikes* 728

Estates.

Under designated section of the Uniform Property Act, a devise to a person and "to his descendants" creates a life estate in such person and a contingent remainder in his descendants as a class. *Ellingrod v. Trombla* 264

Evidence.

1. Evidence as to the value of property for a particular use is not competent. Its adaptability for certain uses may be considered only in determining the rea-

sonable market value of the land at the time it is taken or damaged. *Sump v. Omaha Public Power Dist.* 120

2. The evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future. *Sump v. Omaha Public Power Dist.* 120

3. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged. *Sump v. Omaha Public Power Dist.* 120

4. In proving the reasonable market value of property, it is improper to admit testimony of an alleged offer of a particular price as tending to show its value. *Sump v. Omaha Public Power Dist.* 120

5. In a criminal case it is not error to exclude evidence which is not substantive proof of any fact relative to the issue. Evidence which does not tend to establish the guilt or innocence of a defendant of a crime charged is immaterial and should be excluded. *Scherer v. State* 127

6. State courts of general jurisdiction will not, as a rule, take judicial notice of municipal ordinances or private statutes, unless required to do so by charter or general law. *Dell v. City of Lincoln* 174

7. In a hearing before the juvenile court the customary rules of evidence must be adhered to and a finding of fact may not rest upon hearsay or unsworn testimony. *State ex rel. Fitzgerald v. Barkus* 247

8. In the absence of proper foundation, reports of an ex parte investigation made by a county attorney or a probation officer are not competent evidence and may not properly be considered by the court in determining issues of fact in a contested proceeding befor a juvenile court. *State ex rel. Fitzgerald v. Barkus* 247

9. A fact, relation, or state of things once shown to exist is presumed to continue until the contrary appears. *State ex rel. Beck v. Associates Discount Corp.* 298

10. A practice, if well established, will be presumed to have been followed until the contrary is shown. *State ex rel. Beck v. Associates Discount Corp.* 298

11. The rules of evidence in civil cases are applicable

in criminal contempt cases. *State ex rel. Beck v. Lush* 367

12. The trial court should be allowed a reasonable discretion in receiving or rejecting evidence of prior declarations of a witness consistent with his testimony where he has been impeached by proof of other inconsistent statements. *Anderson v. Evans* 373

13. Considerable latitude must necessarily be allowed in the admission of corroborative evidence; and whether such testimony should be received rests largely in the discretion of the trial court. *Anderson v. Evans* 373

14. Presumptions and inferences may be drawn only from facts established. A presumption may not rest on presumption or inference on inference. *Stump v. Stransky* 414

15. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Savorelli v. Stone* 419

16. Proof in the trial of a jury case should be confined to legal evidence which tends to prove or disprove the issues made by the pleadings. *Barton v. Wilson* 480

17. Evidence erroneously received may not be treated as being without prejudice to the party against whom it was admitted if it may have influenced the result adversely to him. *Barton v. Wilson* 480

18. A litigant should not ordinarily be permitted to cross-examine a witness on a matter foreign to the scope of his direct examination. *Westover v. Kerr* 494

19. Under statute, violation of the strict rule of cross-examination is not considered ground for reversal unless it results in prejudice to the substantial rights of the party complaining. *Westover v. Kerr* 494

20. In the absence of an abuse of discretion, a ruling by the trial court on the admission or rejection of evidence will not require reversal by the Supreme Court. *Westover v. Kerr* 494

21. The receiving, over objection, of evidence of an immaterial fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party. *Svehla v. State* 553

22. In a criminal prosecution, mere errors in rulings on evidence or in giving or refusing instructions, if without prejudice to accused, are not grounds for reversing a conviction. *Svehla v. State* 553

23. Rule stated as to right of party to ask his own witness as to prior statements inconsistent with his testimony. *Svehla v. State* 553

Executors and Administrators.

1. The only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so. *Storm v. Cluck* 13
2. In this jurisdiction a cause of action for wrongful death is a sufficient estate to justify the appointment of an administrator. *Cox v. Kresovich* 673
3. A policy of automobile indemnity insurance held by nonresident motorist was an asset of his estate sufficient to support administration of his estate in Nebraska. *Cox v. Kresovich* 673
4. The insurance represented by an automobile indemnity insurance policy was an asset of the insured before his death and after his death it became an asset of his estate in this jurisdiction where he came to his death and another or others sustained injury and damage by reason of his tortious act. *Cox v. Kresovich* 673
5. A proceeding for administration may be maintained in any county in the state where the insurance company is carrying on its business and is amenable to service of process. *Cox v. Kresovich* 673
6. Where claims have been filed in a proceeding to administer an estate, and later the administrative proceeding is abated and dismissed for want of jurisdiction by the county court, which abatement and dismissal is vacated on appeal, the claims stand for trial on their merits in the county court. *Cox v. Kresovich* 673

False Imprisonment.

1. In an action for damages for false arrest or false imprisonment, whether or not the acts of a defendant amount to false arrest or false imprisonment is a question for the jury provided the evidence is sufficient to support a verdict for the plaintiff. *Barton v. Wilson* 480
2. In order to recover in a civil action for false arrest or imprisonment, the burden is upon the plaintiff to

prove facts and circumstances amounting to an unlawful restraint of liberty. *Barton v. Wilson* 480

Forfeitures.

A statutory provision limiting the period for bringing an action to recover a penalty or forfeiture generally applies only to a penalty or forfeiture created by a penal statute for a dereliction of duty, or failure to perform specific acts, or for the commission of acts prohibited by statute. *Arthur v. Trindel* 429

Fraud.

A recovery by a plaintiff in a civil action based upon fraud pursuant to the provisions of the Blue-Sky Law may not be sustained where there is a judicial admission by the plaintiff that no fraud existed. *Savorelli v. Stone* 419

Garnishment.

The procedure to obtain garnishment by the terms of the Uniform Enforcement of Foreign Judgments Act is substantially the same as that for obtaining garnishment after judgment on a domestic judgment. *Sullivan v. Sullivan* 850

Guardian and Ward.

On an appeal from an order of the county court removing a guardian of a minor, the county court has power to designate a representative for the guardianship for the purposes of the appeal. *Workman v. Workman* 408

Highways.

1. A motorist is justified in assuming that highway signs, having the appearance of regularity, were erected by proper authority. *Bell v. Crook* 685
2. Where stop signs have been erected at a highway intersection for a considerable period of time and have been recognized by the users of the intersecting roads as designating one of them a favored highway, it will be presumed, until the contrary appears, that the signs were installed by competent officials acting under authority of law. *Bell v. Crook* 685
3. An arterial highway is not deprived of its character or status because stop signs on an intersecting road

are temporarily displaced or otherwise made invisible. *Bell v. Crook* 685

4. If a motorist knows of the through character of a highway, the presence or absence of warning signs is immaterial as respects his negligence in failing to yield the right-of-way. *Bell v. Crook* 685

5. A motorist traveling on a favored highway may assume that traffic on an intersecting secondary highway will yield the right-of-way, and the effect of his right to rely on this assumption is not lost because warning signs have been temporarily misplaced or removed. *Bell v. Crook* 685

6. Duty of motorist entering an intersection of two highways stated, and effect thereof on failure to see a motor vehicle not shown to be in a favored position determined. *Bell v. Crook* 685

7. All travelers are required to exercise due care in coming to and crossing an intersection of public highways. *Bell v. Crook* 685

8. The effect of the failure to look rule is subject to certain limitations. It is not intended to make a person entering a favored intersection an insurer against a collision irrespective of the negligence of the other party. *Bell v. Crook* 685

9. The driver of a motor vehicle approaching a highway protected by stop signs must stop before going upon it, look to his left and to his right, and permit vehicles to pass which are at a distance and traveling at a speed that it would be imprudent for the motorist to proceed into the intersection. *Bell v. Crook* 685

10. There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching and entering a favored highway intersection acted with due care. *Bell v. Crook* 685

11. Restrictions are placed by statute upon the prima facie lawful speeds fixed for any highway outside of a city or village. A duty is imposed to decrease speed to less than the prima facie lawful speeds when the conditions described exist. *Bell v. Crook* 685

12. If the owner of land encloses it with a fence and installs gates therein at the entrance and exit where the right-of-way is claimed across the tract, it is evidence that he recognizes the right of those who use the road to continue to use it. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805

13. Elements requisite to the establishment of a highway by prescription stated. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
14. It is not indispensable to the establishment of a highway by prescription that there has been no deviation in the line of travel. If the course of travel has remained substantially unchanged for the full period, it is sufficient. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
15. If the owner of land over which a road extends changes the route for his convenience or advantage, and if the public continues the use of the road as changed and public authorities expend public funds on its improvement, the owner of the land cannot question the identity of the line of travel. The public right therein does not become extinguished but exists in the highway as changed. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
16. Change in the course of a road after the right of the public is established by use for the statutory period does not defeat the public right to the use of the road as previously established. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
17. A public highway may be established by implied dedication if there is present an intent to appropriate an easement for such public use. The intent may be expressed in the visible conduct and acts of the owner. After acceptance of the highway, the owner cannot recall the appropriation. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
18. In order to constitute a highway by implied dedication it is not necessary that the offer be accepted by public authorities but it may be accepted by the public. Such acceptance may be shown by the public entering upon and using the land and thereby enjoying the privilege offered. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
19. The extent and nature of an easement is determined from the use made of the property during the prescriptive period. It may be more or less than the width of a public highway as prescribed by statute. *State ex rel. Game, Forestation & Parks Commission v. Hull* 805
20. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path but the right extends to such width as is reasonably necessary for public travel.

State ex rel. Game, Forestation & Parks Commission v. Hull 805

Husband and Wife.

A wife is not prevented, for good cause shown, from having a domicile or residence separate and apart from that of her husband. *Schalk v. Schalk* 229

Incest.

1. The statute defining incest provides in part that if a father shall licentiously cohabit with his own daughter, the father shall upon conviction be punished by confinement in the penitentiary. *Svehla v. State* 553
2. Sexual intercourse is defined. *Svehla v. State* 553
3. In the use of the words "licentiously cohabit," the Legislature contemplated one or more acts of sexual intercourse of a father with his own daughter. *Svehla v. State* 553
4. Where the crime of incest is charged, the State is required to prove beyond a reasonable doubt that such offense was committed within 3 years prior to the date of the filing of the information. *Svehla v. State* 553

Indictments and Informations.

1. The State is required to furnish a defendant informed against for a felony with a copy of the information filed against him within 24 hours after such filing. *Shepperd v. State* 464
2. There is no specified time that must elapse between filing of an information and the commencement of trial thereon, except defendant may not without his consent be arraigned or required to answer it until at least 1 day after he has received a copy thereof. *Shepperd v. State* 464
3. If the information informs the accused with reasonable certainty of the charge made against him, it is sufficient. *Shepperd v. State* 464
4. A trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant. *Svehla v. State* 553
5. The district court may, in its discretion, permit the amendment of an information charging a criminal offense where the nature or identity of the offense

is not changed and where the information as amended does not charge an offense other than the one on which the accused had his preliminary examination. *Svehla v. State* 553

Infants.

1. A complaint under the Juvenile Court Act must allege facts as distinguished from conclusions showing that the accused is a neglected, dependent, or delinquent child. *Krell v. Sanders* 458
2. A complaint under the Juvenile Court Act which alleges that the accused child committed, without legal provocation, an assault and battery upon another person and that the accused is a delinquent child is sufficient. *Krell v. Sanders* 458
3. The Juvenile Court Act did not create a new court but it conferred new and additional powers on the district court. It did not change the rules, practice, and procedure applicable to hearings without a jury of issues of fact in that court. *Krell v. Sanders* 458
4. The duties imposed by the Juvenile Court Act on the district court are judicial and not administrative. *Krell v. Sanders* 458
5. An issue of fact in a proceeding authorized by the Juvenile Court Act concerning the alleged delinquency of a child must be heard and determined by substantial observance of the rules of evidence and procedure applicable in civil cases in the district court. *Krell v. Sanders* 458
6. A single violation of a law of the state by an infant does not always permit of a conclusion that the transgressor is a juvenile delinquent. *Krell v. Sanders* 458

Injunction.

Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute or constitute a nuisance. *State ex rel. Beck v. Associates Discount Corp.* 298

Insurance.

1. Where there is no uncertainty as to the meaning of a policy of insurance, and the same is legal and not opposed to public policy, it will be enforced as it is made. *Mills v. Aetna Ins. Co.* 612

2. In construing terms used in a policy of insurance, they are generally to be taken in their plain and popular sense. *Mills v. Aetna Ins. Co.* 612
3. In construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof. *Mills v. Aetna Ins. Co.* 612
4. The parties to a contract of insurance may contract for any lawful coverage. An insurance company has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations not inconsistent with public policy or statute. *Mills v. Aetna Ins. Co.* 612
5. Provision in an insurance policy or certificate of insurance that no coverage is afforded unless the accidental bodily injury or disease occurs during the period for which the insured is covered, means accidental bodily injury or disease and disability caused thereby, which first occurs and manifests itself during the period mentioned. *Mills v. Aetna Ins. Co.* 612
6. A policy of automobile indemnity insurance held by a nonresident motorist was an asset of his estate sufficient to support administration of his estate in Nebraska. *Cox v. Kresovich* 673
7. The insurance represented by an automobile indemnity insurance policy was an asset of the insured before his death and after his death it became an asset of his estate in this jurisdiction where he came to his death and another or others sustained injury and damages by reason of his tortious act. *Cox v. Kresovich* 673
8. A proceeding for administration may be maintained in any county in the state where the insurance company is carrying on its business and is amenable to service of process. *Cox v. Kresovich* 673

Interest.

In the absence of any statute or provision in a contract, interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal. *State ex rel. Beck v. Associates Discount Corp.* 298

Judgments.

1. Rule stated whereby court may examine its own records in cases that are interwoven and interdependent and take judicial notice thereof. *County of Keith v. Triska* 1
   Wischmann v. Raikes 728
2. A party is not in contempt of either the railway commission or the Supreme Court in acting upon a judgment of the Supreme Court reversing an order of the railway commission. *Save The Trains Assn. v. Chicago & N. W. Ry. Co.* 180
3. An order entered in a divorce action where personal service of process has been had is personam in character, and when final it is generally res judicata. *Weesner v. Weesner* 346
4. Where all necessary parties are before a competent court in the state where land is situated, an order of such court will be given force and effect under the full faith and credit clause of the Constitution of the United States. *Weesner v. Weesner* 346
5. A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective. *Johnson v. School Dist. No. 3* 547
   Lange v. Kansas Hide & Wool Co. 601
6. The court examines the evidence on motion for summary judgment, not to decide any issue of fact, but to discover if a real issue of fact exists. *Lange v. Kansas Hide & Wool Co.* 601
7. The summary judgment is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged. *Lange v. Kansas Hide & Wool Co.* 601
8. Material facts or questions which were an issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein. Such facts or questions become res judicata and may not again be litigated in a subsequent action. *Wischmann v. Raikes* 728
9. An adjudication by the Supreme Court extends to all matters decided expressly or by necessary implication. It extends not alone to the questions actually and formally presented but to all existing

in the record and necessarily involved in the decision. *Wischmann v. Raikes* 728

10. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. *Wischmann v. Raikes* 728

11. The pleadings and judgment, but not the opinion of the appellate court, may be introduced in evidence to support a plea of res judicata. *Wischmann v. Raikes* 728

12. Under the Uniform Enforcement of Foreign Judgments Act, at any time after registration and regardless of whether jurisdiction of the person of the judgment debtor has been secured or final judgment has been obtained, a levy may be made under the registered judgment upon any property of the judgment debtor. *Sullivan v. Sullivan* 850

13. The proper procedure to obtain garnishment under the terms of the Uniform Enforcement of Foreign Judgments Act is the filing of an affidavit by the judgment creditor, his agent or attorney, that he has good reason to and does believe that some person, partnership, or corporation has property of or is indebted to the judgment debtor. *Sullivan v. Sullivan* 850

14. The procedure to obtain garnishment by the terms of the Uniform Enforcement of Foreign Judgments Act is substantially the same as that for obtaining garnishment after judgment on a domestic judgment. *Sullivan v. Sullivan* 850

Landlord and Tenant.

1. Where the only consideration for the lease of a gravel pit for a period of years was a royalty on the gravel removed, and the lease contained no express provision for a continuous operation or for forfeiture for failure to develop and operate the pit, there was an implied covenant on the part of the lessee to develop and operate the pit with reasonable diligence. *George v. Jones* 149

2. A lessee under a mining lease for gravel on a royalty basis is obligated to work the gravel pit with ordinary diligence. *George v. Jones* 149

3. An occupant is one who has actual possession as a tenant as distinguished from a landlord who has legal or constructive possession. *Durfee v. Keiffer* 272

Libel and Slander.

1. Any language, the nature and meaning of which are to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace, is slanderous per se. *Hutchens v. Kuker* 451
2. One who is liable for a libel or for a slander actionable per se is liable for at least nominal damages. *Hutchens v. Kuker* 451
3. Words spoken imputing an indictable offense are actionable per se, and no special damage need be proved. The jury has a right to award such damages as in its judgment would fairly compensate the plaintiff for the injury sustained. *Hutchens v. Kuker* 451
4. It is proper in a slander action for the court to instruct the jury that in fixing the amount of damages it may take into consideration the present and future injury to the plaintiff. *Hutchens v. Kuker* 451
5. In determining compensatory damages in a slander action, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error. *Hutchens v. Kuker* 451
6. There is no absolute test of damages in a slander action. It is peculiarly a matter for the jury to determine. The Supreme Court cannot interfere with a jury's verdict unless it appears that the verdict was induced by passion and prejudice or some consideration other than the evidence. *Hutchens v. Kuker* 451
7. The condition and situation in life of one injured by a slander may be shown in evidence, and may be considered by the jury upon the question of the amount of damages. *Hutchens v. Kuker* 451
8. Grounds for setting aside of excessive verdict in action for slander stated. *Hutchens v. Kuker* 451
9. Rules applicable to setting aside of verdict for slander action apply to the judgment of a court making a finding of compensatory damages where a jury has been waived. *Hutchens v. Kuker* 451

Limitations of Actions.

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. *Anderson v. Evans* 373

Master and Servant.

1. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury. *Anderson v. Evans* 373
2. The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment. *Schlueter v. School Dist. No. 42* 443
3. The measure of damages in suits for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period. *Schlueter v. School Dist. No. 42* 443
4. In an action by an employee against his employer for damages for breach of contract arising from the wrongful discharge of the former, the fact that the plaintiff obtained or, by the exercise of due diligence, might have obtained other employment is a matter of defense which the plaintiff is not required to anticipate in his petition. *Schlueter v. School Dist. No. 42* 443
5. The burden of proof is on the defendant to establish the defense that plaintiff might have obtained other employment and on failure thereof, or of showing other facts in mitigation of damages, the measure of damages is the contract price. *Schlueter v. School Dist. No. 42* 443

Mechanics' Liens.

1. Where a party performs labor or furnishes materials for the improvement of a house pursuant to an agreement with the owner thereof, such party has 4 months from the completion of the work or the furnishing of the materials in which to file a mechanic's lien. *Gillespie v. Hynes* 49
2. Where no equitable relief is granted in a suit to foreclose a mechanic's lien, a court of equity is

without authority to enter a personal judgment in favor of the mechanic's lien claimant. *Gillespie v. Hynes* 49

3. Where a mechanic's lien claimant fails to establish a lien in a suit to foreclose his lien, the issue of personal liability is a question to be determined as in any other law action. In such a situation the trial court should retain the question of personal liability for trial as a law action. *Gillespie v. Hynes* 49

4. Insofar as they conflict with the general rule that equity jurisdiction will not be retained to grant legal relief where no right to equitable relief is established, cases specified and others of similar import are disapproved. *Gillespie v. Hynes* 49

5. Where a building is constructed on a "time and materials" basis, the materials and labor for which a party furnishing them is entitled to a mechanic's lien are such only as were used in or delivered at the building described in the claim of lien, and at a cost not in excess of the actual cost thereof. *Jensen v. Manthe* 361

6. The owner is entitled to the benefit of any discount or other reduction of cost accruing to the contractor operating under a cost or cost plus agreement. *Jensen v. Manthe* 361

Mines and Minerals.

1. Where the only consideration for the lease of a gravel pit for a period of years was a royalty on the gravel removed, and the lease contained no express provision for a continuous operation or for forfeiture for failure to develop and operate the pit, there was an implied covenant on the part of the lessee to develop and operate the pit with reasonable diligence. *George v. Jones* 149

2. A lessee under a mining lease for gravel on a royalty basis is obligated to work the gravel pit with ordinary diligence. *George v. Jones* 149

3. By the terms of an entirety clause the parties thereto agree that in the event the mineral interests under the leased premises shall become separately owned the royalties shall nevertheless be treated as an entirety, the separate owners participating pro rata. *Krone v. Lacy* 792

4. An entirety clause in a lease has the effect of placing a restriction upon the power of the lessor to alienate his mineral and royalty interests therein

contrary thereto as long as the lease containing such clause remains in force and effect. *Krone v. Lacy* 792

Motor Carriers.

1. The burden is on applicant for a certificate of public convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity. *Miller v. Consolidated Motor Freight, Inc.* 712
2. Rules controlling the issuance of a certificate of public convenience and necessity stated. *Miller v. Consolidated Motor Freight, Inc.* 712
3. The power of the railway commission to fix the rates to be charged by common carriers is legislative and not judicial in character. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786
4. Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786
5. Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the railway commission and not the courts. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786
6. Where it is shown that an order of the railway commission is within the scope of the powers vested in it, and such order is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

Municipal Corporations.

1. Statute governing cities of the primary class empowers mayor and council of city to open and improve any street, avenue, alley, or lane. *Dell v. City of Lincoln* 174
2. The same statute provides that when any street, avenue, alley, or lane shall be vacated, the same shall revert to the owners of the adjacent real

estate, one-half on each side thereof. *Dell v. City of Lincoln* 174

3. The standards of certainty are higher in legislative acts prescribing punishment for offenses than in those depending primarily upon civil sanction for enforcement. *State v. Nelson* 394

4. The law of this state imposes upon the various municipal corporations thereof the duty to keep their streets and sidewalks in a reasonably safe condition for travel by the public. *Stump v. Stransky* 414

5. Under the common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition. *Stump v. Stransky* 414

6. Where the performance of a duty is for the benefit of the municipality as an organized government, and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government. No right of action accrues to an individual citizen especially injured thereby. *Stump v. Stransky* 414

7. The requirement of notice contained in the statute and city charter is a condition precedent to the operative effect of the duty of an owner of property contained in the two provisions. *Stump v. Stransky* 414

8. Where a statute prohibits an officer of a municipality from having an interest in any contract with the municipality and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported contract may be recovered back at the suit of the municipality or of a taxpayer suing in its behalf. *Arthur v. Trindel* 429

9. When a statute prohibits an officer of a municipality from entering into a contract with the city and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had. *Arthur v. Trindel* 429

10. Contracts prohibited by statute are wholly void for all purposes as to everybody whose rights would be affected by them if valid; such contracts require no disaffirmance to avoid them; they cannot be validated by ratification; and they are not susceptible of validation. *Arthur v. Trindel* 429

Negligence.

1. Contributory negligence is a want of ordinary care on the part of the plaintiff which, concurring with the negligence of the defendant, is a proximate cause of the injury of which complaint is made. *Larsen v. Omaha Transit Co.* 205
2. Want of ordinary care and not knowledge of the danger is the test of contributory negligence. *Larsen v. Omaha Transit Co.* 205
3. If a person in a place of safety is aware of the approach of a motor vehicle and suddenly moves from the place of safety into the path of the vehicle, his conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery by him. *Larsen v. Omaha Transit Co.* 205
4. An issue concerning contributory negligence is one of fact if different minds may reasonably deduce various conclusions or inferences from the evidence or if there is a conflict in the evidence. *Larsen v. Omaha Transit Co.* 205
5. Liability of owner or operator of motor vehicle under guest statute stated. *Pester v. Nelson* 243
6. Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. *Pester v. Nelson* 243
7. There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances in each case. *Pester v. Nelson* 243
8. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. *Anderson v. Evans* 373
9. Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury. *Anderson v. Evans* 373
10. Definition of negligence is given. *Baer v. Schaap* 578
11. If contributory negligence is relied upon by defendant, the burden is upon him to prove it by a

preponderance of the evidence, except insofar as the same may appear in evidence adduced for plaintiff. *Baer v. Schaap* 578

12. Basis of liability of the supplier or bailor of a scaffold stated. *Baer v. Schaap* 578

13. Under statute, when a scafford is constructed by a supplier or bailor and rented to a bailee to be used in repairing a building, the scaffold must be safe, suitable, and proper for the purpose for which it is used. Generally, the bailor is liable if it does not meet that requirement. *Baer v. Schaap* 578

14. Statutes requiring protective devices, such as scaffolds, impose a mandatory and affirmative duty upon the supplier of such property. A failure to perform a mandatory duty so enjoined is negligence per se. If any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation, a case is made. *Baer v. Schaap* 578

15. Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent to offer evidence of any negligence which contributed to the injury. *Baer v. Schaap* 578

16. The trial court must without request charge the jury as to each issue presented by the pleadings and the evidence, including the affirmative defense of contributory negligence. *Bell v. Crook* 685

17. Each specific charge of contributory negligence pleaded and supported by proof must be by proper instruction submitted to the jury for its determination, and the failure to do so is error. *Bell v. Crook* 685

18. In an action by a guest against the driver of an automobile, a verdict for the defendant should not be directed unless the evidence as a whole fails to establish gross negligence. *Jennings v. Lowrey* 831

19. Where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence, the determination of that question is for the jury. *Jennings v. Lowrey* 831

20. Original petition charging negligence of a defendant will be regarded as an affirmative charge of contributory negligence as to a cross-petition where

case is so tried and the jury so instructed. *Watson Bros. Transp. Co. v. Jacobson* 862

New Trial.

1. A motion for a new trial in a criminal action must be filed within 10 days after the verdict or judgment is rendered in order to be considered on appeal, except for the cause of newly discovered evidence, or unless the defendant was unavoidably prevented from filing the motion within 10 days. *Stanosheck v. State* 43
2. The words "unavoidably prevented" are equivalent in meaning to circumstances beyond the control of the party desiring to file a motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground. *Stanosheck v. State* 43
3. The striking of a motion for a new trial, timely filed in the district court, is the equivalent of overruling the same and finally disposing of the cause upon the merits, from which appeal may be taken to the Supreme Court. *Campbell v. Campbell* 533
4. The Supreme Court is without jurisdiction to entertain an appeal from the overruling of a motion for new trial by the district court unless a notice of appeal is filed in the office of the clerk of the district court within 1 month from the denial of a motion for a new trial timely filed in the cause. *Campbell v. Campbell* 533
5. A motion for a new trial not filed within the time specified by statute is a nullity and does not enlarge the time within which a notice of appeal must be filed after the rendition of judgment in a cause. *Campbell v. Campbell* 533

Notice.

1. The statutory provision that a zoning resolution adopted by a county board shall be published in book or pamphlet form or in a newspaper published and of general circulation in the county is mandatory. *Board of Commisisoners v. McNally* 23
2. The entire zoning resolution, including any map, plat, or zoning plan attached to, made a part of, or referred to in the resolution, must be published. *Board of Commissioners v. McNally* 23
3. A failure to comply with a statutory provision for

publication of a zoning resolution prevents the resolution from becoming valid, effective, or enforceable. *Board of Commissioners v. McNally* 23

4. It cannot be presumed that a county zoning resolution was published in the manner provided by law when the proof establishes it was not. *Board of Commissioners v. McNally* 23

5. Actual possession or occupancy are synonymous and mean actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. *Durfee v. Keiffer* 272

6. Possession of land is notice to the world of the possessor's rights therein. *Durfee v. Keiffer* 272

7. Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry. *Durfee v. Keiffer* 272

Officers.

An officer invested with discretion is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without willfulness, malice, or corruption. *Peterson v. George* 571

Opinions Disapproved.

Insofar as they conflict with the general rule that equity jurisdiction will not be retained to grant legal relief where no right to equitable relief is established, cases specified and others of similar import are disapproved. *Gillespie v. Hynes* 49

Parent and Child.

The fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children. *Schalk v. Schalk* 229

Penalties.

1. If an act is prohibited by statute, an agreement in violation of the statute is void, although the act is not penalized, for it is the prohibition and not the penalty which makes the act illegal. *Arthur v. Trindel* 429

2. A statutory provision limiting the period for bringing an action to recover a penalty or forfeiture generally applies only to a penalty or forfeiture

created by a penal statute for a dereliction of duty, or failure to perform specific acts, or for the commission of acts prohibited by statute. *Arthur v. Trindel* 429

Pleading.

1. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented, the presumption is that the common law or statutes of such other jurisdiction is the same as ours. However, there is no such presumption where the local statute prescribes penalties and forfeitures. *State ex rel. Beck v. Associates Discount Corp.* 298
2. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Savorelli v. Stone* 419
3. Admissions of fact contained in the pleadings are treated as established and do not require support in the evidence. *Johnson v. School Dist. No. 3* 547
4. Where defendant admits the material facts in plaintiff's petition and pleads a waiver, an estoppel, or matters in avoidance as a defense thereto, such material facts will be treated as true, though the answer also contains a general denial. *Johnson v. School Dist. No. 3* 547
5. Original petition charging negligence of a defendant will be regarded as an affirmative charge of contributory negligence as to a cross-petition where case is so tried and the jury so instructed. *Watson Bros. Transp. Co. v. Jacobson* 862

Powers.

1. Powers of a trustee under a testamentary trust will be construed in this state according to the principles of the common law. *Applegate v. Brown* 190
2. In the construction of powers, the cardinal principle is that the intention of the donor is controlling and such intention is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the instrument. *Applegate v. Brown* 190
3. The court will endeavor to place itself in the position of the donor, ascertain his intention and enforce

it in all its parts, if it be lawful to do so. *Applegate v. Brown* 190

4. The donee of a power must keep within its terms, and where the donor prescribes the method of its execution, that method must be strictly followed, so far at least as may be necessary to give effect to the donor's intent and design. *Applegate v. Brown* 190

5. Where there is no prohibition or restriction in a power, everything which is legal and within its limits should be supported. But where there is a prohibition, limitation, or restriction, such provision will control and the donee will not be permitted to disregard the same. *Applegate v. Brown* 190

Principal and Agent.

Where a person acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf, in the absence of fraud, create no individual or personal liability against him. *Savorelli v. Stone* 419

Process.

1. By statute, proof of service of publication is conclusive against all persons except those in actual possession of the property and whose ownership of, interest in, right or title to, or lien upon such property does not appear of record. *Durfee v. Keiffer* 272

2. The right of persons upon whom service of process has been made by publication to avoid the conclusive effect of such service is limited to strict compliance with proof of actual possession in the literal meaning of those words. *Durfee v. Keiffer* 272

Property.

1. In construing a uniform act, such as the Uniform Property Act, the meaning of which is not clear, the intention of those who drafted it, if ascertainable, should be given controlling consideration. *Ellingrod v. Trombla* 264

2. The enactment of a uniform property act is within the general legislative power of the Legislature to fix the policy of the law as it relates to the conveyance of property in this state. *Ellingrod v. Trombla* 264

3. Upon the enactment of the Uniform Property Act,

its provisions supersede conflicting provisions of the law of property existing prior to the effective date of the act. *Ellingrod v. Trombla* 264

Public Service Commissions.

1. A party is not in contempt of either the railway commission or the Supreme Court in acting upon a judgment of the Supreme Court reversing an order of the railway commission. *Save The Trains Assn. v. Chicago & N. W. Ry. Co.* 180
2. Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily. *Walker v. Morgan Drive Away, Inc.* 222
3. An order issued by the railway commission takes effect from the time prescribed therein and continues in force unless the order is annulled, revised, or modified by the commission, or set aside by a court of competent jurisdiction. *Miller v. Consolidated Motor Freight, Inc.* 712
4. On an appeal to the Supreme Court from an order of the railway commission granting a certificate of public convenience and necessity, the only questions to be determined are whether or not the commission acted within the scope of its authority, and whether or not the order complained of is reasonable and not arbitrary. *Miller v. Consolidated Motor Freight, Inc.* 712
5. The burden is on applicant for a certificate of public convenience and necessity to show that the operation under the certificate is and will be required by the present or future public convenience and necessity. *Miller v. Consolidated Motor Freight, Inc.* 712
6. Rules controlling the issuance of a certificate of public convenience and necessity stated. *Miller v. Consolidated Motor Freight, Inc.* 712
7. The power of the railway commission to fix the rates to be charged by common carriers is legislative and not judicial in character. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786
8. On appeal from a decision of the railway commission involving the rates to be charged by common carriers, it is presumed that the rates prescribed are just, reasonable, and not arbitrary, and are otherwise lawful. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

9. Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

10. On appeal from a decision of the railway commission, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

11. Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the railway commission and not the courts. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

12. Where it is shown that an order of the railway commission is within the scope of the powers vested in it, and such order is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission. *Nebraska Limestone Producers Assn. v. All Nebraska Railroads* 786

Quieting Title.

1. Plaintiff in an action to quiet title has the burden of proof. He must recover upon the strength of his title and not because of any weakness in the title of his adversary. *Durfee v. Keiffer* 272

2. In a contested action to quiet title, the plaintiff is required to establish that he is the owner of the legal or equitable title to the property, or has some interest therein, superior to the rights of the defendant, in order to entitle him to the relief demanded. *Weesner v. Weesner* 346

3. In an action to quiet title in this state the question of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate or any part of it to the party entitled thereto. *Weesner v. Weesner* 346

Rape.

1. Where assault with intent to commit rape is charged, the testimony of prosecutrix must be corroborated by facts and circumstances established by other competent evidence to justify conviction. *Shepperd v. State* 464
2. Rule as to corroboration required upon prosecution for assault with intent to commit rape stated. *Shepperd v. State* 464
3. In a prosecution for assault with intent to commit rape, a sufficient corroboration is shown by evidence of opportunity and inclination on the part of the defendant to commit the offense supported by circumstances proved by other witnesses tending to corroborate the testimony of prosecutrix. *Shepperd v. State* 464

Receivers.

1. A receiver, as an officer of the court appointing him, is required to account to the court for the receipts and disbursements of all money and property received by him as a receiver. *State ex rel. Beck v. Associates Discount Corp.* 298
2. It is the duty of the receiver to account to the court whose officer he is. It is the correlative duty of the court to examine and rule upon the account. *State ex rel. Beck v. Associates Discount Corp.* 298
3. Compensation of a receiver should be fixed at an amount that will be fair and reasonable for the services rendered. The question as to what is fair and reasonable is always one of fact in each case. *State ex rel. Beck v. Associates Discount Corp.* 298
4. Ordinarily the compensation of a receiver should not be greater than what would be reasonable compensation for doing the same amount and character of work if employed in the usual course of private business. *State ex rel. Beck v. Associates Discount Corp.* 298
5. Factors entering into determination of compensation to be paid to a receiver stated. *State ex rel. Beck v. Associates Discount Corp.* 298
6. In making an allowance to a receiver, the court is not confined to evidence formally introduced, in respect to the matter, but may act on its own knowledge and judgment as to the services rendered and

the reasonableness of the charge. *State ex rel. Beck v. Associates Discount Corp.* 298

Sales.

1. A contractual limitation of warranty relating to quality is not unlawful. Notice of limitation of warranty to the purchaser at the time of sale creates a valid contractual arrangement. *United Seeds, Inc. v. Hoyt* 527
2. A right, duty, or liability implied by law may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom if the custom be such as to bind both parties. *United Seeds, Inc. v. Hoyt* 527
3. The Department of Agriculture and Inspection is without power under the Nebraska Seed Law to impose or enforce a prohibition against limitation of warranty of agricultural seeds. *United Seeds, Inc. v. Hoyt* 527

Schools and School Districts.

1. The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment. *Schlueter v. School Dist. No. 42* 443
2. The measure of damages in suits for breach of contract for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period. *Schlueter v. School Dist. No. 42* 443
3. In an action by an employee against his employer for damages for breach of contract arising from the wrongful discharge of the former, the fact that the plaintiff obtained or, by the exercise of due diligence, might have obtained other employment is a matter of defense which the plaintiff is not required to anticipate in his petition. *Schlueter v. School Dist. No. 42* 443
4. The burden of proof is on the defendant to establish the defense that plaintiff might have obtained other employment and on failure thereof, or of showing other facts in mitigation of damages, the measure of damages is the contract price. *Schlueter v. School Dist. No. 42* 443
5. Under a contract between a school district and a

teacher providing that it may be terminated only by mutual agreement or by operation of law, a school district will be deemed to have contractually delegated its right to terminate the contract to the State Board of Education. *Johnson v. School Dist. No. 3* 547

6. A contract between a school district and a school teacher providing that the teacher holds, or will hold, at the beginning of the term of the contract, a valid certificate properly registered in the office of the county superintendent, is a binding contract, voidable by the school district during the period the teacher fails to comply with statutory requirements. *Johnson v. School Dist. No. 3* 547

Specific Performance.

1. When land, or any interest therein, is the subject matter of an agreement the power of a court of equity to enforce specific performance thereof is beyond question. *Kjeldgaard v. Carlberg* 662
2. The equitable remedy of specific performance is not demandable as a matter of right but may be granted by the court in its sound judicial discretion, depending upon the facts and circumstances. *Kjeldgaard v. Carlberg* 662
3. Specific performance will not be enforced unless the contract has been entered into with perfect fairness and without misapprehension, misrepresentation, or oppression. *Kjeldgaard v. Carlberg* 662
4. Courts of equity do not enforce specific performance of a contract where circumstances have arisen which make its performance inequitable. *Kjeldgaard v. Carlberg* 662

States.

A court of one state cannot directly affect or determine the title to land in another state. *Weesner v. Weesner* 346

Statutes.

1. Generally, the word "may" used in statutes will be construed as permissive or discretionary and not mandatory unless it would manifestly defeat the object of the statute. *County of Keith v. Triska* 1
2. Invalid legislation confers no rights and imposes no duties or obligations. Legally it is as though

it had never been adopted. *Board of Commissioners v. McNally* 23

3. The provisions of a uniform act must be construed together to give effect to the whole act. *Ellingrod v. Trombla* 264

4. In construing a uniform act, such as the Uniform Property Act, the meaning of which is not clear, the intention of those who drafted it, if ascertainable, should be given controlling consideration. *Ellingrod v. Trombla* 264

5. The enactment of a uniform property act is within the general legislative power of the Legislature to fix the policy of the law as it relates to the conveyance of property in this state. *Ellingrod v. Trombla* 264

6. Upon the enactment of the Uniform Property Act, its provisions supersede conflicting provisions of the law of property existing prior to the effective date of the act. *Ellingrod v. Trombla* 264

7. It is to be presumed that the Legislature in using language in a statute gave to it the significance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute. *Durfee v. Keiffer* 272

8. In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented, the presumption is that the common law or statutes of such other jurisdiction is the same as ours. However, there is no such presumption where the local statute prescribes penalties and forfeitures. *State ex rel. Beck v. Associates Discount Corp.* 298

9. Where no additional grounds are presented, prior determination of constitutionality of a legislative act will be adhered to in future cases. *State v. Nelson* 394

10. A legislative act which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *State v. Nelson* 394

11. The dividing line in a statute between what is lawful and unlawful cannot be left to conjecture. *State v. Nelson* 394

12. The standards of certainty are higher in legislative acts prescribing punishment for offenses than in

those depending primarily upon civil sanction for enforcement. *State v. Nelson* 394

13. Those engaged in the business of storing goods, wares, and merchandise for others constitute a proper classification for legislation where the purpose of the legislation has application to the class. *United States Cold Storage Corp. v. Stolinski* 513

14. The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment. *United States Cold Storage Corp. v. Stolinski* 513

15. The Legislature may properly legislate in regard to a class of persons, but it may not divide a class of persons and enact different rules for the government of each segment of the class. *United States Cold Storage Corp. v. Stolinski* 513

16. The Department of Agriculture and Inspection is without power under the Nebraska Seed Law to impose or enforce a prohibition against limitation of warranty of agricultural seeds. *United Seeds, Inc. v. Hoyt* 527

17. In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act. *Yeoman v. Houston* 855

Taxation.

1. In determining inheritance taxes, the expenses, costs, and attorneys' fees incurred in litigation between distributees over their respective interests in order to establish the right to take the property should not be deducted. *County of Keith v. Triska* 1

2. Insofar as the transferee of property has paid a consideration to the transferor therefor, the inheritance tax due will be assessed and determined only on the difference between the fair market value of the property and the consideration paid therefor. *County of Keith v. Triska* 1

3. The legislative power to tax is a plenary one, limited only by the restrictions upon it contained in the Constitution. The provisions of the Constitution in

relation to taxation are not grants of power but are limitations on the taxing power lodged in the Legislature. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166

4. The power to tax and the power to provide for the allocation and distribution of revenues raised by taxation are identical and inseparable. The power to allocate and distribute tax revenues, including those raised by political subdivisions of the state under authority of the state, is a plenary one, subject only to the restrictions of the Constitution. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166
5. The section of the Constitution providing for the allocation of tax proceeds from motor vehicles means that they shall be allocated in the same proportion that the levy of each bears to the total levy in each tax district in the county on intangible personal property. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166
6. Statute providing for distribution of proceeds of motor vehicle taxes makes definite that which is implied in the Constitution. *State ex rel. School Dist of Scottsbluff v. Ellis* 166
7. The proceeds from the taxation of motor vehicles should be allocated to the taxing units in the same proportion that the mill levy on tangible personal property of each of such taxing units bears to the total mill levy on tangible personal property of all the taxing units in which the motor vehicle has its tax situs. *State ex rel. School Dist. of Scottsbluff v. Ellis* 166
8. As a general rule, public property and the instrumentalities of government are immune from taxation. Municipalities cannot, in the absence of express legislative authority, tax a property or instrumentality of the state used in the exercise of its functions. *Consumers Public Power Dist. v. City of Lincoln* 183
9. Where a public corporation by virtue of statute is required to pay a specific sum in lieu of taxes, including occupation taxes, a city cannot impose an occupation tax on the public corporation for revenue purposes. A payment in lieu of taxes is in effect a substitute for the power to tax. *Consumers Public Power Dist. v. City of Lincoln* 183
10. A statute authorizing the payment of a determinable sum by public corporations in lieu of taxes

is a matter of state-wide concern. The provisions of a home rule charter of a city, and ordinances enacted pursuant thereto, must yield to such a statute. *Consumers Public Power Dist. v. City of Lincoln* 183

11. Statute imposing obligation to make payment in lieu of taxes precludes a municipality from imposing on a corporation within the purview of the statute an occupation tax for revenue purposes. *Consumers Public Power Dist. v. Village of Hallam* 187

12. Assuming that the power to tax otherwise existed, the payment in lieu of taxes is a substitute for the power to tax. The power to tax is withheld as long as the payment in lieu of taxes is effective. *Consumers Public Power Dist. v. Village of Hallam* 187

13. An appeal to the district court from action of the county board of equalization is tried as in equity and upon appeal therefrom to the Supreme Court it is tried de novo. *Adams v. Board of Equalization* 286

14. Ordinarily the valuation by the assessor is presumed to be correct. However, if the assessor does not make a personal inspection of the property but accepts a valuation thereof fixed by a professional appraiser, the presumption does not obtain. *Adams v. Board of Equalization* 286

15. The presumption that a board of equalization in making an assessment acted upon sufficient evidence to justify its action disappears when there is competent evidence on appeal to the contrary. Thereafter the reasonableness of the valuation fixed by the board is one of fact to be determined from the evidence, unaided by presumption. The burden of showing such valuation to be unreasonable is upon the complaining party. *Adams v. Board of Equalization* 286

16. The Legislature has plenary power over taxation and matters incidental to such power within the limits of the Constitution. *United States Cold Storage Corp. v. Stolinski* 513

17. The mandate of the Constitution that all tangible property shall be taxed uniformly and proportionately includes the right of the Legislature to enact any reasonable legislation that appears necessary in accomplishing that purpose. *United States Cold Storage Corp. v. Stolinski* 513

18. Those engaged in the business of storing goods, wares, and merchandise for others constitute a

proper classification for legislation where the purpose of the legislation has application to the class. *United States Cold Storage Corp. v. Stolinski* 513

19. Statute requiring warehousemen to list and file return of all tangible property in their warehouses on assessment day is a reasonable exercise of legislative power to secure compliance with the constitutional provision that all tangible property shall be taxed uniformly and proportionately. *United States Cold Storage Corp. v. Stolinski* 513

20. Warehouse Reporting Act is not unconstitutional in that it places warehousemen in a different classification from other businesses, since the Legislature may properly classify persons, organizations, or corporations according to their businesses, and may apply different rules to those which belong to different classes. *United States Cold Storage Corp. v. Stolinski* 513

21. A statute requiring warehousemen to furnish the tax assessor with lists of property in their warehouses without compensation therefor is not a denial of due process of law, nor a taking of private property for a public use. *United States Cold Storage Corp. v. Stolinski* 513

22. An act requiring a warehouseman to furnish the tax assessor with a list of property stored in his warehouse is not violative of the constitutional prohibition against unreasonable searches and seizures. *United States Cold Storage Corp. v. Stolinski* 513

23. The fact that goods shipped from a point of origin in a foreign state to a point of destination in another foreign state are stored in transit in Nebraska does not ipso facto require a finding that such goods are in interstate commerce. *United States Cold Storage Corp. v. Stolinski* 513

24. Whether or not goods being transported in interstate commerce with stop-over privileges in Nebraska come to rest and acquire a tax situs in Nebraska involves a complicated question of law and fact. *United States Cold Storage Corp. v. Stolinski* 513

25. Conditions stated under which the continuity of transit remains unimpaired and the immunity of goods from state or local taxation is unaffected. *United States Cold Storage Corp. v. Stolinski* 513

26. If the interruption in transit occurred for purposes connected with the business convenience or profit of the owner of the property, the continuity of the

transit must be regarded as having been so disturbed as to destroy the immunity of the property from state and local taxation. *United States Cold Storage Corp. v. Stolinski* 513

27. The contention that statute impedes the free flow of and is an unlawful burden upon interstate commerce is unavailing, even if pertinent to the issue, where the evidence does not conclusively establish that the goods in question were in interstate commerce on the tax assessment date. *United States Cold Storage Corp. v. Stolinski* 513

28. Statute requiring warehouseman to file information return and exempting therefrom household goods creates an arbitrary classification of warehousemen and grants privileges and immunities to some which it denies to others, and is therefore unconstitutional. *United States Cold Storage Corp. v. Stolinski* 513

Trial.

1. An instruction which fails to properly limit the consideration of future uses to reasonable uses in the immediate future is prejudicially erroneous. *Sump v. Omaha Public Power Dist.* 120

2. It is not error to refuse a requested instruction if the substance of it is included in the instructions given. *Larsen v. Omaha Transit Co.* 205

3. Trial courts should not permit a record to be made of testimony referring to exhibits without requiring counsel and witnesses to identify for the record that about which they testify. *Durfee v. Keiffer* 272

4. Rule for consideration of motion for directed verdict or judgment notwithstanding the verdict stated.
Anderson v. Evans 373
Baer v. Schaap 578

5. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. *Anderson v. Evans* 373

6. Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable. *Anderson v. Evans* 373

7. The fact that the trial court copied the pleadings in presenting the case to the jury is not alone sufficient to cause a reversal unless it can be said that the complaining party was prejudiced thereby. *Anderson v. Evans* 373
8. It is not prejudicial error for a trial court to inform a jury orally or in writing that an inquiry made by it is covered by an instruction and that reference should be made to such instruction. *Anderson v. Evans* 373
9. 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 the court is requested to do so or not. *Barton v. Wilson* 480
10. A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective. *Johnson v. School Dist No. 3* 547
Lange v. Kansas Hide & Wool Co. 601
11. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. *Baer v. Schaap* 578
12. If contributory negligence is relied upon by defendant, the burden is upon him to prove it by a preponderance of the evidence, except insofar as the same may appear in evidence adduced for plaintiff. *Baer v. Schaap* 578
13. Where a petition charges specific grounds of negligence as a basis for recovery, and also contains a general allegation of negligence on the part of the defendant in causing the damage, and where no motion for a more specific statement is filed, it is competent to offer evidence of any negligence which contributed to the injury. *Baer v. Schaap* 578
14. 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, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or controlling rules of law. *Baer v. Schaap* 578
15. The court examines the evidence on motion for

summary judgment, not to decide any issue of fact, but to discover if a real issue of fact exists. *Lange v. Kansas Hide & Wool Co.* 601

16. The summary judgment is effective and serves a separate useful purpose only when it can be used to pierce allegations in the pleadings and show that the facts are otherwise than as alleged. *Lange v. Kansas Hide & Wool Co.* 601

17. Where defendant at conclusion of all the evidence moves for a directed verdict in his favor or for dismissal, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff, and he is entitled to the benefit of all proper inferences that can reasonably be deduced therefrom. *Mills v. Aetna Ins. Co.* 612

18. If the evidence upon an issue is undisputed or such that minds of men could reasonably arrive at but one conclusion, the question is one for decision by the court as a matter of law. Otherwise, it is a question for the jury to decide as other issuable facts in the case. *Wylie v. Czapla* 646

19. The trial court must without request charge the jury as to each issue presented by the pleadings and the evidence, including the affirmative defense of contributory negligence. *Bell v. Crook* 685

20. Each specific charge of contributory negligence pleaded and supported by proof must be by proper instruction submitted to the jury for its determination, and the failure to do so is error. *Bell v. Crook* 685

21. An instruction reciting the provisions of statutes regulating and controlling the speed of motor vehicles should include therein all material applicable statutory limitations and qualifications to enable the jury to observe and understand the duty of drivers at the time and place in question. *Bell v. Crook* 685

22. In an action which involves issues of negligence and contributory negligence arising out of the collision of motor vehicles at a highway intersection the jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the motor vehicles in approaching and crossing the intersection. *Bell v. Crook* 685

23. It is always the duty of the court to instruct the jury as to the proper basis upon which damages

are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which it should take into consideration in arriving at its verdict. *Wischmann v. Raikes* 728

24. A litigant is entitled to have the jury instructed as to his theory of the case as shown by pleading and evidence, and a failure to do so is prejudicial error. *Wischmann v. Raikes* 728

25. In an action by a guest against the driver of an automobile, a verdict for the defendant should not be directed unless the evidence as a whole fails to establish gross negligence. *Jennings v. Lowrey* 831

26. Where the evidence of negligence falls within the area where reasonable minds can differ as to whether or not it establishes gross negligence, the determination of that question is for the jury. *Jennings v. Lowrey* 831

27. An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it. It is therefore a limitation of the issues. *Goodman v. Goodman* 842

28. The proof in a trial of a jury case must be confined to legal evidence tending to prove or disprove an issue made by the pleadings. The admission of improper evidence is prejudicial if it may have influenced the verdict. *Watson Bros. Transp. Co. v. Jacobson* 862

29. The trial judge's instructions to the jury should state the issues as the case is being finally presented to it on the pleadings and the evidence adduced. *Watson Bros. Transp. Co. v. Jacobson* 862

Trusts.

1. Powers of a trustee under a testamentary trust will be construed in this state according to the principles of the common law. *Applegate v. Brown* 190

2. In order that there may be a finding of the existence of a valid trust there must be a trustee, an estate devised to him, and a beneficiary. *Applegate v. Brown* 190

3. A trust can be created for any purpose which is not against public policy or otherwise illegal. In order to uphold the trust, it is not necessary affirmatively to show that the purpose is one of the purposes for which a disposition of legal interests can be made.

A trust can be created for any purpose unless it appears that the purpose is one which is illegal. *Applegate v. Brown* 190

4. Any provision in the terms of the trust is valid, unless it appears that such provision is illegal. *Applegate v. Brown* 190

5. A trust is not rendered invalid by the fact that the trustee is vested with discretion, if it is clear that a trust was intended and its terms are sufficiently certain to permit their enforcement. *Applegate v. Brown* 190

6. At termination of the trust under a will or by operation of law, the beneficiaries ordinarily take the property as provided in the will. *Applegate v. Brown* 190

7. Where there is no disposition by will of the remainder of a trust estate, the corpus of the trust property on the termination of the trust descends as intestate property to the testator's heirs, who are such as of the date of the termination of the trust. *Applegate v. Brown* 190

Usury.

1. The installment loan statutes include all persons or parties violating any of the inhibitory provisions thereof whether they be licensees or nonlicensees. *State ex rel. Beck v. Associates Discount Corp.* 298

2. Courts in usury cases must look through the form to the substance of transactions by unlawful money lenders. *State ex rel. Beck v. Associates Discount Corp.* 298

3. In cases where usury is charged, courts will look through the form to the substance of the transactions in order to determine whether there have been bona fide time sales or loans. *State ex rel. Beck v. Associates Discount Corp.* 298

4. An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. *State ex rel. Beck v. Associates Discount Corp.* 298

5. In order to have a valid time sale, it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price

and a cash sale price. *State ex rel. Beck v. Associates Discount Corp.* 298

6. The rules applicable to a valid time sale do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute. *State ex rel. Beck v. Associates Discount Corp.* 298

7. If a contract is usurious in its inception no subsequent transaction will cure it. When a usurious contract is renewed by the giving of a renewal contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation. *State ex rel. Beck v. Associates Discount Corp.* 298

8. Where original note is free from usury, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the debt at a usurious rate for the time of the extension, the renewal note is tainted with usury. *State ex rel. Beck v. Associates Discount Corp.* 298

Vendor and Purchaser.

1. It is only those persons who possess a title which complies with the provisions of the Marketable Title Act who are qualified to invoke its aid. *Smith v. Berberich* 142

2. A conveyance, to satisfy the requirements of the Marketable Title Act, must purport to create in the person who claims its benefits or in his immediate or remote grantors the interest which is claimed. *Smith v. Berberich* 142

3. When a party enters into a contract to sell certain real estate and agrees to furnish a warranty deed conveying a good and merchantable title thereto, he is not entitled to the specific performance of the contract where it appears that he has only a life estate in such property. *Ellingrod v. Trombla* 264

Waters.

1. The boundary between Missouri and Nebraska fluctuates with changes made by accretion and reliction, not with changes made by avulsion. *Durfee v. Keiffer* 272

2. Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both accretion and reliction. *Durfee v. Keiffer* 272
3. 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. *Durfee v. Keiffer* 272
4. 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. *Durfee v. Keiffer* 272
5. 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. *Durfee v. Keiffer* 272
6. Where the accretion commences with the shore of an island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact. *Durfee v. Keiffer* 272
7. Where a river changes its main channel in flowing around intervening land, rather than passing over it, the boundary line between estates remains in the old channel, subject to such changes as are made by accretion. *Durfee v. Keiffer* 272
8. The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage. No one has the lawful right by diversions or obstructions to interfere with the accustomed flow to the damage of another. *Wischmann v. Raikes* 728

Wills.

1. The valid portions of a will are to be carried out in accordance with the intention of the testator as gleaned from the four corners of the will, even though it results in a partial intestacy. *Applegate v. Brown* 190

2. Where particular words in a will are followed by general, the general words are ordinarily restricted in meaning to provisions of like kind. *Applegate v. Brown* 190
3. The time for ascertaining the members of a class depends upon the intention of the testator, rather than upon technical language used in a particular clause of a will. *Applegate v. Brown* 190
4. In determining the time at which the members of a class to share in a gift are to be ascertained, where it is not fixed by the will itself and where the gift is immediate, the time is fixed at the death of the testator, and where it is postponed pending the determination of a preceding estate, it is fixed at the distribution of the estate. *Applegate v. Brown* 190
5. A testator may by will confer upon another person the power to do any act with reference to the property of the testator which the testator could lawfully have done himself. *Applegate v. Brown* 190
6. At termination of the trust under a will or by operation of law, the beneficiaries ordinarily take the property as provided in the will. *Applegate v. Brown* 190
7. Where there is no disposition by will of the remainder of a trust estate, the corpus of the trust property on the termination of the trust descends as intestate property to the testator's heirs, who are such as of the date of the termination of the trust. *Applegate v. Brown* 190
8. Subject to the requirements of mental capacity and absence of undue influence, a testator may dispose of his property by will as he pleases. *Westover v. Kerr* 494
9. The mental capacity of a testator is tested by the state of his mind at the time he executed his will. *Westover v. Kerr* 494
10. When undue influence is alleged as a defense, the evidence must tend to show undue influence directly in reference to the will in question. *Westover v. Kerr* 494
11. Proof of undue influence is generally permitted to take a wide range but it should be confined to a date materially corresponding with execution of the will. *Westover v. Kerr* 494
12. A legacy is specific when it is the intention of the testator that the legatee should have the very

thing bequeathed, and not merely a corresponding amount in value. *Bray v. Sedlak* 633

13. The distinction between specific and general legacies is that the former single out the particular thing which the testator intends the donee to have, no regard being had to its value, while the latter are payable out of the general assets, the chief element of the gift being its value. *Bray v. Sedlak* 633

14. Debts and expenses of administration, as a general rule, are payable primarily out of the personal estate of the testator, and real estate will not be charged with their payment unless the intention to do so is expressly declared or clearly inferable from the dispositions of the will. The chief criterion is the intention of the testator. *Bray v. Sedlak* 633

15. Generally speaking, and in the absence of an expression of a contrary intent, where the assets of an estate are insufficient to pay all obligations and legacies, there will be an abatement in the following order: (1) Residuary estate, (2) other general legacies pro rata, (3) specific bequests or devises. *Bray v. Sedlak* 633

16. By statute, if a testator makes provision in his will for the payment of his debts, expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, or so far as the same may be sufficient. *Bray v. Sedlak* 633

17. A well-recognized rule in the interpretation of wills is that the court will give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the established rules of law. *Bray v. Sedlak* 633

18. Statute providing that debts shall be payable out of personal estate is applicable where a testator has not provided otherwise in his will. *Bray v. Sedlak* 633

Words and Phrases.

The word "occur" is an ordinary one without technical import. It carries to the mind a sense of origin, beginning, not of mere existence or of continuation, and in its generally accepted and most popular sense the word "occur" means to happen. *Mills v. Aetna Ins. Co.* 612

Workmen's Compensation.

1. In order that a recovery may be had for benefits under the Workmen's Compensation Act it must be proved that an accident occurred which arose out of and in the course of the employment and resulted in disability or death. *Nelson v. Frenchman-Cambridge Irr. Dist.* 37
2. The burden of proving an accident arising out of and in the course of the employment is upon the person claiming the benefits of the act. *Nelson v. Frenchman-Cambridge Irr. Dist.* 37
3. Whether death resulted from an accident arising out of and in the course of the employment, or from disease which brought on the alleged compensable accident, is a question of fact to be determined from the evidence. *Nelson v. Frenchman-Cambridge Irr. Dist.* 37
4. 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. *Gourley v. City of Grand Island* 538
5. Where an employee who suffered an accident arising out of and in the course of his employment requests and receives medical services and medicines furnished by the employer, it constitutes the receipt of compensation under the Workmen's Compensation Act, and dispenses with the necessity of making a claim for compensation within 6 months after the occurrence of the injury. *Gourley v. City of Grand Island* 538
6. Where an employer furnishes medical, surgical, and hospital services to an employee, the payments therefor constitute payment of compensation within the meaning of the Workmen's Compensation Act. *Gourley v. City of Grand Island* 538
7. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment. *Gourley v. City of Grand Island* 538
8. Where the evidence shows that certain hospital and nurse expenses have been incurred by the injured employee, a prima facie case is made out, and in the absence of any showing that the expenses so

incurred were unreasonable, such proof will be held to be sufficient. *Gourley v. City of Grand Island* 538

9. A workmen's compensation case is triable de novo in the Supreme Court, and to entitle the plaintiff to a recovery he must sustain the burden of proving by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. *Schanhols v. Scottsbluff Bean & Elevator Co.* 626

10. An accident within the meaning of the Workmen's Compensation Act is construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. *Schanhols v. Scottsbluff Bean & Elevator Co.* 626

11. A compensation award cannot be based on possibilities or probabilities but must be based on sufficient evidence that the plaintiff incurred a disability arising out of and in the course of his employment. *Schanhols v. Scottsbluff Bean & Elevator Co.* 626
Brown v. Armour & Co. 835

12. The burden of proof in a claim for compensation under the Workmen's Compensation Act is upon the plaintiff to establish his right thereto by a preponderance of the evidence. *Brown v. Armour & Co.* 835

13. Under the statutory definition of an occupational disease, the evidence must establish that the disease is due to causes and conditions which are characteristic of and peculiar to the employment out of which the disease is alleged to have arisen. *Brown v. Armour & Co.* 835