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STATE OF NEBRASKA, APPELLEE, V. TERESSA BEST ET AL., APPELLANTS.

113 N. W. 2d 650

Filed March 9, 1962. No. 35135.

1. **Parent and Child.** By statute, a dependent child is defined as any child under the age of 18 years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian.
2. ———. By statute, a neglected child is defined as any child under the age of 18 years who is abandoned by his parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; or whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child.
3. **Parent and Child: Courts.** By statute, upon the filing of a complaint, a summons shall issue requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons. The parents of the child, if living, and if their residence is known, shall be notified of the proceedings.
4. ———: ———. By statute, in case of a neglected or dependent child, the court may continue the hearing, from time to time, and may commit the child to the care or custody of a probation officer, and may allow said child to remain in its own home, subject to the visitation of the probation officer, such child to report to the probation officer as often as he may be required, and subject to be returned to the court for further or other proceedings whenever such action may appear to be necessary.
5. **Parent and Child: Appeal and Error.** 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 neglected or dependent is disposed of in this court by trial de novo upon the record.
6. **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.
7. **Pleading.** A failure to assert a defect or irregularity by a timely and appropriate plea or motion is usually regarded as a waiver.
8. **Process.** Defects in process or service may be waived by defendant's participation in the trial on the merits of plaintiff's cause of action, and also where by stipulation of the parties the

defendants are considered to have filed an answer to the plaintiff's petition.

9. **Pleading.** A long-established rule in this state is that, when timely objection is not made, pleadings, when possible, will be sustained.

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

11. ———. This court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

C. Morris Gillespie and *Kenneth H. Dryden,* for appellants.

Clarence A. H. Meyer, Attorney General, *Melvin K. Kammerlohr,* and *Robert A. Munro,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action brought by the county attorney of Buffalo County, charging the five minor children of Lavern and Grace Best with being neglected and dependent children, and praying that such children be committed to the Nebraska Home for Children or some suitable place or home as might be determined by the juvenile court. The action was brought in the county court of Buffalo County on January 16, 1961. On January 31, 1961, hearing was had in the county court of Buffalo County. The following persons were present in court: Teressa Best, born April 13, 1950; Allen Best, born September 29, 1953; Linda Best, born August 5, 1955; Colleen Best, born July 26, 1956; Randall Best, born October 10, 1959; Lavern Best, the father of the children; Grace Best, the mother of the children; the attorneys

for the parents of the children; the persons having the temporary custody of the children; and other persons presumably witnesses. No record of the testimony was made in the county court. Hearing was had, and the court found that proper service had been had on all interested parties, and from the evidence that the allegations of the petition were true; that the children were neglected and dependent under the laws of the State of Nebraska; and that it was to the best interests of the children that custody be taken. The children were committed to the Board of Control, with full rights of placement and adoption. The court ordered that the children be taken to the Nebraska Home for Children at Lincoln, Nebraska. This commitment was filed January 31, 1961.

A mittimus was issued out of the county court of Buffalo County, and the return on the mittimus shows that Teressa Best and Allen Best were delivered to the Home for Children, and Linda Best, Colleen Best, and Randall Best were delivered to the foster care unit. This return was filed in the county court on February 2, 1961. Lavern Best, father and natural guardian of the children, for himself and his wife Grace Best, appealed to the district court for Buffalo County.

The cause was tried in the district court on June 1 and 2, 1961. On June 22, 1961, the trial court found that all five children were, on the date of the filing of the complaint in the county court of Buffalo County, neglected and dependent children; and that the court retained custody in itself of the following children: Teressa Best, Allen Best, and Linda Best. The court temporarily placed the custody of these children with the parents, Lavern Best and Grace Best, based upon the following conditions: That the parents agree in writing that they would stay out of the Veterans of Foreign Wars Club in Kearney, Nebraska; that they would allow Mrs. Bess Simmerman, or a caseworker for the Buffalo County assistance office, to enter their home at

any time, day or night, to make an investigation on behalf of the court to see that said children were properly cared for; and that if it appeared that these children had been well taken care of for a period of 2 years, then the court would at that time review whether or not the children should be permanently removed from the list of neglected and dependent children. With respect to Colleen Best and Randall Best, the district court found that the order of the county court placing them in the custody of the Nebraska Board of Control should be approved and said board should be directed to place said children out for adoption. Judgment was rendered in accordance with the findings.

Lavern Best and Grace Best, as parents of Teressa, Allen, and Linda Best, approved and consented to the findings and order of the court pertaining to the above-named children. Such order of the court has heretofore been mentioned. Lavern Best and Grace Best stated that they understood that this consent had no bearing on the court's findings and order pertaining to the other two children, Colleen and Randall Best.

A motion for new trial was filed in behalf of the children, but there was no ruling on the motion.

For convenience we will refer to the State of Nebraska as the plaintiff, to the children as defendants or by their names as required, and to the parents by their first names.

The defendants set forth the following assignments of error: That the trial court erred in assuming jurisdiction of defendants or other interested parties without proper service of process; that the trial court erred in rendering judgment on an insufficient petition based on conclusions; that the trial court erred in making its order and judgment contingent upon the consent of the parents of the defendant children; and that the findings and judgment of the trial court are inconsistent in themselves, and not substantiated by the pleadings and evidence.

Section 43-201, R. R. S. 1943, provides in part: "As

used in sections 43-201 to 43-221, unless the context otherwise requires: * * * (2) Dependent child shall mean any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian; (3) Neglected child shall mean any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; * * * (5) Parent shall mean one or both parents."

Section 43-206, R. R. S. 1943, provides in part: "Upon the filing of the complaint, a summons shall issue requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons, * * *. The parents of the child, if living, and if their residence is known, * * * shall be notified of the proceedings, * * *."

Section 43-210, R. R. S. 1943, provides in part: "In the case of a delinquent, neglected or dependent child, the court may continue the hearing, from time to time, and may commit the child to the care or custody of a probation officer, and may allow said child to remain in its own home, subject to the visitation of the probation officer, such child to report to the probation officer as often as he may be required, and subject to be returned to the court for further or other proceedings whenever such action may appear to be necessary; * * *."

The foregoing sections of the statutes are applicable to the case at bar. The following are also applicable.

In Krell v. Sanders, 168 Neb. 458, 96 N. W. 2d 218, it is said: "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." This rule also applies to children who are charged with being neglected and dependent. The court said further: "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."

In the instant case the defendants make objection to the type of process served on the parents of the children, in that such process was in the form of a subpoena and not a summons as required by section 43-206, R. R. S. 1943. The words "to give evidence in a suit between" and "on the part of the said" were crossed out on this process, which would negative or destroy the form as a subpoena. The parents received notice as required by section 43-206, R. R. S. 1943, although they did not have custody of the children at the time of the hearing in the county court. They were not deceived or misled by the process served upon them.

In the case of State v Andersen, 159 Neb. 601, 68 N. W. 2d 146, cited by the defendants, the parents were never notified in any manner of the proceedings, nor did they make an appearance. And in the case of State v. Roth, 158 Neb. 789, 64 N. W. 2d 799, cited by the defendants, the transcript failed to disclose that section 43-206, R. R. S. 1943, had been complied with. Nor was there anything to show any type of service upon the parents of the boys being charged with being delinquent. The present case discloses a different situation. The parents appeared in the county court with their counsel, made no objection to the form of process, and appealed this matter to the district court. In this situation we believe the following is applicable.

In 72 C. J. S., Process, § 113, b., p. 1168, it is said: "A failure to assert a defect or irregularity by a timely and appropriate plea or motion is usually regarded as a waiver. Defects in process or service may also be waived by defendant's participation in the trial on the merits

of plaintiff's cause of action, by the filing of an answer, by giving a stipulation to answer judgment, * * *."

In the instant case the defendants stipulated that a general denial would be considered filed as against the plaintiff's petition. The record shows that the defendants, their parents, and their counsel failed to object to the form of process before the submission of the cause, and therefore we conclude that they have waived any defect in the summons or notice.

The defendants object to the sufficiency of the pleadings, in that the pleadings were insufficient because the facts were not set forth showing in what manner the children here involved were neglected or dependent children within the meaning of section 43-201, R. R. S. 1943. No objection was made at any stage of the proceedings to the sufficiency of the petition until after the judgment of the trial court had been rendered.

This court held in Irwin v. Gould & Son, 99 Neb. 283, 156 N. W. 503, that when a petition was not attacked in the lower court by either motion or demurrer, nor any defense to the alleged omission pleaded in the answer, it may be upheld under the long-established rule that, when timely objection is not made, pleadings when possible, will be sustained. There are other cases to the same effect. See, O'Donohoe v. Polk, 45 Neb. 510, 63 N. W. 829; Henry & Coatsworth Co. v. McCurdy, 36 Neb. 863, 55 N. W. 261.

We conclude that under the circumstances, the defendants' contention is without merit.

The record discloses that on March 6, 1947, Lavern Best and Grace Covert were married at Phillipsburg, Kansas. They lived in Kearney most of the time after their marriage.

A caseworker testified that from September 1960, through January 1961, Grace received $710 as payments for dependent children; and that in 1959, she received county relief in the amount of $563.57. In 1959 she also received some clothing for her children from

the Good Fellows. There is evidence by this witness as to Grace contacting the public welfare director of Buffalo County with reference to obtaining assistance for herself and her children, and also evidence of another caseworker in such department relating to the same subject.

There is evidence of school teachers relating to the attendance and tardiness of the Best children, their progress, their manner in school, and the way in which they were dressed. It appears that at times the children's hair was not combed, they were dirty at times, and they wore soiled clothing. There is also evidence of conferences had with Grace relating to the progress of the children in school, and it appears that Grace showed a willingness to cooperate with the teachers as best she could.

A caseworker testified that she told Grace she had heard that Grace was at the Vets' Club drinking alcoholic beverages and that she shouldn't do this sort of thing. Grace was agreeable, and said she thought she should stay home and take care of the children and not go out, and that was what she would do. This witness further testified that on the morning of January 4, 1961, she and others were at the home of Grace. The two older children had gone to school. The younger children were crying and said that their mother had gone the night before and had not returned, and they wanted their mother. At that time arrangements were made for the children to go to the home of Mrs. Louise Steele, the next-door neighbor. At the time this witness was in the Best home on January 4, 1961, there were dirt, filth, and clothing strewn throughout the house. On the floor in the kitchen there were dishes containing the remains of the breakfast prepared for the children by Teressa. This evidence was corroborated by other witnesses. This witness further testified that on January 4, 1961, she made plans with Louise Steele for the three younger children to go to her house, and the two other

children were also to go to her house after they returned from school; that an effort was made to locate some clothes for the children to wear; and that she returned to the welfare office and called Mrs. Roy Sheen and Mrs. Wesley Strever and made arrangements for them to take care of the children and furnish them board and care. The three younger children were to go with Mrs. Sheen and the other two with Mrs. Strever. This witness further testified that Linda said that her mother had left home after 8 p.m., January 3, 1961; and that she called Mrs. John Laue, Jr., a sister of Grace, and told her what had been done, that Grace was not at home, and asked Mrs. Laue to help. On January 5, 1961, this witness contacted the sheriff and he took steps to locate Grace. On the same day Lavern called this witness at noon and inquired about the children. He was informed that they were in good hands. The sheriff called and said that Grace had been located on January 5, 1961.

The sheriff of Buffalo County testified that an extensive search was put on to find Grace.

Grace Best testified that she was employed at Fox Produce Company from the first part of 1959 until June of that year. At that time she was living with her husband. She and her husband were separated in the summer of 1959 for a period of 6 months, and went back together just prior to the birth of Randall Best. This witness went back to work for the produce company on December 23, 1959, and worked until December 29, 1960. When she was separated from her husband she had an arrangement with him to pay $20 a week for her support and for the support of the children, which was paid each week until he received a back injury about 2 months before they went back together. She was unable to pay all of the expenses, and as a consequence she went to the Buffalo County welfare office on August 18, 1960. In July 1960, she and her husband separated again. With reference to getting assistance

from the welfare office, she testified that she contacted the deputy county attorney and told him she would like to have her husband notified that he would have to pay support for the children. A letter was sent to her husband giving him 30 days in which to start payments for support of the children. A complaint was filed for nonsupport, and her husband agreed to pay $30 a week, which she received for a period of 5 weeks. This witness testified that on January 3, 1961, she took a taxicab from her home to town; that she was to go to the hospital to relieve her sister, Mrs. John Laue, Jr., who was with her daughter who had been operated upon that morning; that she did not go to the hospital but stopped to make a call to the hospital and was informed that her services would not be necessary; and that she then walked to the home of Ann Bacon. She denied that on that evening she took a taxicab from the Vets' Club. After she arrived at Ann Bacon's home, she was not feeling well. She had had the "flu" for a couple of days prior to that time. She remained at Ann Bacon's home until January 5, 1961, at 5:30 p.m., and had been there all the time except to go out and use the telephone. On January 4, 1961, she called her sister, Arlene Schultz, to ask her to go to the home of this witness, and Arlene Schultz agreed to go there and take care of the children. This witness further testified that the first person she saw on January 5, 1961, was her husband. This was in the evening when he came to Ann Bacon's home and told this witness that the sheriff had been looking for her and he was to notify the sheriff if he contacted her. She and her husband left for home at 8:30 p.m. Her husband called and notified the sheriff that he had found her. This witness testified to the amount she received when she worked for the Fox Produce Company, and what she used it for. She further testified that in the evenings, after 5 o'clock, when she would arrive home from work she would straighten up the house, and on Sunday she would do her regular house cleaning, wash-

ing, and ironing. She further testified that after January 5, 1961, she saw the children on two occasions, once when they were in school, and at the county court hearing on January 31, 1961.

Ann Bacon testified that she was acquainted with Lavern and Grace and had known them for 7 or 8 years; that she was a babysitter for Grace in 1959, during part of the winter; and that the times when she was in Grace's home it was clean and presentable, and the children were clean. She further testified that on January 3, 1961, Grace came to the home of this witness. She looked worn out and weak. She laid down, and stayed all night. The next morning when this witness went to work, Grace was no better. Grace was there until January 5, 1961, and left after this witness returned from work, and she did not see Grace again.

There is evidence on the part of the following witnesses, a caseworker, Mrs. Louise Steele and Violet Laue to the effect that this witness kept her house clean and presentable; and that the children were well behaved and dressed with clean clothing. As testified to by Mrs. Louise Steele, the condition of the house was average, considering that there was a family of five children and the mother worked. Grace had babysitters who cared for the children during the time she was working.

Lavern Best testified that on January 4, 1961, he was living apart from his wife, and that he went to where Grace was living. Mrs. Steele told him that the children had been taken away. He then went to see Violet Laue, his wife's sister, and he called Mrs. Simmerman, a caseworker, to find out where the children were. She could not tell him, but said that they were well taken care of. He found his wife at Ann Bacon's home, and when he did, she was lying down; she was quite pale, and looked ill. He further testified as to the various jobs he held, what he made, and where he lived, with relatives, while separated from his wife.

Grace Best was recalled and testified that she and

Lavern had been living together since January 20, 1961, were getting along better, and had not had any trouble since that date; that her husband was working steady at that time; that they were able to keep up with their obligations; that she was in such physical condition that she could return to work but did not desire to do so; that she wanted her children returned to her home; that she had never joined a church but had attended one; and that her children had gone to Sunday school.

The problem in this case was whether or not Lavern and Grace, the parents of the children, were fit to perform the duties of the father and mother of their children, or whether such parents had, by wrongful acts and neglect, forfeited their right to the care and custody of their children or any of them.

It is fully established in this state that courts may not properly deprive a parent or parents of their minor child or children unless it is shown that such parent or parents are unfit to perform the duties of the relationship of parent and child or have forfeited the right to the custody of such child or children. The custody of a child or children is to be determined by the best interests of the child or children with due regard to the superior rights of the parent. See Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151. See, also, Lakey v. Gudgel, 158 Neb. 116, 62 N. W. 2d 525.

In Boucher v. Dittmer, 151 Neb. 580, 38 N. W. 2d 401, the court said: "The courts may not properly deprive the parents of the custody of their children unless it be shown that such parents are unfit to perform the duties imposed by the relation or that they have forfeited that right."

In Gorsuch v. Gorsuch, 143 Neb. 572, 10 N. W. 2d 466, on rehearing, 143 Neb. 578, 11 N. W. 2d 456, the court said: "But this court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide. See Voboril v. Voboril, 115 Neb. 615, 214 N. W. 254."

In the instant case the trial court made no findings of unfitness on the part of the parents of these children. The evidence discloses only one instance of neglect on the part of the mother, Grace Best, for a period not to exceed 3 days, at which time this mother was ill, needed help, went to the home of her friend, Ann Bacon, and believed that one of her sisters would go to the home and take care of the children. This evidence, as heretofore mentioned, is contradicted. In consideration of the evidence, the trial court evidently believed that the parents of these children were fit and proper persons to have their care and custody, because it gave such care and custody of the three oldest children to the parents. We believe, from a review of the evidence, that the parents are fit and proper persons to have the care and custody of their five minor children. They are living together at this time. The evidence discloses that they are able at this time to fulfill their obligations to their children, and we see no reason why the two minor children not now in the custody of the parents should not be returned to the care and custody of their parents.

Section 43-207, R. R. S. 1943, authorizes the district judge to appoint a probation officer.

In the instant case, as heretofore set out, the trial court appointed a competent and capable person to inspect and visit the home of the parents of these children at any time, day or night, to ascertain the conditions in the home and what care the children are receiving. As heretofore mentioned, the trial court may continue the hearing from time to time, as provided for in section 43-210, R. R. S. 1943, and may make such orders as may be necessary for the best interests of the children here involved.

We conclude that the judgment of the trial court should be modified in the respects as heretofore set forth. We affirm that part of the judgment of the trial court leaving the three older children here involved with the parents, and reverse that part of the judgment

of the trial court wherein the trial court placed the custody of the two younger children in the care of the Board of Control, to be placed out for adoption. We remand the cause with directions to render judgment in conformity with this opinion.

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

SIMMONS, C. J., participating on briefs.

PAUL E. RHODES, APPELLANT, V. STAR HERALD PRINTING CO., A CORPORATION, ET AL., APPELLEES.

113 N. W. 2d 658

Filed March 9, 1962. No. 35149.

1. **Libel and Slander.** In order for a publication in a newspaper to be libelous per se, its nature and obvious meaning must be such as to impute to a person the commission of a crime, or subject him to public ridicule, ignominy, or disgrace.
2. ———. There is no civil liability, in the absence of actual malice, for qualifiedly privileged, defamatory publications.
3. ———. Whether or not a newspaper article is libelous per se is a matter of law for the court.
4. ———. Newspaper article not expressing newspaper's opinion, but stating the acts and proceedings of courts and their officers relating to conduct of the plaintiff, is qualifiedly privileged, and not actionable in the absence of actual malice.
5. ———. In determining whether publication is libelous per se, language of publication can alone be looked to, without the aid of innuendoes not supported by the language used.
6. ———. As a general rule fair and impartial reports of judicial, executive, or legislative official proceedings are considered as qualifiedly privileged, and are not actionable in the absence of actual malice.
7. **Courts.** Under the provisions of section 25-2221, R. S. Supp., 1959, all courts and their offices may be open for business on Saturdays, Sundays, and holidays in the discretion of the judges of such courts.

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

Paul E. Rhodes, pro se.

Atkins, Ferguson & Nichols and *James L. Macken,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and SCHEELE, District Judge.

CARTER, J.

This is an action for libel brought by the plaintiff, Paul E. Rhodes, against the defendants, Star Herald Printing Company, a corporation, the Scottsbluff Star Herald, Len Propp, Floyd Wisner, Norval Houston, and Maryland Casualty Company, Inc. The trial court sustained general demurrers to the petition and, upon failure of the plaintiff to file an amended petition, dismissed the action. Plaintiff has perfected his appeal to this court.

The action is grounded on a news article published in the Scottsbluff Star Herald, a daily newspaper of general circulation in western Nebraska, which is owned by the Star Herald Printing Company, a corporation. Floyd Wisner is alleged to be the publisher of the Scottsbluff Star Herald and Len Propp is alleged to be the writer of the article constituting the basis for the action. The petition alleges that Norval Houston is the sheriff of Morrill County, Nebraska, and the person alleged to have communicated the statements, contained in the published article, to Len Propp with the intention that they be published for the purpose of damaging the business and reputation of the plaintiff, a practicing lawyer at Bridgeport, Nebraska.

The headline of the published article, dated January 14, 1960, stated: "Sheriff Continues Search for Bridgeport Attorney Rhodes." The article continued in substance as follows: The sheriff of Morrill County late Wednesday said he is still looking for Paul E. Rhodes, a Bridgeport attorney, whom he intends to take into custody unless a $1,000 bond is posted. He stated that

he had been unable to find Rhodes since he had been released from jail on Tuesday. The bond referred to by the sheriff was set by Judge A. W. Crites of Chadron following a hearing in district court on Monday in which Rhodes was charged with second degree arson. Earlier in the day Rhodes released a $1,000 bond posted on December 5, after a preliminary hearing on the same day, was taken into custody, and filed for a writ of habeas corpus. He was brought before Judge McFarland, a hearing was set for January 27, and he was released without bond. After Judge Crites again set a $1,000 bond, Rhodes declined to post bond and was lodged in the county jail at Gering. At Gering he was also issued a writ of habeas corpus and released on a $1,000 bond after hearing was set for February 2.

It is the contention of plaintiff that the foregoing is libelous per se and that it was not published with good motives and justifiable aims. It is alleged that the publication was made for the sole purpose of injuring the plaintiff in his business and to cause him and his family mental pain and anguish, which he asserts they have suffered. He alleged that his business, his reputation, and his credit have been damaged in the aggregate sum of $998,000, for which amount he prayed judgment.

A party who stands on a general demurrer to a petition thereby admits the material facts averred, and must take all the consequences which result from such admission. Panebianco v. City of Omaha, 151 Neb. 463, 37 N. W. 2d 731. For the purposes of this appeal we shall treat the facts well pleaded as true. It will be noted, however, that plaintiff does not contend that the facts stated in the published article are false. The published article does not charge the plaintiff with the commission of crime or assert that he is a fugitive from justice. It does state that the sheriff of Morrill County intends to take Rhodes into custody for failure to post a $1,000 bond fixed by the district court. The conten-

tion of plaintiff that the published article imputes an indictable offense cannot be sustained.

In World Publishing Co. v. Mullen, 43 Neb. 126, 61 N. W. 108, 47 Am. S. R. 737, this court stated the general rule to be as follows: "The rule is that any language the nature and obvious meaning of which is to impute to a person the commission of a crime, or to subject him to public ridicule, ignominy, or disgrace, is actionable of itself." See, also, Barry v. Kirkland, 149 Neb. 839, 32 N. W. 2d 757.

In Fitch v. Daily News Publishing Co., 116 Neb. 474, 217 N. W. 947, 59 A. L. R. 1056, this court said: "A newspaper is allowed to make comments, draw deductions, and slightly add to court documents, if such inferences are fair, honest, and truthful deductions from the privileged proceedings, but of course it does not follow that a newspaper has permission to publish a lie at any time." In the foregoing case we cited the following with approval: "It is not open to dispute that a fair report in a newspaper of pending judicial proceedings is proper, and that this privilege extends to all matters which have been made the subject of judicial proceedings, though such proceedings may be merely preliminary, or interlocutory, or even ex parte."

The article published appears to be a fair and impartial statement of facts dealing with judicial proceedings, the truth of which is not denied. It appears to have been published in good faith and to have been free from malice. The plaintiff contends that animus and malice appear by innuendo. We point out that in an action for libel per se the language of the publication can alone be looked to, giving the language its usual and ordinary meaning. Innuendo may not be resorted to in such a case except when it is supported by the language of the publication without outside aid. Layne v. The Tribune Co., 108 Fla. 177, 146 So. 234, 86 A. L. R. 466.

An examination of the published article reveals that it is a mere statement of facts. It does not purport to

charge the plaintiff with a crime. It does not subject him to ridicule, ignominy, or disgrace. It purports only to be a statement of the acts of the courts and their officers in relation to court proceedings, the fixing of bonds, the failure of plaintiff to post bond, and the attempt of an officer to take plaintiff into custody in default of such bond. Such a statement recites facts which the public is entitled to know and falls within the rule of qualified privilege that protects a newspaper in the dissemination of news. See Restatement, Torts, § 611, p. 293.

It was likewise proper for the sheriff to detail the circumstances and the facts that brought about the existing situation. Kilgore v. Koen, 133 Ore. 1, 288 P. 192. Public officers have a qualified privilege in reporting news items with reference to the duties and functions of their offices. Such qualified privilege extends to fair and accurate reports germane to their public duties and made in good faith without malice. Fitch v. Daily News Publishing Co., *supra;* Kilgore v. Koen, *supra.*

Under the foregoing authorities the petition of plaintiff does not state a cause of action for libel per se. The trial court therefore properly sustained the demurrer and dismissed the action. See McClure v. Review Publishing Co., 38 Wash. 160, 80 P. 303.

Plaintiff contends that the order dismissing his petition is void for the reason that it was made on a Saturday. This point is controlled by section 25-2221, R. S. Supp., 1959, which states in part: "Notwithstanding any other provision of law, all courts and their offices may be closed on Saturdays, Sundays, and (named holidays)." By this provision, the Legislature left to the discretion of the courts as to whether or not the courts and their offices should be closed on Saturdays, Sundays, and holidays. When in the judgment of the court it is necessary to hold court on any such days, it is within the province of the court to do so. On the other hand, the court may with propriety decline to hold court on any of such days. The record shows that plaintiff had ample notice of the

date of the hearing. It is not contended by plaintiff that he was in any manner prejudiced by the action of the court in setting the hearing on a Saturday. There is no merit to plaintiff's contention on this assignment of error.

The judgment of the trial court is in all respects correct and it is affirmed.

AFFIRMED.

PAUL E. RHODES, APPELLANT, V. ALBERT W. CRITES ET AL., APPELLEES.
113 N. W. 2d 611

Filed March 9, 1962. No. 35150.

1. **Pleading.** By statute, when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.
2. ———. If the allegations are so indefinite or uncertain that the precise meaning is not apparent, the remedy of the other party is an application to the court to have the pleading in that particular made more definite and certain.
3. **Pleading: Appeal and Error.** An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion.
4. **Courts.** Section 25-2221, R. S. Supp., 1959, removed the specific prohibition against courts being open on certain named days, and the matter is left to the discretion of the court as to whether said court will be open on Saturdays to hear such matters as might come before it.

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

Paul E. Rhodes, pro se.

Clarence A. H. Meyer, Attorney General, *Gerald S. Vitamvas,* and *James L. Macken,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and SCHEELE, District Judge.

MESSMORE, J.

This is an appeal from an order of the district court for Morrill County, Nebraska, dismissing the plaintiff's action after the plaintiff failed to file an amended petition in compliance with the order of the court to make his petition more definite and certain.

The plaintiff's petition was filed in the district court for Morrill County on August 30, 1960. The pertinent allegations of the plaintiff's petition were in substance as follows: That on January 11, 1960, at Bridgeport, Morrill County, Nebraska, the defendants and Clarence S. Beck, through his special assistant, Rush C. Clarke, unlawfully, maliciously, and with intent to injure the plaintiff, did by force compel the plaintiff to enter the county jail of Morrill County, and later the county jail of Scotts Bluff County, on said day, in Bridgeport, Morrill County, and Gering, Scotts Bluff County, and did transport said plaintiff by force, against his will, from Morrill County into Scotts Bluff County and therein imprison the plaintiff in the county jail of Morrill County and in the county jail of Scotts Bluff County, and then and there detained the plaintiff and restrained him of his liberty for a period of approximately 22 hours, without reasonable cause and without right or authority to do so, against the will of the plaintiff, whereby the plaintiff was injured in his credit and by the unfavorable publicity that was secured therefrom; that the plaintiff was prevented from attending his necessary affairs and business during that time, and was forced to spend money for counsel fees in securing his discharge from said unlawful imprisonment; that the plaintiff was forced to spend his own time in securing said discharge from the unlawful imprisonment; and that because of said false and unlawful imprisonment the plaintiff suffered embarrassment and humiliation. The plaintiff prayed for damages.

On September 26, 1960, the defendants filed in the district court for Morrill County a motion requiring

the plaintiff to make his petition more definite and certain, setting forth certain particulars with which the defendants claimed the plaintiff should be required to comply.

On December 19, 1960, the plaintiff filed an application for transfer of trial to another judge on account of the bias and prejudice of the presiding judge, supported by an affidavit of the plaintiff.

On the same date, December 19, 1960, the plaintiff's motion to transfer this case for hearing by another judge was overruled.

The motion of the defendants to require the plaintiff to make his petition more definite and certain was overruled in part and in part sustained on the same date. The parts of the motion to require the plaintiff to make his petition more definite and certain which were sustained are as follows: To set forth in unnumbered paragraph 2 of the petition the particular facts showing in what manner and by what means the defendants, and each of them, participated in the use of force against the plaintiff causing him to enter the county jail of Morrill County; to set forth in unnumbered paragraph 2 of the petition the particular facts showing in what manner and by what means the defendants, and each of them, participated in the use of force against the plaintiff causing him to enter the county jail of Scotts Bluff County; and to set forth in unnumbered paragraph 2 of the petition the particular facts relied upon to show in what manner and in what way the said imprisonment was false and unlawful.

On December 27, 1960, the plaintiff filed a motion for new trial or for rehearing.

On March 29, 1961, there was filed in the district court for Morrill County, a notice as follows: "You are hereby notified that the Hon. Edmund Nuss will be in Bridgeport on Saturday, April 15, 1961, and I will on that date ask him to take up all matters pending in the above case, at 10:00 o'clock A.M. on that date or as soon thereafter as

it may be heard. Dated this 24th day of March, 1961. ALBERT W. CRITES, et al., Defendants By /s/ James L. Macken James L. Macken, Their Attorney." There was a return relating to the service of the above notice, as follows: "I hereby certify that on March 27th, 1961, I served the foregoing notice upon Paul E. Rhodes, plaintiff, by delivering to him personally in Lancaster County, Nebraska, a true copy thereof." This return was signed by Kenneth W. Nelson, deputy, for Merle C. Karnopp, sheriff, and indicated that it was received at 9:27 a.m., on March 27, 1961.

On April 14, 1961, the plaintiff filed a motion for continuance. On April 25, 1961, a journal entry dated April 15, 1961, was filed, in which the plaintiff's motion for continuance was overruled, and the plaintiff's motion for new trial or rehearing was overruled. The plaintiff was allowed 30 days from date to file his amended petition as authorized by the order of December 19, 1960. It was ordered that if such amended petition was not filed within 30 days from date (April 15, 1961) the case should stand dismissed. The above orders were made by Judge Edmund Nuss, and a copy of the orders was handed to Paul E. Rhodes on April 21, 1961, by John B. Greenholtz, deputy warden of the State Penitentiary.

On June 8, 1961, the plaintiff filed a notice of appeal directed to the orders of the district court of December 5, 1960, December 19, 1960, and April 15, 1961.

On August 15, 1961, there was filed in the district court for Morrill County the following journal entry: "Now on this 15th day of August, 1961, * * * the court observes that plaintiff has failed to file an amended petition as required by the journal entry of this court entered April 15, 1961, and the court finds that the case should be dismissed, as of May 16, 1961. IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that this case be, and it hereby is, dismissed at plaintiff's costs. BY THE COURT: /s/ Edmund Nuss District Judge."

On August 17, 1961, there was filed in the district court for Morrill County a notice, and return made on such notice, as follows: "NOTICE TO PAUL E. RHODES: You are hereby notified that Judge Edmund Nuss will be in Bridgeport on Tuesday, August 15, 1961, at 10:00 o'clock A.M., Mountain Standard Time, and at that time he will be asked to take up and hear all matters pending in all cases in which you are interested as a party or as an attorney. Dated this 15th day of July, 1961. /s/ James L. Macken County Attorney /s/ James L. Macken Attorney." The return was made on this notice as follows: "I certify that the foregoing notice was personally served on Paul E. Rhodes on the 28th day of July, 1961. Merle Karnopp, Sheriff, By /s/ Leonard R. Schafer Deputy."

The plaintiff filed his notice of appeal herein on September 11, 1961.

There is also a bill of exceptions showing trial before the Hon. Edmund Nuss, district judge, at Bridgeport, Nebraska, on April 15, 1961. It shows notice to the plaintiff, Paul E. Rhodes, that the Hon. Edmund Nuss would be in Bridgeport on Saturday, April 15, 1961, to take up all matters pending in the above case at 10 o'clock a.m., on that date or as soon thereafter as it might be heard. This was dated March 24, 1961. The return was made on this notice as follows: "I hereby certify that on March 27th, 1961, I served the foregoing notice upon Paul E. Rhodes, plaintiff, by delivering to him personally in Lancaster County, Nebraska, a true copy thereof. Dated the day above written. Merle C. Karnopp Sheriff By Kenneth W. Nelson Deputy."

The bill of exceptions also shows that the motion for rehearing should be overruled, and that the plaintiff should be given 30 additional days in which to file an amended petition if he so desired. This matter was before the Hon. Edmund Nuss who presided in the district court for Morrill County on April 15, 1961. (Exhibit

No. 1 is the notice to show proof of service and was received in evidence.)

The question presented by this appeal is whether or not the action of the district court in dismissing the action of the plaintiff, after the plaintiff's failure to file an amended petition pursuant to the order of the trial court, was a proper order.

Section 25-833, R. R. S. 1943, provides in part: "* * * when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

In Western Travelers' Accident Assn. v. Munson, 73 Neb. 858, 103 N. W. 688, the court said: "Ordinarily, it is only necessary to plead the ultimate facts upon which the pleader relies. Such facts, of necessity, are conclusions drawn from intermediate and evidential facts. If the ultimate facts are not stated with sufficient certainty, the remedy is by motion."

If the allegations are uncertain or indefinite, the remedy is by motion. See Burr v. Boyer, 2 Neb. 265, wherein the court said: "If the allegations are so indefinite or uncertain that the precise meaning is not apparent, the remedy of the other party is an application to the Court to have the pleading in that particular made more definite and certain. Code, sect. 125; Olcutt v. Carroll, 39 N. Y., 436."

The plaintiff, in his first assignment of error, asserts that the trial court erred in failing to find that Judge Van Steenberg was disqualified from acting as judge in this case. It is true that Judge Van Steenberg refused to disqualify himself. The record shows that on December 19, 1960, Judge Van Steenberg filed his order sustaining, in part, the defendants' motion to make more definite and certain, as heretofore mentioned. All subsequent orders in this case were rendered by Judge Edmund Nuss. Since the order of Judge Edmund Nuss gave the plaintiff an additional time in which to plead,

namely 30 days, if any error occurred by reason of Judge Van Steenberg's participation in this action, it was cured by the subsequent consideration of the case by Judge Edmund Nuss.

The defendants take the position that the sustaining of the motion to make the petition more definite and certain is within the discretion of the trial court. The plaintiff did not contend nor point out wherein he would be prejudiced by the order requiring him to plead further. It is apparent that his contention in this court is that the petition as filed in the district court for Morrill County was definite and certain enough to sustain a valid claim, and adequate enough to advise the defendants of the charge against them.

The defendants in this action are designated by name, with no allegation of their official capacities. Judicial notice is taken of the judges and justices within the state, and of numerous other court officials. See 31 C. J. S., Evidence, § 48, p. 613. Judicial notice will also be taken of public officers and their official positions and authority within the jurisdiction of the court. See 31 C. J. S., Evidence, § 37, p. 594. Thus, Albert W. Crites is a district judge. Clarence S. Beck, at the time of the alleged false imprisonment, was the Attorney General of the State of Nebraska.

The plaintiff alleges in his petition that Clarence S. Beck, "through his special assistant and agent, Rush C. Clarke," performed the acts complained of. Norval E. Houston was sued as the sheriff of Morrill County. It therefore appears that the acts of the individuals concerned were official acts. If so, it is the defendants' position that they are entitled to know this, and that it would not be a burden nor prejudicial to the plaintiff to so state in his petition. If the position of the plaintiff is that the acts were not done in an official capacity then a different standard of pleading could be applied, but if, for instance, it appears that Judge Crites is sued for his actions as a district judge, then the following

statements of the court in the case of Olmsted v. Edson, 71 Neb. 17, 98 N. W. 415, would be pertinent: "It will be observed that the gravamen of the plaintiffs' petition was the act of the alleged illegal or false imprisonment on the part of the defendant Edson. It may be stated at the outset that, in order to state a cause of action in such a case, the petition must allege facts, not the conclusions of the pleader, from which it clearly appears that the officer acted without jurisdiction, or that the evidence sought to be elicited from the witness was of such a character as would justify him in refusing to testify. It is a familiar rule that a judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred on him by law."

In Schuster v. Douglas, 156 Neb. 484, 56 N. W. 2d 618, this court said: "An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion to the prejudice of the plaintiff." See, also, Northport Irrigation Dist. v. Farmers Irrigation Dist., 125 Neb. 607, 251 N. W. 174; Bushnell v. Thompson, 133 Neb. 115, 274 N. W. 453. The court went on to say: "In the light of the record the only proper basis upon which the motion to dismiss could have been sustained was that the plaintiff failed timely to comply with the order of the court to make the petition more definite and certain. Assuming therefore that the order was so based the order of dismissal is on that ground affirmed."

In the instant case the order to require the plaintiff to make his petition more definite and certain was well taken. It would not have been difficult for the plaintiff to comply with the order by alleging the facts as required by that part of the motion sustained by the trial court.

The next question raised by the plaintiff is whether

or not the trial court may be open and hold a hearing on a Saturday.

Section 25-2221, R. S. Supp., 1959, provides in part: "The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period runs until the end of the next day on which the office shall be open. Notwithstanding any other provision of law, all courts and their offices may be closed on Saturdays, Sundays, and these holidays: * * *. If any such holiday falls on Sunday, the following Monday shall be a holiday. Court offices shall be open on all other days." The present section of the statutes was enacted by the 1959 Legislature. L. B. 450, Laws 1959, c. 108, § 1, p. 437.

Section 25-2221, R. R. S. 1943, which section was amended, merely provided for the method of computing the time within which an act should be done. Under this provision, Sunday, if the last day in which an act was to be done, was to be excluded in computing time. L. B. 450 also repealed section 24-316, R. R. S. 1943, which read in part: "No court shall be opened, nor any judicial business be transacted, on Sunday, or on January 1, May 30, July 4, December 25, or the fourth Thursday in November, except * * *. Except on Sundays and on holidays herein mentioned, courts may be opened and may transact any kind of judicial business."

It will be observed that the present law permits courts and their offices to be closed on the days mentioned. The specific prohibition against courts being opened on certain named days was removed from the law, and the matter is left to the discretion of the court. There is nothing in section 25-2221, R. S. Supp., 1959, that requires the court to be closed on Saturdays.

There was no attempt on the part of the plaintiff to comply with the order of the court to make his petition more definite and certain. He had adequate and ample

time to allege facts in an amended petition to meet the requirements of that part of the defendants' motion to make plaintiff's petition more definite and certain, had he chosen to do so.

On July 19, 1961, the plaintiff filed a motion showing that he was imprisoned by Norval Houston, sheriff of Morrill County, and praying that the court direct the defendant Norval Houston to bring the plaintiff before the court to present the motion pro se, and to further direct the defendant Norval Houston to provide the plaintiff with the necessary papers, books, and supplies for the preparation of brief on appeal. The trial court overruled this motion on August 15, 1961. This matter was wholly immaterial to this appeal, and the trial court's ruling on this motion was correct.

As heretofore stated, the only question before this court was whether or not the trial court erred in dismissing the plaintiff's action after failure of the plaintiff to file an amended petition pursuant to an order of the trial court. We conclude, from the record before us, that the judgment of the trial court should be affirmed.

AFFIRMED.

IN RE ESTATE OF ANTON J. FISHER, DECEASED.
ARDATH D. HOBER, APPELLEE, V. E. B. MCARDLE, APPELLEE, STATE OF NEBRASKA, APPELLANT.
113 N. W. 2d 625

Filed March 16, 1962. No. 35089.

1. **Wills. A proponent of a lost will must show what became of the original will, in whose custody it was placed, and account for its nonproduction in the probate proceeding.**
2. **———. A will which was left in the custody of the testator, and which cannot be found after his death, is presumed to have been destroyed by him with the intention of revoking it.**
3. **———. There is no presumption that a lost will was revoked. A will which was delivered to a third person after its execution,**

and which cannot be found after the death of the testator, is presumed to have been lost.

4. ———. If a will is traced out of the testator's custody, the burden is on the party alleging revocation to show that the will was returned to the control of the testator or destroyed at his direction.

APPEAL from the district court for Douglas County: PAUL J. GARROTTO, JUDGE. *Affirmed.*

Clarence A. H. Meyer, Attorney General, and *Bernard L. Packett,* for appellant.

Herbert T. White, Rudolph Tesar, and *Burbridge & Burbridge,* for appellee Hober.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding to probate a lost will. Anton J. Fisher, the testator, died August 15, 1958.

Ardath D. Hober, the appellee, is the proponent. She is the sole beneficiary in the will and is named as executrix. The deceased and Ardath D. Hober were married in 1935 and divorced in 1938.

The State of Nebraska is the appellant and the contestant. While the petition to probate the will was pending, the county court, as required by section 30-217.01, R. R. S. 1943, notified the Attorney General that the matter was pending and that the heirs of the deceased were unknown. The Attorney General then filed objections to the probate of the will, alleging that if it had been executed it had been revoked; that the deceased died intestate leaving no heirs; and that his property had escheated to the State of Nebraska.

The county court found that the deceased had revoked the will in his lifetime, that it should not be admitted to probate, and appointed E. B. McArdle as administrator of the estate. The administrator appears as an appellee in this court but has no right to contest

the will. In re Estate of Sexton, 146 Neb. 618, 20 N. W. 2d 871.

The proponent appealed to the district court where, after trial to the court without a jury, the court found that the will should be admitted to probate. The contestant's motion for new trial was overruled and it has appealed.

The assignments of error which require consideration are, in substance, that the finding and judgment of the district court is not supported by the evidence. By agreement of counsel a jury was waived. Under such circumstances the finding of a trial court is equivalent to the verdict of a jury and will not be disturbed unless clearly wrong. Thus, in reviewing the evidence it must be considered in the light most favorable to the proponent, every controverted fact must be resolved in the proponent's favor, and the proponent must have the benefit of every inference that can reasonably be deduced therefrom. Roberts Constr. Co. v. State, 172 Neb. 819, 111 N. W. 2d 767.

The evidence shows that the will in question was executed by the deceased on April 11, 1949, at Omaha, Nebraska. One of the witnesses to the will testified that he had prepared the will at the request of the deceased. This witness identified a carbon copy of the original will and testified that the will had been executed by the deceased as required by law. The other witness to the execution of the will is dead. After the will had been executed, the deceased deposited it with the county judge for safekeeping.

The proponent produced evidence that the testator and the proponent remained on friendly terms until his death, and specifically that this relationship continued after October 1955. The proponent testified that the deceased told her on a number of occasions, both before and after October 1955, that he had made a will leaving everything to her and that the will was at the courthouse. Two of the conversations took place in the pres-

ence of Ethel Berghahn. One occurred about 3 weeks before the death of the testator and another took place at the hospital during his last illness. Ethel Berghahn corroborated the testimony of the proponent as to these two conversations and testified to similar declarations of the testator on another occasion. The proponent produced two other witnesses who testified to similar declarations of the testator made after October 1955. There is no evidence that any of these witnesses, except the proponent, would benefit from the will being admitted to probate.

After the death of the deceased the will could not be found. It had been withdrawn from the office of the county judge on October 24, 1955, by Anton R. Stolinski. The principal question in this case is what happened to the will after it was withdrawn from the office of the county judge.

The proponent was required to show what became of the original will, in whose custody it was placed, and account for its nonproduction in the probate proceedings. In re Estate of Francis, 94 Neb. 742, 144 N. W. 789, 50 L. R. A. N. S. 861. In an effort to meet this burden of proof the proponent produced evidence that the statutory procedure for withdrawing the will from the office of the county judge was not followed. The proponent's theory is that if the statutory procedure was not followed, then the will should be considered to be still in the legal custody of the county judge, and the burden of proof to account for the will is satisfied.

The statute, section 30-211, R. R. S. 1943, provides that the will shall be delivered only to the testator or "to some person authorized by him, by an order in writing, duly proved by the oath of a subscribing witness." The proponent produced a handwriting expert who testified that in his opinion the signature of the deceased on the written authorization was not genuine. The evidence also shows that the subscribing witness to the signature of the deceased on the authorization did not appear be-

fore the notary public who executed the jurat on the authorization.

The contestant argues that the proponent's evidence traced the custody of the will to Stolinski and that the proponent was bound to produce the testimony of Stolinski to show what happened to the will after it was delivered to him. This argument assumes that the proponent had no right to question the testimony of Stolinski as to what he did with the will.

The contestant produced the testimony of Stolinski who testified that he had been acquainted with the deceased for about 25 years; that at the request of the deceased he inquired at the county court about withdrawing the will; that the deceased signed an authorization to withdraw the will in his presence and in the presence of Edna Christensen; that he presented the authorization at the office of the county judge and received a sealed envelope; and that he delivered the sealed envelope to the deceased who put it in his pocket. The testimony of Stolinski was corroborated by the testimony of Edna Christensen who testified that she and Stolinski were present when the deceased signed the authorization and that she then signed as a witness. His testimony was further corroborated by the testimony of George Christensen who testified that in October 1955, he saw Stolinski hand an envelope to the deceased and saw the deceased place the envelope in his pocket. There is no evidence that Stolinski or the Christensens would benefit in any way from the destruction of the will.

If the testimony of Stolinski was binding on the trial court, then there is a presumption that the will was revoked. A will which was left in the custody of the testator, and which cannot be found after his death, is presumed to have been destroyed by the testator with the intention of revoking it. Drew v. Hawley, 164 Neb. 141, 82 N. W. 2d 4. The presumption is one of fact and may

be overcome by evidence, circumstantial or otherwise, to the contrary. The declarations of the testator may be shown for this purpose. Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383. The evidence required to overcome the presumption of revocation of a lost will must be clear, unequivocal, and convincing. In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

There is no presumption that a lost will was revoked. If the will is not shown to have been in the custody of the testator, then a presumption of revocation does not arise. 2 Page on Wills (Lifetime Ed.), § 873, p. 723; 95 C. J. S., Wills, § 385, p. 287; Annotation, 3 A. L. R. 2d 949. A will which was delivered to a third person after its execution, and which cannot be found after the death of the testator, is presumed to have been lost. 57 Am. Jur., Wills, § 549, p. 378; Annotation, 34 A. L. R. 1304. If the will is traced out of the testator's custody, the burden is on the party alleging revocation to show that the will was returned to the control of the testator or destroyed at his direction. Williams v. Miles, *supra*.

As we review the record, the question in this case as to what happened to the will after it was withdrawn from the office of the county judge was a question of fact. The contestant produced direct evidence that the will was returned to the testator, but this evidence was not conclusive. The weight of the evidence and the credibility of the witnesses are for the trier of fact. The trial court had a right to reject the evidence of the contestant.

The conclusion to be drawn from the proponent's evidence, if believed, was that the will was withdrawn from the office of the county judge without the knowledge or consent of the testator and that he died thinking that his will leaving everything to the proponent was still in the custody of the county judge.

The evidence was sufficient to sustain the finding and judgment of the district court that the will should

be admitted to probate as a lost will. There being no error, the judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

ALFRED SCHUETZ, APPELLANT, V. CITY WIDE ROCK & EXCAVATING CO., APPELLEE.
113 N. W. 2d 609

Filed March 16, 1962. No. 35093.

Appeal and Error. Where in an action at law the evidence is in conflict on a material matter the verdict of a jury thereon will not be disturbed unless it is clearly wrong.

APPEAL from the district court for Douglas County: JOHN C. BURKE, JUDGE. *Affirmed.*

Viren & Emmert and *Eleanor Knoll Swanson*, for appellant.

Nelson, Harding & Acklie, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action by Alfred Schuetz, plaintiff and appellant, against City Wide Rock & Excavating Co., defendant and appellee, to recover a claimed amount due from the defendant on account of a difference between what plaintiff received as a Nebraska intrastate common carrier and what he was entitled to receive under rates fixed by the Nebraska State Railway Commission for the transportation of rip rap rock.

The case was tried to a jury, and a verdict was returned in favor of the defendant. Judgment was rendered on the verdict. An alternative motion for judgment notwithstanding the verdict or for new trial was duly filed. This motion was overruled. From the

ruling on this motion and the judgment the plaintiff has appealed.

The substance of the cause of action as pleaded is that the plaintiff is a common carrier with authority to transport rock to points of designated delivery; that between May 11, 1957, and July 19, 1957, as a common carrier he transported rock from the quarry of the defendant to a point near the South Omaha Bridge in Omaha, Douglas County, Nebraska, a distance of about 13 miles; and that under the tariff fixed by the Nebraska State Railway Commission he was entitled to receive 91 cents a ton for the mileage involved but that he actually was paid 65 cents a ton. The action is for an accounting of the total mileage, for the difference between the amount received and the amount which he says he was entitled to receive based upon total mileage, treble damages, and attorney's fees.

It is stated here that the mileage total involved is not in dispute. It is likewise not in dispute that the rate for this service by a common carrier as such was 91 cents a ton. Further it is not disputed that the rock was transported in a truck belonging to the plaintiff and that he had a lawful right as a common carrier to use and operate the truck.

The answer of the defendant is of considerable length but the only part of it which requires mention at this point herein is that in it it is denied that the plaintiff was, during the period mentioned, employed by the defendant as a common carrier.

The matter which was in actuality tried was that of whether or not in the performance of the service the plaintiff was operating as a common carrier. The plaintiff, as is already clear, contends that he was. The defendant on the other hand contends that the truck was leased on the basis of a fixed rental and the plaintiff was an employee hired to operate the truck.

It is pointed out that the plaintiff in his brief does not contend that such an arrangement as that for which

the defendant contends, if proved, would be invalid. He goes no further in this area than to say that in such a situation a presumption arises that such transportation is performed by a carrier and is subject to existing carrier regulations.

There is therefore no question of law involved at this point. Involved is only a question of disputed fact. With particularity the question is that of whether or not this transportation was performed by the plaintiff in the status of a common carrier. This question was submitted to a jury under proper instructions, including the definition of a common carrier.

The controlling rule in such a situation is that where in an action at law the evidence is in conflict on a material matter the verdict of a jury will not be disturbed unless it is clearly wrong. See, Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913; Anderson v. Nelsen, 159 Neb. 43, 65 N. W. 2d 149.

The evidence on behalf of the plaintiff relative to the character of the service which was performed and the period over which the transportation involved here was performed is that it was from May 11, 1957, to June 15, 1957; that prior to this time a like service was performed by the plaintiff; that he had no agreement relative to the service which was performed after May 11, 1957; that during the period from May 11, 1957, to June 15, 1957, he knowingly received and receipted for, by endorsement of checks, payments based on lease of the truck to the defendant, and on his hiring to operate the truck, for the entire period; that the last check was cashed by him after he had obtained legal advice on the subject from his attorney; and that on June 15, 1957, the transportation ceased apparently because he refused to sign a written agreement which contained specific provisions relating to future transportation.

There is no evidence on behalf of the plaintiff which by its terminology indicates an agreement that the arrangement between the parties was one of common car-

riage with the defendant a shipper and the plaintiff a common carrier.

Evidence of the defendant is in accord with that of the plaintiff as to the amount of hauling which was done and the manner of performance. Other evidence of the defendant, in substance, indicates that in 1956 a written but undated contract was entered into between these parties by the terms of which the plaintiff leased his truck to the defendant for the purpose of hauling rock at the rate of .173 cents per running mile. Obviously 1.73 cents per running mile was intended. It further provided that the driver of the truck would be an employee of the defendant. It further provided that the arrangement should continue as long as it was mutually agreeable or until canceled or terminated. Cancellation could be accomplished on 15 days' written notice. No such notice was ever given. For the service performed pursuant to this arrangement the plaintiff was paid for each round trip haul as rental for his truck 45 cents a ton, or 1.73 cents per running mile, and for his service as an employee driving the truck 20 cents for each ton hauled or a minimum of $1 an hour. The rate for driving was not a part of the undated contract. By computation and allocation the plaintiff actually received for the two services a total of 65 cents a ton. About this there is no dispute. The plaintiff performed under this contract in 1956 and at least for some period in 1957. Whether or not there was a suspension of service at any time before May 11, 1957, does not clearly appear.

There is no evidence that there was any new arrangement or contract entered into before or after the commencement of service performed on or after May 11, 1957. Payments were made by the defendant and accepted by the plaintiff on the basis of the terms of the 1956 arrangement.

There is evidence that service was discontinued on June 15, 1957, following an argument between the plaintiff and the representative of the defendant. No informa-

tion appears as to the basis of the argument except that the plaintiff refused to sign an agreement of some kind tendered by the defendant.

The case was submitted to the jury and by the instructions it was told that if it should be found by a preponderance of the evidence that the service was performed by the plaintiff as a common carrier, he was entitled to recover. If, however, he failed to so prove, or if it should be found that the defendant had leased the truck and hired the plaintiff as an employee driver, the verdict should be for the defendant.

The verdict on this issue was for the defendant. It cannot be reasonably said that this verdict was not supported by evidence sufficient to sustain it. The finding of the jury on this issue in favor of the defendant must be sustained.

Instructions were challenged by an assignment of error. The challenge however could not avail anything to the plaintiff since on the record made it is not contended that a transportation arrangement such as is contended for by the defendant was illegal.

There are other assignments of error but the conclusion herein reached renders a consideration of them unnecessary. The ultimate determination of the case must depend upon and follow this conclusion.

The judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE ESTATE OF GOLDIE TIPTON, DECEASED.
AGNES MUSE ET AL., APPELLANTS, V. B. W. STEWART ET AL., APPELLEES.
113 N. W. 2d 644

Filed March 16, 1962. No. 35099.

1. **Wills. Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death,**

the presumption is that the testator destroyed it animo revocandi.

2. ———. Declarations of a testator may be received in evidence to prove the existence of a will.
3. ———. The presumption of revocation is not conclusive, but may be overcome by proof which is clear, unequivocal, and convincing that the testator did not revoke the will.
4. ———. The burden is on the proponents of the lost will, and the determination of the sufficiency of the evidence to overcome the presumption is for the court in the first instance.
5. ———. We do not mean to infer that the proof required must establish with absolute certainty that the will was not revoked, but we do say that a degree of proof is required which produces conviction in an unprejudiced mind.
6. **Attorney and Client: Witnesses.** It is against sound principles of professional ethics for one who knows he is to be called as a material witness in a case to appear as attorney therein.
7. ———: ———. This rule applies even though the attorney is representing himself in a representative capacity, such as executor.

APPEAL from the district court for Gage County: JOSEPH ACH, JUDGE. *Reversed and remanded with directions.*

McCown & Baumfalk, for appellants.

Clarence C. Kunc, George H. Miller, and *Wilbert Sunderwirth,* for appellees.

B. W. Stewart, amicus curiae.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an appeal from a judgment probating a lost will. The pertinent facts disclosed by the record may be summarized as follows: On October 8, 1958, Goldie Tipton, hereinafter referred to as decedent, a resident of Gage County, executed a last will and testament in the law office of B. W. Stewart, in the presence of B. W. Stewart and his secretary. At the time of the execution of the will, an original copy of a postnuptial agreement between the decedent and her husband, Doctor A.

Ernest Tipton, hereinafter referred to as Doctor Tipton, was attached to it. These were placed in an envelope and given to the decedent, who stated that she was going to place the envelope in her safe-deposit box. Doctor Tipton, who was with her on that occasion, testifies that this was done.

Decedent died on May 7, 1960, in Gage County, Nebraska. Doctor Tipton, her seventh husband, survived her. His competency was very questionable but he was called by the proponents and permitted to testify herein. A guardian ad litem was appointed for him in the county court. In addition to her husband, decedent was survived by one nephew, Arthur G. Watson, hereinafter referred to as Watson, and two nieces.

The original will was never seen after it was placed in the safe-deposit box. B. W. Stewart, hereinafter referred to as Stewart, who was named as the executor, filed a petition for probate of a lost will and produced an unsigned copy of the will which was received in evidence.

Briefly, the will devised a farm in Missouri of approximately 205 acres to the tenant, Donald G. Williams, hereinafter referred to as Williams, who was a nephew of decedent's third husband. The rest of her property was devised and bequeathed to her executor in trust, with directions to pay Doctor Tipton $2,000 which he had advanced on the purchase of a Beatrice property, and then provided for the payment to him of $200 a month for life. After the death of Doctor Tipton, she provided for the payment of $4,000 to Williams; $5,000 to her own nephew, Watson; $1,000 to the Church of Christ at Beatrice, of which she was a member; $1,000 to her Eastern Star chapter; $1,000 each to a Masonic lodge in Kansas and one in Missouri; $500 to the Salvation Army for use in Beatrice; and $500 to the State Department of Public Welfare for the use of the needy in the Tuberculosis Hospital at Kearney. The residue of the estate was then devised and bequeathed to a Methodist church and a

Christian church at Beatrice. There is nothing in the record which would in any way suggest any connection or association of decedent with these two churches.

On the Monday following the death of decedent the previous Saturday, Stewart, Watson, Watson's wife, Williams, and Doctor Tipton went to the bank and examined the safe-deposit box but did not find the will, although they did find an original signed copy of the postnuptial agreement. There is no question but that Mrs. Tipton was the only one who had access to the safe-deposit box. They then went to the Tipton residence and examined the contents of a large trunk which was locked. Watson handed Stewart the keys and Doctor Tipton pointed out the one to use. No will was found in the trunk, but they did find another copy of the postnuptial agreement which Stewart testified to the best of his recollection was signed, but that he wouldn't say it was. Stewart testified that in the process of examining the trunk, he removed packages of letters, receipts, and reports, and that in the center of the trunk he picked up a package and uncovered a white cotton or outing flannel bag for jewelry, and that Mrs. Watson, who was looking over his shoulder, said: " 'Why, there is Goldie's jewelry bag and there is nothing in it.' " On two subsequent occasions, Stewart examined the trunk and did not find the jewelry. Subsequently, after an administrator was appointed, the administrator went through the trunk and found the jewelry in the bag fastened with safety pins. There were no jewels or pins in the bag when it was first seen.

Williams arrived in Beatrice the day of decedent's death. He testified that when he arrived Doctor Tipton had the keys and said to him, " 'All her papers are in that trunk and here is the key to it,' " but that they did not open the trunk. Watson arrived the next day, Sunday, and made arrangements for all of them, including Doctor Tipton, to stay at the Paddock Hotel. Stewart took his office copy of the will to the hotel,

and Watson read it to all of them except Doctor Tipton. After the will was read, Watson said, " 'Now, Doctor is in his room asleep. He is under sedation, and * * * I put him to bed. I know where his keys are. They are under his pillow. We can get those keys and go up to the house if we wish.' " However, this was not done. Both Watson and Williams knew that Doctor Tipton had the keys. There is nothing to indicate that anyone went back to the house until the next day.

After a hearing on the petition for probate in county court, probate of the lost will was refused and an appeal was perfected to the district court by Stewart and Williams. They were joined in the appeal by the Eastern Star chapter and the two Masonic lodges. Previous to the filing of the petition for probate, a petition had been filed by Watson for the appointment of an administrator, and Vernon R. Mulig was appointed as administrator. Stewart and Williams perfected an appeal to the district court from the granting of letters of administration. These appeals were consolidated for trial in the district court. The district court overruled the objections, admitted the will to probate, and disallowed and dismissed the petition for administration.

A next-door neighbor to the Tiptons, Mildred L. Guenther, testified on behalf of proponents. She told of an occasion in November 1958, when the decedent discussed a will. Her testimony is as follows: "Q Now at any time did Goldie Tipton discuss with you or make any statements with reference to her will as such? A Yes. One day she came over and she said she had hardly slept all night before because she had brought her will home the day before and wanted to study it, and she said she could hardly wait until she took it to the bank downtown the next day because she was so worried about having it at home. Q Did she by any chance state where she was going to take it downtown? A Well, I believe she said the bank. Q Did you see this instrument yourself? A No, I didn't." The rest of the

testimony deemed pertinent will be summarized hereinafter.

The issue in this case is whether or not the copy of the alleged will should be admitted to probate. There is no question it should be admitted if the proponents have adduced evidence which, as a whole, is clear, unequivocal, and sufficient in and of itself to overcome the presumption of revocation of the will by the decedent.

The last time the will was seen, the day of its execution, it was in the possession of the decedent. The law of Nebraska is well settled that, where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is that the testator destroyed it animo revocandi. Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383. The very fact that the will cannot be found is regarded as tending to show that the testator destroyed it animo revocandi. However, such presumption is not conclusive but may be overcome by proper and sufficient proof that the testator did not revoke the will. In re Estate of Ladman, 128 Neb. 483, 259 N. W. 50.

A will is, according to law, of an ambulatory character. No person can have any rights in it until the testator is dead. The testator may change it at pleasure, and human experience has shown that wills are almost always destroyed secretly. Consequently, the evidence to overcome the presumption of revocation of a lost will must be clear, unequivocal, and convincing. This burden is on the proponents, and the determination of the sufficiency of the evidence to overcome the presumption is for the court in the first instance. In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

Before considering the sufficiency of the evidence, we note that there has been an inference that Watson, who would benefit if the will was revoked, may have utilized an opportunity to destroy it. As we view the evidence, this is a wholly incorrect assumption. The most that can be said is that Watson had access to the key the

Sunday after decedent's death, and while it is remotely relevant, it is not sufficient to overcome the presumption that the destructive act was done by the testator. Ignoring the fact that there is no evidence to suggest the will was in the trunk, there is not one scintilla of evidence to suggest that Watson visited the house alone or that he used the key. We assume that the fact that Mrs. Watson recognized the jewelry bag belonging to the decedent is supposed to have some significance. We think the nature of the exclamation speaks for itself. It is not the kind one would expect from someone who, we assume the inference to be, may have seen it a few hours previously. In any event, we say that the evidence of an opportunity of a person having an adverse interest to destroy a will does not alone rebut the presumption of revocation.

We must then determine the quality of the evidence adduced to determine its sufficiency. The decedent was a dominant woman. She appeared to be fairly methodical in her methods. She took charge of the business for the family. The evidence is undisputed that the will was deposited in a safe-deposit box to which she alone had access. On the only occasion when there is evidence that the will may have been out of the safe-deposit box, decedent was nervous and disturbed until she returned it. To find against the presumption, we must determine that she removed the will from the safe-deposit box for some purpose and had it in her home at the time of her death.

To rebut the presumption of revocation, the proponents rely on declarations of the testator. We will analyze this testimony. Stewart delivered the will to the decedent on October 8, 1958. She said that she was going to put it in her safe-deposit box, and he never saw it again or visited with her about it.

Williams testified that the decedent told him in August or September of 1959 that she was leaving him the Missouri farm and some money by will. On another occa-

sion, she told him that if anything ever happened to her, he was to come to Beatrice and get her keys, and there would be instructions in her trunk as to what to do. He further stated that when he arrived at decedent's home after her death, Doctor Tipton pulled out the keys and said, " 'All her papers are in that trunk and here is the key to it,' " but that they did not open the trunk.

Guy Pheasant, treasurer of the Church of Christ, testified that during 1958 decedent told him she was going to make a will and leave some money to the church, and she wanted to know how to do so. At a later date, she told him that she had completed her will and fixed it the way she wished.

Mrs. Fannie Pringle, supervisor at the state home where the Tiptons had been employed, and a member of decedent's church, testified that decedent mentioned many times about having made a will, and that she had fixed up her affairs. The Pringles usually took the Tiptons to church, and the last time they did so, a few days before the decedent's death, she thought that perhaps the Tiptons had had a little difficulty, and decedent said: " 'Mrs. Pringle, no, I won't take him on a long trip; he wants to take a long trip and I don't just feel like making them and I don't want to do it. You know he is taken care of at my death and,' she says 'I think that is enough, don't you?' " Mrs. Pringle also testified that shortly after decedent had made funeral arrangements for herself and Doctor Tipton, which was on September 29, 1958, decedent told her that she was pleased with the way Williams managed her farm and that he was to get it at her death.

Edwin T. Pringle testified that within a few months of her death, decedent was pleased with the fact that she had provided for Doctor Tipton's financial status after she was dead.

Reverend George Williams, minister of the Church of Christ, testified: "Mrs. Tipton was a very strong woman; you might say she was a dominant woman, I

suspect would be a better description; she was very much concerned with Dr. Tipton; she looked after him; she felt that she was responsible for him * * *. I went up there one afternoon it seems to me, as I remember, about two months before she passed away, and Dr. Tipton wasn't well. He was upstairs and she was downstairs, and we talked for a few minutes, and she said that Dr. Tipton wasn't well and that she was concerned about him, and so she said she had made provision so, if anything happened to her, that he would be taken care of and he wouldn't want for anything." He further testified that the church had been attempting to purchase a lot adjoining the church and he visited with her about it and the fact that the owners would not sell to the church, and then said: "* * * and I had talked to Sister Tipton one afternoon about it; and she said at that time that she had made plans so that she would—Let me see just how she did put it; I want to say it right. She said she had made provision to leave the church some money; she didn't say how much; but she said, since those people didn't know her and know she was a member of the church, that she would endeavor to purchase that lot for the church."

Doctor Tipton, who was called by the proponents, testified as follows: "A I knew Mr. Stewart made the will. I was right there. Q Was Mr. Watson up at your home last Easter before your wife died? A He was. Q Did you hear Mr. Watson there in your home and your wife talking and did you visit together on that day? A We sure did. Q And on that occasion didn't Mr. Watson tell your wife he would take care of you if she died, that he would see you were taken care of? A And she said that and she wanted him. But at the Paddock Hotel on Saturday there, while he was eating the dinner, they had their individual talk which I didn't hear. I wasn't any more concerned than you are. But she did say in the last she says, 'I want you to take care of Ernest.' Q And didn't she tell him right when you were there too

that she was going to see you were well taken care of? A She did. Q And didn't you tell him in the same conversation she had made a will and you were well taken care of? A I knew all about that. She didn't have to tell me. Q And didn't she tell him in that conversation that she had made a will? A Yes. Q And that you were well taken care of in the will? A That is what it says."

This summarizes the testimony on declarations. Additionally, the testimony is generally directed to the fact that the decedent was concerned about the future of Doctor Tipton, who was apparently incompetent; that she was satisfied with and grateful to her tenant, Williams; and was interested in her church and regular in attendance.

The only evidence whatever that the will existed subsequent to the day of its execution is based upon the declarations of the testator; declarations that she had a will or that she had made provision for certain beneficiaries. No one ever saw the will, and no one had access to it other than the decedent. Declarations of a testator may be received in evidence to prove the existence of a will. However, it should be remembered that the declarations at best are merely narrative of a past event and suggestive of reasons for the action taken; that wills are ambulatory; and that ideas and intentions change. The following quotation from Clark v. Turner, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433, found at page 302, is still pertinent: "As said by the supreme court of the United States in Lea v. Polk County Copper Co., 21 How., 493: 'Courts of justice lend a very unwilling ear to statements of what dead men have said.' Such evidence is always considered dangerous, and subject to the closest scrutiny."

Is the evidence sufficient to rebut the presumption of revocation? The trial court held that it was, and proponents suggest that the finding of the court has the effect of a verdict of a jury and will not be disturbed

unless clearly wrong. Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797. Before there can ever be a jury question, the trial court must determine that evidence of sufficient quality to rebut the presumption has been adduced. Has that been done in the instant case? We determine that it has not. We do not mean to infer that the proof required must establish with absolute certainty that the will was not revoked, but we do say that a degree of proof is required which produces conviction in an unprejudiced mind.

To find for the proponents, it is necessary to indulge in several speculations, the most important of which are that the decedent kept her will at home, locked in the trunk, and that someone other than the decedent surreptitiously removed and destroyed it. The proponents' evidence does more to rebut the inference that the decedent had the will at home than to sustain it. There is not even a scintilla of evidence to infer a motive for removing the will from the safe-deposit box, unless it would be to change or revoke it. Decedent was a methodical person, and, the evidence would suggest, kept her valuable papers in her safe-deposit box. The inventory of her estate lists many bonds and certificates of deposit which were apparently kept in the safe-deposit box. In any event, the will was traced to her safe-deposit box, and the decedent was uneasy on the one occasion when it may have been temporarily removed. We can assume that if decedent had been fully satisfied with her will, it would have remained in the safe-deposit box. The very fact that it was not there, when she alone had access to the safe-deposit box, suggests revocation in the absence of some reason for its removal. If we are to permit indulgence in speculation, what might we conclude from the fact that just a few days before her death she asked Watson, her closest blood relative, to take care of Doctor Tipton? He was a minor beneficiary in her will compared to Williams, her third husband's nephew. Stewart testified that an

original copy of the postnuptial contract was attached to the will. An original copy of that contract was in the safe-deposit box. Stewart was not positive the one in the trunk was an original copy. Reverend Williams testified decedent was going to endeavor to purchase a lot the church wanted. Could her discussion with Reverend Williams have made her question the disposition of the residue of her estate which was left to two other Beatrice churches with whom she had no ties? We can only answer that the very purpose of the statute of wills is to eliminate the uncertainties inherent in reliance on parol evidence. Consequently, courts have always required the evidence to admit a lost will, last in the hands of the testator, to be direct, clear, and convincing. We find the evidence in this case to fall short of that criterion.

A brief amicus curiae was filed by Stewart, the executor, questioning his exclusion as an attorney in these proceedings after he had testified. We said in McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543: "It is against sound principles of professional ethics for one who knows that he is to be called as a witness in a case to accept the retainer as lawyer in that case. And where, after retainer, it is apparent to an attorney that his testimony will be material in behalf of his client, it is his duty to confer with his client and associate counsel at once and finally determine whether he will become a witness. If it is decided that he shall be a witness, he should immediately sever his connection with the litigation." We hold that this same principle applies even though the attorney is representing himself in a representative capacity, such as executor. The action of the trial court in refusing to permit the executor to represent himself as an attorney, where it was apparent that he would be a witness, was in all respects proper.

For the reasons given above, the judgment of the district court admitting the lost will to probate is reversed and the cause is remanded with directions to dismiss

the petition for probate of the will, as well as the appeal from the granting of letters of administration, and to certify the case back to the county court for the completion of the administration proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

RUTH HELEN KEHR, APPELLANT, V. NORRIS W. KEHR, APPELLEE.
114 N. W. 2d 26

Filed March 23, 1962. No. 35116.

1. **Appeal and Error.** A party on appeal may not properly assign the admission of evidence as error when no objection was made thereto in the trial.
2. ———. A trial court may properly direct the inclusion of all matters in a bill of exceptions which it had before it and which it considered, although such matters were not formally received.
3. **Divorce.** In a suit for a divorce from bed and board the court has power to adjust the property rights of the parties when the evidence and circumstances require it.
4. **Abatement and Revival.** It is the general rule that the commencement of a second suit for the same cause of action cannot be pleaded in abatement of the first suit.
5. ———. But when the second suit embraces more as to the subject matter than the first, the court may properly abate the first action and permit the parties to proceed in the second where complete relief can be granted, and thus avoid a multiplicity of suits.

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

Person & Dier, for appellant.

Anderson, Storms & Anderson, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from a judgment of the district court

for Gosper County sustaining a plea in abatement and dismissing plaintiff's petition for a partition of certain lands held by the parties in joint tenancy.

Plaintiff and defendant were wife and husband during the times pertinent to this appeal. They were the owners of 400 acres of farm land in Gosper County which they owned in joint tenancy. On December 9, 1960, plaintiff filed an action to secure a partition of these lands. On the same day, plaintiff filed an action to obtain an absolute divorce, child custody, child support, and a determination of property rights. Defendant thereupon filed a plea in abatement in the partition case on the ground that the relief sought in that case could be determined in the divorce action and that the partition action should be abated to avoid a multiplicity of suits. Before hearing on the plea in abatement, plaintiff dismissed her divorce suit without prejudice. The objections of defendant to the dismissal of the divorce action were overruled by the trial court. Defendant's plea in abatement was thereupon overruled.

On April 27, 1961, plaintiff filed a suit in the district court for Gosper County to obtain a divorce from bed and board. The defendant thereupon filed a second plea in abatement in the partition suit which the trial court sustained. The plaintiff has appealed from the order of the trial court dismissing the partition suit.

The plaintiff complains that the trial court admitted the files in the divorce action and in the suit for divorce from bed and board without a proper foundation being laid therefor. It is a sufficient answer to this assignment of error for us to say that no objection was made to the offer of the files in evidence. Plaintiff may not complain of the admission of evidence to which no objection was made.

Plaintiff contends that the files in the divorce and separate maintenance actions were not formally received in evidence by the trial court and that it is error

for that court to direct their inclusion in the bill of exceptions.

It is the rule in this state that the trial court may properly direct the inclusion of all matters in a bill of exceptions which it had before it and which it considered in determining the case. That the files in question were offered and considered by the trial court, although not formally received, is established by the record. Under such circumstances the trial court may properly order their inclusion in the bill of exceptions. State ex rel. Bankers Reserve Life Assn. v. Scott, 59 Neb. 499, 81 N. W. 305; State ex rel. Cobb v. Fawcett, 64 Neb. 496, 90 N. W. 250; Peterson v. Skiles, *ante* p. 223, 113 N. W. 2d 105.

Whether or not the district court has jurisdiction in a suit for divorce from bed and board to determine the property rights of the parties appears pertinent to a decision of the present appeal. The right to a divorce from bed and board is statutory. The applicable statute appears to make no distinction between a suit for absolute divorce and one from bed and board. § 42-318, R. R. S. 1943. It contemplates a divorce from bed and board as being a complete and permanent separation of the parties without a legal dissolution of the marriage. Scholz v. Scholz, 172 Neb. 184, 109 N. W. 2d 156. A division of property and an allowance of alimony in a divorce from bed and board is as broad in scope as in an absolute divorce. The extent of the use of the power granted rests within the sound discretion of the trial court. It is clearly within the power of the district court to adjust all the property rights of a husband and wife in a proceeding for a divorce from bed and board when the evidence and circumstances require it.

Plaintiff contends that the filing of a plea in abatement to avoid a multiplicity of suits should be directed at the second suit filed and not to the first one, as in the present case. It is a general rule that the commencement of another suit for the same cause of action can-

not be pleaded in abatement of the original suit. State ex rel. Chicago, B. & Q. R.R. Co. v. North Lincoln St. Ry. Co., 34 Neb. 634, 52 N. W. 369. See, also, 1 Am. Jur., Abatement and Revival, § 21, p. 31.

There is, however, a recognized exception to the general rule where the subsequent suit embraces more as to the subject matter than the first suit as in the case at bar. The suit for divorce from bed and board contains issues in addition to its prayer for a division of the property. In such a case the court may with propriety dismiss the prior suit and permit the plaintiff to proceed in the second suit. Dietrich v. Hutchinson, 81 Vt. 160, 69 A. 661; 1 C. J. S., Abatement and Revival, § 18, p. 52.

In the present case the parties in the two actions are identical. The subject matter of the first action is within the scope of the relief sought in the second. Since the scope of the subject matter of the second action is broader than the first, it is proper to sustain the plea in abatement in the first action and permit the plaintiff to proceed in the second where complete relief can be granted, and thus avoid a multiplicity of suits.

Under the foregoing rules the trial court did not err in sustaining the plea in abatement directed to plaintiff's first suit. We think it would have been more expeditious, however, for the trial court to have directed a consolidation of the two cases for the purpose of trial and decision. There being no prejudicial error in the record, the judgment of the trial court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE DEPENDENCY OF PAMELA RAE GROSS AND PATRICIA SUE GROSS, MINORS.
STATE OF NEBRASKA ET AL., APPELLEES, V. RICHARD H. GROSS ET AL., APPELLANTS.
114 N. W. 2d 16

Filed March 23, 1962. No. 35132.

1. **Parent and Child: Appeal and Error.** 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 neglected or dependent is disposed of in this court by trial de novo upon the record.
2. **Parent and Child.** A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child.
3. ———. The right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement.
4. **Parent and Child: Infants.** A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.
5. ———: ———. Jurisdiction in a dependency proceeding attaches only where proceedings are brought, not in behalf of any person, but only where children are found delinquent or to have been so circumstanced, neglected, or imposed upon as to require the state to take over their custody or to act otherwise for their protection.

APPEAL from the district court for Holt County: WILLIAM C. SMITH, JR., JUDGE. *Reversed and dismissed.*

William G. Whitford, for appellants.

Clarence A. H. Meyer, Attorney General, *Melvin K. Kammerlohr,* and *William W. Griffin,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an action brought under the juvenile laws of this state in the district court for Holt County, Nebraska, to have Pamela Rae Gross and Patricia Sue Gross,

minors, declared to be dependent and neglected children. They are twins and hereafter will be referred to as such.

The petition filed by the county attorney of Holt County, on May 22, 1961, first alleges that these twins were and had been in the care, custody, and control of Eugene and Mary Zimmerman, husband and wife, residing at Ewing, Nebraska, where they were placed by their father on December 5, 1960. It then alleges that they are dependent and neglected children in that they have no proper parental care or guidance. It states they were abandoned and relinquished by their natural parents, who have failed and neglected to furnish or provide a suitable home, care, supervision, and maintenance for said children. It closes by alleging both of the natural parents are unfit to have the care, custody, and control of said children.

At the trial Richard H. Gross and Dorothy Gross, husband and wife, and parents of the two minor children, appeared and resisted the petition. They were designated as protestants and at times will be so designated herein.

The court's decision was announced immediately at the close of the evidence. It found that the twins were neglected children in much the same language as the petition; that since December 5, 1960, they resided in Holt County, Nebraska, in the care, custody, and control of the Zimmermans; and that they had been placed there by their father on that date. It then entered judgment making them wards of the court and taking them from the parents and placing them again in the care, custody, and control of the Zimmermans.

The protestants' motion for a new trial having been overruled they have appealed to this court.

Protestants make 16 assignments of error but in view of our discussion the only ones to be discussed in this opinion are that the findings and judgment of the trial court are contrary to the law and the evidence.

We sustain these assignments.

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 neglected or dependent is disposed of in this court by trial de novo upon the record. Krell v. Sanders, 168 Neb. 458, 96 N. W. 2d 218; State v. Best, *ante* p. 483, 113 N. W. 2d 650. It is therefore necessary to discuss the evidence as disclosed by the record.

The twins were born June 8, 1959, and their parents are the protestants Richard H. Gross and Dorothy Gross. Richard was 17 and Dorothy was 16 years of age when they were married. They have five children whose names and ages at the time of trial were Douglas, age 9, Richard, age 6, Letha, age 3, and the twins in this litigation, age 2. The protestants lived most of their married life at either Norfolk, Nebraska, or Yankton, South Dakota. Their married life had not always been harmonious. They had separated three times and Dorothy had twice sued for divorce but each time there was a reconciliation. Nothing was shown in regard to the first two separations. Prior to and at the birth of the twins, Dorothy was in very poor health necessitating extended treatment in the hospital. Her sickness continued thereafter and she was subjected to a serious operation which, according to her testimony, occurred 9 months later. She had trouble with her husband after the twins were born and while they were living at Norfolk. Dorothy's mother said her sickness had much to do with this last separation. Following a nervous breakdown Dorothy took the five children and went back to Yankton where they had previously lived, but the three eldest were thereafter brought back to their father. She worked in the state hospital there as she did before her marriage. While in Yankton, Dorothy brought the second divorce action.

In December 1960, Dorothy Gross became ill and telephoned, saying she could not take care of the twins. Richard went to Yankton and brought them back to

Norfolk. He took them to his parents' home. They were there only a day. Arlene Meinke, a sister of Richard, had the older girl and Richard's mother had the two boys and neither could or would take care of more. The sister decided the twins simply had to go somewhere and had learned that the Zimmermans wanted children. She recommended to the brother that they were good people and would make a fine home for the twins. Richard telephoned the Zimmermans. They came and, after discussion that day, took the twins from Norfolk. The grandmother, sister and her husband, and Richard were all present. The grandmother and sister reiterated they would not keep the twins and something must be done that day. There is some dispute as to what was said between the father and the Zimmermans. The father contends he told them they could adopt the twins if the protestants were divorced. Mary Zimmerman says he agreed to the adoption without question. In any event it is not disputed that Dorothy Gross never gave her consent to adoption and was never then consulted about the matter by anyone.

Richard and Dorothy Gross became reconciled shortly thereafter. In February or early March of 1961, they established a home at Madison, Nebraska. Richard is employed there in a filling station and has worked regularly since the fall of 1960. His regular weekly wage is $65, and he receives some overtime in addition. Their three older children are with them. The evidence is wholly uncontradicted concerning the present home. Since their reconciliation there seems to be no discord in the home and the parents and children seem fond of one another. The home is clean, and the three children with them are properly dressed. They regularly attend school and Sunday school. The childrens' school work seems satisfactory. The surroundings are in all respects decent and proper. The authorities in Madison County have in no way complained of their home. Neither is any immoral conduct shown on behalf of the parents.

Meanwhile the twins have been with the Zimmermans in Ewing, Nebraska, and the evidence shows they have been in all respects adequately and properly cared for. The protestants do not dispute it. The witnesses for the State emphasize it. The trial court believed it or it would not have again placed the twins with the Zimmermans, and this court accepts that view.

After the protestants had established their home at Madison, they went to the Zimmerman home and despite some difference in the testimony, the preponderance of the evidence clearly establishes that their purpose was to get the twins. Richard Gross made three trips. On the first trip he found the Zimmermans were not at home. The second time, in April, both protestants with the grandmother were at the Zimmerman home, and the father and mother were there twice thereafter. The Grosses testified they wanted the children and that Dorothy was in tears and begged for them. Mary Zimmerman contends that Dorothy Gross never said, "Give me my children today." On at least one occasion and perhaps two occasions the Zimmermans refused to let them see the children. On the last call the Zimmermans advised them to see their lawyer.

Dorothy Gross, on January 31, 1961, had already seen Daniel Jewell, the attorney for the Zimmermans. He endeavored to have her sign a consent for his clients to adopt the twins, but she refused so to do. On March 9, 1961, the attorney informed his clients of the refusal. He suggested the Zimmermans consult the county attorney of Holt County whom he advised by telephone of their coming. Jewell in turn discussed the matter with the county attorney and was present at the trial.

The trial court held that the twins were neglected children within the purview of section 43-201, R. R. S. 1943. Its findings were restricted in their reference to the parents only and in no way made reference to what was being done for the twins by the Zimmermans who had them in custody. It appears plainly that at that

time they were carefully nurtured, cared for, and loved by them. Neither had their parents abandoned them at the time the petition was filed but rather they were trying to regain their custody. Without contradiction the twins were returned to Richard by Dorothy Gross because of her illness which rendered her utterly unable to care for them. Richard was then estranged from his wife. The twins were infants of tender age. His sister and mother advised him in the presence of the Zimmermans that they couldn't and wouldn't care for the twins and something had to be done immediately. He appears to have been working and his earnings seem badly needed. Mary Zimmerman said the Grosses were desperate. The same day he allowed the Zimmermans to take the twins in custody.

In Norval v. Zinsmaster, 57 Neb. 158, 77 N. W. 373, 73 Am. S. R. 500, this court said: "The right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement."

Even if the conversation between Richard and the Zimmermans could be construed as a consent for the adoption, it cannot affect the rights of the wife Dorothy Gross. She was never consulted, or consented to their adoption. She was ill when they were taken and declined to consent to adoption in January 1961. She and Richard shortly thereafter tried to regain their custody.

In Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151, this court held: "A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child."

To the same effect, in Lung v. Frandsen, 155 Neb. 255, 51 N. W. 2d 623, it was said: "After Mrs. Lung returned from the hospital her condition improved and the general condition of the home improved. This is also true of the house they now occupy in Kansas which

is a 7-room home with both water and electricity available. * * * There is nothing in the record that disqualifies either of them from having and raising their own children, except the fact that they are in a low income bracket and consequently have not always had available all the facilities we commonly associate with a modern home."

The trial court's finding with respect to lack of parental care is couched in both past and present tense. So far as the present is concerned they were not in the care of the parents and it is conceded by all that they were having the best of care. Also the Gross home at Madison is a proper home and the children remaining with them are properly cared for.

It is quite apparent that the State adopted the theory that the present condition of the home of the twins' parents was immaterial. On the trial the county attorney stated that though the home of the parents was kept clean and the children well fed and not neglected when the trial occurred, it would make little difference because the proper inquiry was what the condition was prior to the Zimmermans' taking them. It is quite clear the court also adopted this theory. There is no satisfactory evidence that the Grosses had previously failed or neglected to provide proper subsistence, or the necessary care for their health. The Zimmermans' physician testified that one of the twins had scars on her buttocks and the other one had a scar on her foot. They were healed, however, when he saw them, though one not completely. The report given to him by the doctor from Yankton indicated that they had been hospitalized on four occasions for either streptococcal tonsilitis, respiratory infection, or diarrhea. There is no showing that it was caused by neglect. They were then under the care of a physician. Considering the serious illness of the mother there is little wonder that the twins were not well. Parents may not be deprived of their children because of sickness under such circumstances without

a showing that it was caused by neglect.

The State in its brief asserts that the parents made no attempt to furnish support for the twins while at Ewing. No evidence is introduced in this regard but it is quite evident from the record that not only was none asked, but that none was wanted. The Zimmermans did not want the parents to have any responsibility toward the children. They wanted to have the exclusive care, custody, and parental responsibility over them by adoption. They were not willing for the parents to see the children.

This is not the case usually considered in juvenile court. The twins did not want for anything by way of subsistence, care, nurture, or love. It is plainly an attempt to use the juvenile courts to determine the rights to their custody between two families. The Zimmermans' counsel telephoned to the county attorney and conferred with him, and sent his clients to him for that purpose. We are not cited to cases in this jurisdiction where the juvenile courts were so employed. The problem has however presented itself in other jurisdictions.

In Orr v. State, 70 Ind. App. 242, 123 N. E. 470, the court, in a similar contest between a mother and grandparents who had the actual custody of the child, stated that a child is not a "dependent child," within the meaning of Burns' Ann. St. 1914, section 1642, although both parents have left her, where a grandparent has always sheltered, clothed, and nourished her, and desired to do so in the future.

In a similar situation the Supreme Court of Colorado in Carrera v. Kelley, 131 Colo. 421, 283 P. 2d 162, said that jurisdiction in a dependency proceeding attaches only where proceedings are brought, not in behalf of any person, but only where children are found delinquent or to have been so circumstanced, neglected or imposed upon as to require state to take over their custody or to act otherwise for their protection.

In Hull v. Hull (Tex. Civ. App.), 332 S. W. 2d 758,

the following rules were laid down in such cases: "A child must in fact be dependent and neglected at time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future. Vernon's Ann. Civ. St. arts. 46a, § 6, 2332."

A child may not be declared dependent and neglected for the sole purpose of facilitating adoption proceedings, or to better the position of anyone in a dispute over custody of the child. Legislation authorizing proceedings to declare a child neglected and dependent is applicable only to emergency situations where the child's needs must be met. To the same effect, see In re Masters, 165 Ohio St. 503, 137 N. E. 2d 752, the Ohio statute being much like our own. See, also, Fritts v. Krugh, 354 Mich. 97, 92 N. W. 2d 604.

It is apparent that the twins in this action were not neglected children within the purview of the juvenile statute cited herein. And that statute could not be used to determine their custody between their parents and the Zimmermans in such a proceeding.

It follows that the judgment of the trial court must be reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND DISMISSED.

SIMMONS, C. J., participating on briefs.

HELEN V. JABLONSKI, APPELLANT AND CROSS-APPELLEE, V. EDWARD J. JABLONSKI, APPELLEE AND CROSS-APPELLANT.
114 N. W. 2d 1

Filed March 23, 1962. No. 35133.

1. **Divorce.** In a divorce action, regardless of who holds the legal title, where the court has jurisdiction of the parties it has the power and authority to adjust all of their respective property interests and rights.
2. ———. The court in determining the amount of alimony or

in making a division of the 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.

3. ———. Under section 25-1925, R. R. S. 1943, a divorce action is triable de novo upon the issues presented by the appeal.

APPEAL from the district court for Hall County: WILLIAM F. MANASIL, JUDGE. *Affirmed as modified.*

Buechler & Huber, for appellant.

John F. McCarthy, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action for divorce, instituted in the district court for Hall County by Helen V. Jablonski, plaintiff and appellant, hereinafter referred to as plaintiff, against Edward J. Jablonski, defendant and appellee, hereinafter referred to as defendant. A decree of divorce was duly granted to the plaintiff. The decree also adjudicated the rights of the parties with regard to a division of property. Both parties filed motions for a new trial. These were overruled. The plaintiff appeals and the defendant cross-appeals.

The parties were married in 1922. Two children, who are now adults, were born to the marriage. During the marriage the plaintiff and the defendant separated on several occasions. The next to the last separation culminated in an agreement, the effect of which was to transfer the real property of the parties to the plaintiff and to give the plaintiff the possession and control of the bank and building and loan accounts of the parties. This agreement is dated May 23, 1959. The parties separated June 21, 1960, and thereafter lived apart. The present action was filed March 28, 1961.

The only issue raised in the appeal is the division of the property. It is apparent that a divorce was in order and that it was properly granted to the plaintiff.

At the time of the trial, plaintiff was 59 years of age, the defendant 62. The plaintiff worked for 2 years near the end of the World War II at the Grand Island Ordnance Plant. This was her only away-from-home employment until after the separation. There is no question but that she is a frugal, hard-working woman who supplemented the family income by taking in roomers and in the early days of the marriage by taking in washing. The defendant had been steadily employed by the Union Pacific Railroad Company from 1927 to the time of the separation. He was also hard working and industrious and spent his unemployed hours on the properties acquired by the parties. Clearly, the accumulation of property by the parties during the marriage was the result of their joint efforts.

There is no evidence that the plaintiff has any problem of health or is unable to hold employment within her capabilities. She was employed in a cafeteria at the time of the trial. Her testimony was that she spent $13 for medical attention after the separation and that this included some minor surgery. After the separation defendant, who had been employed at Cheyenne, Wyoming, and was commuting back and forth from Grand Island over the weekend, gave up that employment. He returned to Grand Island for the same employer but as an extra or temporary employee. The trial court determined at a pretrial conference that he would soon be eligible for a pension of $135 per month. Plaintiff complains of defendant's action in leaving steady employment at Cheyenne to return to Grand Island. Defendant's physician testified that defendant has moderately severe high blood pressure and an arteriosclerotic heart disease, with irregularity of heart beat that interferes with the normal functions of his heart. As we view

the evidence, plaintiff's health is much better than that of the defendant.

Plaintiff stresses the fact that in 1922 she brought $500 cash and five cows, which were later sold for $300, into the marriage. Defendant at that time was heavily in debt and soon thereafter took bankruptcy. Early in 1923, the parties moved to Grand Island. They then, through their joint efforts, began the accumulation of the property they now possess. At the present time, they own a modern one and one-half story home containing eight rooms, and a modern two-story frame house containing three apartments and a double garage, all under the same roof. The property is located in an area of Grand Island zoned for business. The plaintiff valued the properties at $35,000. An exhibit produced by the defendant placed the value on them at $40,000. Although the property was in the plaintiff's name by the agreement referred to, the defendant had possession of it and collected the rents after the separation. It was stipulated that the gross amount collected was $1,690. After paying certain expenses, the defendant had a net rental income of $1,481.42.

At the time of trial, the plaintiff had possession of the following personal property:

Home Federal Savings and Loan Association account	$7,400.58
First National Bank account	3,308.47
Equitable Building and Loan Association account	1,770.55
Equitable Building and Loan Association account	1,748.62
A cashier's check, for	1,100.00

The defendant at the time of the trial had a bank account, which is not further identified, in the amount of $291.

The parties also had household goods which were not described or valued. The defendant had a 1950 automobile, and each of the parties had some cash on hand which is not further considered herein.

The plaintiff's principal contention is that when the defendant conveyed the title to the real property to her, in accordance with the agreement, that this constituted a gift to her of all of his interest in the real estate, and that it became the plaintiff's sole property. Ignoring the obvious purpose of the agreement, we suggest that the property was accumulated and acquired during the marriage through the joint efforts of the parties, and that regardless of who holds the legal title, in a divorce action it is subject to the power of the court to adjust the respective property interests of the parties. Francil v. Francil, 153 Neb. 243, 44 N. W. 2d 315.

The court in determining the amount of alimony or in making a division of the 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. Abel v. Abel, 168 Neb. 488, 96 N. W. 2d 276.

We point out that this rule provides no mathematical formula by which the property shall be divided or by which an alimony award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case. In the instant case, the plaintiff was given more than one-half of the property but still saw fit to appeal. This case is here for trial de novo upon the issues presented by the appeal. § 25-1925, R. R. S. 1943. As we view this record, we can find no reason why this case should be an exception to the rule we have generally applied in these cases.

The trial court found that there was $672.30 due in taxes on the real estate, and directed that this be paid by the plaintiff from the funds in her hands. The court then set off to the plaintiff the sum of $6,550, represent-

ing funds contributed by her or inherited during the marriage. It then allowed her one-half of the net rents, amounting to $740.71, as well as $1,800 in living expenses during the period of the separation. In this respect, it should be noted that the court made no adjustments of the withdrawals made by the plaintiff from the savings accounts of the parties nor considered her earnings subsequent to the separation. The balance of the cash on hand was then divided equally between the parties. With reference to the real property, the court determined its value to be $35,000, and gave the plaintiff a 30-day option to purchase the defendant's interest in the real estate by paying the defendant $17,500. If she did not exercise the option to purchase, the property was to be sold at public auction and the proceeds were to be divided equally between the parties.

Under the circumstances of this case, we conclude that, so far as possible, there should be an equal division of property between the parties.

At the time of the separation, the balance in the account with the Home Federal Savings and Loan Association was $9,606.69, and thereafter $193.89 was added to the account by accrued interest, so that during the separation $2,400 was withdrawn from the account by the plaintiff. Of this amount, $1,100 went into the cashier's check. The Equitable Building and Loan Association account, of $1,770.55, had a balance at the time of the separation of $2,563.42. Thereafter, interest credits were added of $82.13, so that $875 was withdrawn from that account by the plaintiff during the separation.

Defendant during the marriage inherited $4,000 in bonds from his father's estate. He testified that these were turned over to his wife, cashed by her, and put into their accounts. This is denied by the plaintiff. Her testimony on all of the property is confused and unsatisfactory. The fact that the defendant over the years apparently let the plaintiff handle all financial matters tends to lend substance to his testimony. Plaintiff in-

herited $1,000 from the estate of her father and $4,827.55 from the estate of her mother. In adjusting these accounts, we set off the difference of $1,827.55 to the plaintiff as her separate funds. We have purposely ignored the contribution made by the plaintiff at the inception of the marital relationship, $75 of which may have been used as a down payment on their first property.

On one occasion the parties borrowed $6,000, and each took $3,000. As near as we can infer from the evidence, this was at a time when the defendant had had an accident and needed his share of the money for that purpose. The balance of $1,748.62 in an account with the Equitable Building and Loan Association is apparently what remains of the plaintiff's $3,000. We feel that this account should be set off to the plaintiff as her separate property, and it will be so handled.

Considering first the real property of the parties, we accept the trial court's determination that it should be divided equally between the parties and that the value should be fixed at $35,000 for the purposes of adjustment between the parties. We therefore determine that each of the parties shall have an undivided one-half interest in said real property and modify the findings of the trial court as set out hereafter. The plaintiff shall have the right for 30 days from the issuance of mandate herein to purchase defendant's interest in said real property for $17,500. If plaintiff fails to exercise the option within that period, the defendant shall have the right for 30 days thereafter to purchase the plaintiff's interest for $17,500. If neither party exercises the option to purchase, unless the parties agree otherwise, the real property shall be sold at public auction and the proceeds divided equally between the parties.

For the purposes of a division of the personal property of the parties, we determine their cash assets to be as follows:

Home Federal Savings and Loan Association	$7,400.58
First National Bank	3,308.47

Equitable Building and Loan Association	1,770.55
Equitable Building and Loan Association	1,748.62
Cashier's check	1,100.00
Defendant's bank balance	291.00
Net rentals collected during separation	1,481.42
Total	$17,100.64

There were taxes due at the time of the trial of $672.30 which the plaintiff was directed to pay. These should be paid by the plaintiff if that has not already been done. If there is interest due on this item, it should be charged to the plaintiff. Deducting this amount leaves a balance of $16,428.34.

We have previously suggested that $1,827.55, and the Equitable Building and Loan Association account of $1,748.62, should be set off to the plaintiff as her sole and separate property. We make no allowance for the support of the plaintiff after the separation above the withdrawals made by her from the accounts of the parties. This leaves a balance as of the time of the trial, to be divided equally between the parties, of $12,852.17, with $6,426.08 to the defendant and $6,426.09 to the plaintiff. Except for the rentals and defendant's personal bank account, this property is under the control of the plaintiff. Deducting one-half of those two items, $1,481.42 and $291, or $886.21, from $6,426.08, there is due to the defendant the sum of $5,539.87, which amount the plaintiff is directed to pay over to him.

We affirm the action of the trial court in granting all household goods to the plaintiff, the automobile to the defendant, and permitting each party to retain any and all property now in his or her possession other than above stated.

The trial court entered a supplementary decree allowing the plaintiff $150 per month support, commencing July 21, 1961, pending the appeal herein, and providing as to the future division of the rents collected by the defendant. As we view this case, the defendant

should not be required to contribute to plaintiff's support pending this appeal, and therefore vacate said allowance. The supplemental decree is affirmed in all other particulars. We also determine that any interest accumulations subsequent to the trial in district court shall be the plaintiff's property. We further direct that the costs of this appeal shall be taxed to the plaintiff.

Plaintiff's withdrawals indicated she had advanced $300 to her attorneys. The trial court charged the defendant with the payment of an additional fee of $500. We affirm this allowance, but do not feel that plaintiff's attorneys are entitled to any further allowance in this court.

For the reasons set forth above, the judgment of the trial court is affirmed as modified herein.

AFFIRMED AS MODIFIED.

SIMMONS, C. J., participating on briefs.

ALBERT GRABER, APPELLANT, V. O. L. SCHEER ET AL., APPELLEES.
114 N. W. 2d 13

Filed March 23, 1962. No. 35159.

1. **Workmen's Compensation: Appeal and Error.** An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record.
2. **Workmen's Compensation.** The burden of proof is on the plaintiff to establish that his injury was the result of an accident arising out of and in the course of his employment.
3. ———. An injury arises out of an employment when there is a reasonable causal connection between the conditions under which the work is required to be performed and the injury received.
4. ———. An award of compensation in a workmen's compensation case may not be based upon possibilities, probabilities, or speculative evidence.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Hutton & Hutton, for appellant.

Bernard Ptak, Frederick M. Deutsch, and *William I. Hagen*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. Albert Graber, the appellant, was the plaintiff in the lower court. O. L. Scheer and Federated Insurance Company, the appellees, were defendants. For convenience, O. L. Scheer will be referred to as the defendant and Federated Insurance Company as the insurance company.

The plaintiff recovered an award in the compensation court. The defendant and the insurance company each waived rehearing before the full compensation court and appealed to the district court. Before trial, the separate appeals were consolidated and thereafter proceeded as one action.

At the close of the plaintiff's evidence the district court sustained separate motions by the defendant and the insurance company to dismiss the action. The plaintiff's motion for new trial was overruled and he has appealed. The assignments of error all relate to the action of the trial court in dismissing the action at the close of the plaintiff's evidence.

An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. Breland v. Ceco Steel Products Corp., *ante* p. 354, 113 N. W. 2d 528. Thus, the question presented in this case is whether the evidence of the plaintiff is sufficient to establish a right to compensation under the act.

The evidence shows that the defendant and his wife own property in Norfolk, Nebraska. On and prior to May 25, 1960, the defendant was engaged in construct-

ing an apartment house upon this property. The defendant did not enter into a contract with a general contractor for the construction of the building but dealt directly with subcontractors and other workmen for the construction of the building.

During April and May 1960, the plaintiff was employed by the defendant as a carpenter's helper to work on the building. On May 24, 1960, the plaintiff spent the day nailing tar paper to the roof. On the morning of May 25, 1960, the plaintiff worked at applying plastic roofing cement over the tar paper. The roofing cement was spread with a trowel without being heated. Another layer of tar paper was then laid over the roofing cement. The plaintiff was on his hands and knees while doing this work.

There is no evidence as to the composition of the roofing cement other than it did not contain coal tar. There is no direct evidence that the particular roofing cement which was used contained any ingredient that would produce irritation or inflammation of the skin.

The plaintiff testified that after working with the roofing cement there was some of it on his arms, legs, and clothing; that at about noon, after he had been working for 3½ or 4 hours, his arms and legs began to burn; that when he wiped the back of his neck it began to burn; and that he told Mr. Taylor and the carpenter foreman, " 'I don't think I can stand this any longer. That's burning me so bad I can't stand it.' " He further testified that he went to his home, attempted to wash the roofing cement from his arms, legs, and the back of his neck; and that he applied vaseline to the skin. The plaintiff did not return to work thereafter.

Bert Taylor testified that the plaintiff made no statement to him on the morning of May 25, 1960, about being burned or feeling burned or anything of that nature, and that he did not know of there being anything wrong with the plaintiff on that day.

There is an issue as to self-medication in this case.

The plaintiff did not consult a physician until 12 days after the alleged accident and injury. The evidence is not clear as to what was applied to the plaintiff's skin during this time. The following occurred on cross-examination: "Q. Didn't you treat yourself from May 25th to June 6th in some way, shape, or form, using your liniment and remedies of Raleigh products? A. Very little. Q. You used some? A. I don't use it though. Q. You did use some though, didn't you? A. I would say no."

On June 6, 1960, the plaintiff consulted Dr. James H. Dunlap. Dr. Dunlap found that the plaintiff was suffering from an acute dermatitis or inflammation of the skin on the back of the neck, the back of the hands, the forearms, and the shins. Dr. Dunlap testified that the plaintiff told him that he had been working with a tarry substance used for roofing material with considerable exposure to sunlight; that within a few hours after that a skin problem developed on the back of the plaintiff's neck; that within the next few hours and days the skin problem developed on the upper and lower extremities but primarily on the lower extremities; and that acute dermatitis developed over the next few days. Dr. Dunlap further testified that, initially, the plaintiff had an acute sunburn and a dermatitis caused by contact with foreign materials. The plaintiff also had decreased circulation to the lower extremities. Later the plaintiff developed infection in the areas affected, injury from scratching the affected areas, and sensitivity to the medicines used in his treatment.

On cross-examination Dr. Dunlap testified that he did not know what the primary irritant was that caused the plaintiff's dermatitis; that there is no way to tell what caused the plaintiff's condition except from what the plaintiff told him; that the plaintiff's condition could be brought on by numerous causes, one of which was roofing material; that roofing material might or might not cause dermatitis; that many other substances that

the plaintiff may have been exposed to could have caused dermatitis; that self-medication by the plaintiff did cause him inflammation; that the plaintiff's condition could have been caused by self-medication; that it is possible that the plaintiff's self-medication prior to June 6, 1960, caused the inflammation which he had on June 6, 1960; and that it is conjecture and speculation to say that self-medication did not cause the plaintiff's condition.

Dr. Dunlap also testified that the plaintiff had consulted him on April 21, 1960, at which time the skin over his ankles was inflamed; and that he had seen the plaintiff on two or three other occasions when the plaintiff was suffering from a dermatitis caused by an insect spray.

There was also evidence that in November or December of 1959, the plaintiff wore a handkerchief around his neck because it was "broke out" at that time; that 4 or 5 days before any work was done on the roof, the plaintiff had one of his legs wrapped in a towel which was saturated with something that smelled like liniment; and that at this time the backs of the plaintiff's hands seemed to be sore.

The burden of proof is on the plaintiff to establish that his injury was the result of an accident arising out of and in the course of his employment. An injury arises out of an employment when there is a reasonable causal connection between the conditions under which the work is required to be performed and the injury received. Speas v. Boone County, 119 Neb. 58, 227 N. W. 87.

An analysis of the evidence in this case discloses that the plaintiff failed to prove that the dermatitis arose out of the employment. The evidence is that it may have been caused by the roofing cement or that it may have been caused by self-medication or some other substance to which the plaintiff was exposed. This is not sufficient.

An award of compensation in a workmen's compensation case may not be based upon possibilities, probabilities, or speculative evidence. Hladky v. Omaha Body & Equipment Co., 172 Neb. 197, 109 N. W. 2d 111.

Upon a review of the evidence de novo, we conclude that the evidence was not sufficient to satisfy the burden of proof. The judgment of the district court is correct and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

HARVEY A. PLUMMER, APPELLANT, V. NATIONAL LEASING CORPORATION ET AL., APPELLEES.
114 N. W. 2d 21

Filed March 30, 1962. No. 35079.

1. **Trial.** If a defendant in an action in equity moves at the close of the plaintiff's evidence for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it.
2. **Principal and Agent.** The underlying rule of the law of agency is that the party dealing with the agent must be able to trace the authority on which he relies back to some word or deed of the principal.
3. **Estoppel.** Where one of two innocent persons must suffer a loss occasioned by the wrongful acts of a third person, the one who made it possible for the third person to commit the act should bear the loss.
4. **Principal and Agent.** A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it.
5. ———. In the absence of the existence of a relationship from which authority to act for another may be derived, the admission of one person is not binding on another.
6. ———. Accordingly, a party cannot put the declarations of his own agent in evidence, since such declarations do not bind the other party in the absence of their knowledge and consent.
7. ———. Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent.

APPEAL from the district court for Scotts Bluff County: TED R. FEIDLER, JUDGE. *Affirmed.*

Robert L. Gilbert, for appellant.

Lovell & Raymond and *Holtorf, Hansen & Fitzke,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action in equity brought by Harvey A. Plummer, hereinafter referred to as plaintiff, against National Leasing Corporation and Earl Houk, defendants. Earl Houk is the president of National Leasing Corporation. No evidence was adduced which could even suggest personal liability. If there is liability, it will be that of the National Leasing Corporation. The purpose of the action is to declare a lease agreement to be a loan transaction and to be null and void as being usurious.

Plaintiff was the owner of a 1958 Diamond T diesel truck and a 35-foot 1956 Dorsey van, both of which were purchased in 1957. The truck was purchased from Western Motor Truck, Inc., hereinafter referred to as Western Motor, and was financed by Universal C.I.T. Credit Corporation of Cheyenne, Wyoming, hereinafter referred to as C.I.T. In September of 1959 plaintiff was indebted to Western Motor in the amount of $502.39 for repairs. He was also delinquent on his C.I.T. mortgage, and owed some money to the Gering National Bank. About the middle of September he talked with Fred J. Schoenrock, hereinafter referred to as Schoenrock, president of Western Motor, about the advisability and possibility of refinancing. Schoenrock told him that he thought it would be possible to borrow $11,000 on the truck and trailer at Nebraska Securities. About September 28, 1959, plaintiff told Schoenrock he would refinance if Schoenrock "could get the money at Nebraska

Securities." Schoenrock called the representative of Nebraska Securities, but was unable to contact him at that time. Schoenrock then told plaintiff that he was sure the Nebraska Securities would make the loan and plaintiff signed a blank power of attorney to enable Schoenrock to make the loan for him. Plaintiff testified he next saw Schoenrock about the 8th of October 1959, and Schoenrock told him that it was not possible to get the money from Nebraska Securities but that Schoenrock had another deal that was just as good with National Leasing Corporation. The plaintiff and Schoenrock went over the papers which had been prepared, and plaintiff was not satisfied with some of the provisions. Schoenrock then "said he would get them made over and he would take care of all of it." Schoenrock told him Houk, the president of National Leasing Corporation, was out of town but that the papers would be ready when plaintiff next returned to Scottsbluff, and that everything would be the same as if Nebraska Securities were doing the refinancing. Plaintiff further testified Schoenrock told him that the title would be put in National Leasing Corporation for 18 months, and would then be put back in his name.

It is the plaintiff's testimony that he returned to Scottsbluff on the 14th or 15th of October 1959, at which time the lease agreement was signed by him and the agreement to resell was given to him. Schoenrock accounted for the $11,000, and gave him a Western Motor check for $465.46, representing the balance remaining after the Western Motor had deducted its repair bill, and paid the balance due to the Gering National Bank and the C.I.T. After receiving this check, plaintiff had the loss-payable clause on the truck insurance changed to National Leasing Corporation.

The exhibits indicate that C.I.T. on October 8, 1959, noted a lien discharge on the certificate of title to the truck, and that under date of October 9, the truck and trailer were transferred to Western Motor by Schoen-

rock's bookkeeper by means of the power of attorney. The Western Motor purchase journal shows the equipment as being purchased from plaintiff for $11,000 and a sale to National Leasing Corporation under date of October 9, 1959, for $11,000. The check from National Leasing Corporation to Western Motor is dated October 12, 1959. Plaintiff's testimony is that the truck and trailer were worth $18,500 at this time.

The applications for new certificates of title on the equipment were made for the National Leasing Corporation by F. J. Schoenrock. These applications were dated October 9, 1959. New certificates of title were issued October 13, 1959.

The lease agreement, dated October 10, 1959, and signed for National Leasing Corporation by its president, Earl Houk, and by plaintiff personally, purports to lease the equipment to plaintiff for a rental payment of $540.84 per month for 24 months, with the first payment due November 10, 1959. The agreement provides that if the monthly payments are not made when due, they shall draw 9 percent interest. Plaintiff is required to pay all maintenance costs and all taxes, to insure the equipment, and to furnish lessor with a loss-payable insurance certificate. Lessor is given the right to take immediate possession if plaintiff defaults.

Exhibit No. 3, which plaintiff testified was delivered to him when he signed the lease agreement, is a letter dated October 10, 1959, and is as follows:

"Harvey A. Plummer
1710 6th
Gering Nebraska

"Dear Mr. Plummer:

"Without varing, (varying) or waiving any of the terms, conditions or agreements of our LEASE-RENTAL AGREEMENT executed on October 10, 1959 we are pleased to inform you that if after April 15, 1961 and after you have paid $9,735.12 (Nine Thousand Seven Hundred Thirty-five & 12/100 dollars) on the LEASE

RENTAL AGREEMENT you wish to purchase the equipment herein described:

"1-1958 MODEL 95ONT-SLHD DIAMOND T TRUCK TRACTOR SERIAL NUMBER 95ONT0053-MOTOR NUMBER NT 0-189632

"1-1956 DORSEY INSULLATED (INSULATED) PRODUCE VAN MODEL NUMBER SCT18-SERIAL NUMBER 29818

"We will sell the equipment to you for the sum of $3,245.04 (Three thousand two hundred forty-five and 04/100 dollars) plus any and all State, City, County or Federal Taxes applicable to such sales.

"You may pay the above amount by making 6 (six) payments of $540.84 (Five hundred forty & 84/100 dollars) per month for 6 (six) consecutive months without an interest charge. The first payment to be made on May 10, 1961 and the following payments to be due and payable on the 10th of the following months thereafter until the total amount is paid.

"Yours very truly,
"NATIONAL LEASING
CORPORATION
EARL HOUK (signed)
"Earl Houk, President"

Plaintiff made payments of $540.84 each month from November 1959 through July 1960, or nine payments. This action was filed the next month on August 23, 1960.

The plaintiff did not personally talk to or deal with the National Leasing Corporation, with Earl Houk its president, or any representative of the National Leasing Corporation, unless Schoenrock should be considered to be such representative. As we view the record, unless plaintiff has adduced sufficient evidence to establish the existence of an agency relationship between Schoenrock and National Leasing Corporation, there has been a failure of proof, and the motion to dismiss was properly sustained.

This action was dismissed at the close of the plain-

tiff's evidence. Under these circumstances, the record must be considered in the light of whether or not a cause of action for the relief prayed has been proved. For this purpose, the court must accept as true the evidence of the plaintiff and any reasonable conclusions deducible from it. We said in Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56: "If a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it."

The underlying rule of the law of agency is that the party dealing with the agent must be able to trace the authority on which he relies back to some word or deed of the principal. See Rodine v. Iowa Home Mutual Cas. Co., 171 Neb. 263, 106 N. W. 2d 391.

The transfer of plaintiff's truck and trailer were accomplished by the power of attorney which plaintiff gave to Schoenrock for the purpose of enabling Schoenrock to make refinancing arrangements for him. There can be no question but that Schoenrock was plaintiff's agent for that purpose.

Plaintiff complains that he did not instruct Schoenrock to assign the certificates to Western Motors. If Schoenrock exceeded his authority, which we do not need to decide, plaintiff, by giving him a blank power of attorney, enabled him to do so. In the absence of a finding that Schoenrock was also an agent for National Leasing Corporation, we must apply the rule that where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the act should bear the loss. Federal Land Bank v. Worley, 135 Neb. 493, 282 N. W. 476.

There is also a rule of law that a principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities em-

ployed by the latter in procuring it. See McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1. Plaintiff knew that title had been transferred and operated under the lease for 10 months before bringing this action.

Certainly the fact that plaintiff designated Schoenrock as an agent to refinance his truck and trailer and to discharge certain indebtedness does not make the conversations between plaintiff and his agent binding upon National Leasing Corporation so as to enable plaintiff to establish a prima facie case on a usurious loan. Plaintiff did not call Schoenrock. There is not one iota of testimony as to what transpired in any dealing in this matter between Schoenrock and representatives of National Leasing Corporation at any time, either before, during, or after the transactions.

Plaintiff himself did not talk to any representative of the National Leasing Corporation until January of 1960, and then the conversation merely concerned the licensing of the truck. It is the plaintiff's responsibility to produce competent evidence to establish the existence of an agency relationship between Schoenrock and National Leasing Corporation before the conversations referred to could be admissible.

In the absence of the existence of a relationship from which authority to act for another may be derived, the admission of one person is not binding on another. Accordingly, a party cannot put the declarations of his own agent in evidence, since such declarations do not bind the other party in the absence of their knowledge and consent. 31 C. J. S., Evidence, § 342, p. 1112.

The only evidence produced by the plaintiff which could in the least be claimed to infer an agency relationship is the fact that Schoenrock, to obtain certificates of title for National Leasing Corporation, signed the applications for certificates of title "National Leasing Corporation by F. J. Schoenrock," without any further explanation. This isolated act is not alone sufficient to

establish that Schoenrock had been the agent of National Leasing Corporation rather than the plaintiff in the transactions between them.

Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. Rodine v. Iowa Home Mutual Cas. Co., 171 Neb. 263, 106 N. W. 2d 391.

Defendants, at every stage, objected to the admission of plaintiff's conversations with Schoenrock. At the conclusion of the plaintiff's case, defendants moved to strike all of plaintiff's evidence relative to these conversations. The objections were proper. The motion should have been sustained. This point is decisive and there is no need to discuss the other issues raised. Without Schoenrock's testimony there is not even a scintilla of evidence to establish that the transaction was other than it purports to be, a sale to Western Motors, a sale by Western Motors to National Leasing Corporation, and a leasing transaction between National Leasing Corporation and the plaintiff.

For the reasons specified above, the motion to dismiss at the close of plaintiff's evidence was properly sustained. The judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF PETROLEUM TRANSPORT COMPANY ET AL.

PETROLEUM TRANSPORT COMPANY ET AL., APPELLANTS, V. ALL CLASS I RAIL CARRIERS IN NEBRASKA, APPELLEES.

114 N. W. 2d 34

Filed March 30, 1962. No. 35090.

1. **Public Service Commissions: Appeal and Error.** Where an order of the Nebraska State Railway Commission is reversed by this court for lack of findings and at the time of receiving the

mandate the commission has before it sufficient evidence on which to base findings that will sustain its decision, it may do so without notice or rehearing.

2. **Public Service Commissions.** An order of the Nebraska State Railway Commission making ultimate findings in the language of the statutes is a sufficient compliance with the commission's statutory obligation.
3. **Public Service Commissions: Motor Carriers.** The burden is on the applicant for a certificate of public convenience and necessity to show that he is fit, willing, and able to perform the service he proposes; that he will conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules, and regulations of the Nebraska State Railway Commission promulgated thereunder; and that the proposed service is or will be required by the present or future public convenience and necessity.
4. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
5. **Public Service Commissions: Motor Carriers.** In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, 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 operation without endangering or impairing the operations of existing carriers contrary to the public interest.

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

Nelson, Harding & Acklie, Donald E. Leonard, and *Robert S. Stauffer,* for appellants.

Harvey L. Goth, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an appeal from an order of the Nebraska State Railway Commission, hereinafter referred to as the com-

mission, which denied the applications of the Petroleum Transport Company, formerly Basin Truck Company, and Vernon Lloyd Miller Trucking, Inc., for authority to transport cement in bulk as common carriers between points in Nebraska over irregular routes. The two applicants have appealed and the cases have been briefed and heard together.

The matter was previously before this court in Basin Truck Co. v. All Class I Rail Carriers, 172 Neb. 28, 108 N. W. 2d 388, since which time the Basin Truck Company by reorganization has become the Petroleum Transport Company. Vernon Lloyd Miller Trucking, Inc., has since the filing of the original application succeeded to rights of Vernon Lloyd Miller, the original of one of the two applicants.

In Basin Truck Co. v. All Class I Rail Carriers, *supra*, this court held that the orders of the commission previously entered would be set aside because of irregularity in failing to make findings of fact. After the mandate of the court was lodged with the commission it entered new orders, dated April 28, 1961, reciting the fact of the appeal and decision of the court and containing findings which, with respect to the Petroleum Transport Company, Inc., were as follows:

"1. Petroleum Transport Company (Basin Truck Company) is fit, willing and able properly to perform the service proposed and to conform with the provisions of Section 75-222 to 75-250, R. R. S. 1943 as amended and the Rules and Regulations of the Commission thereunder.

"2. The service proposed is not required by the present or future public convenience and necessity.

"3. Since the proof is found wanting on the issue of public convenience and necessity, the application should be denied."

After these findings appears the order which again denies the application in substantially the same language as the order set out in the previous opinion. A separate order was entered on the application of Vernon

Lloyd Miller Trucking, Inc., differing practically in name only.

From these new orders both Petroleum Transport Company and Vernon Lloyd Miller Trucking, Inc., have perfected appeal to this court. They will be referred to hereafter as the applicants, or separately as Petroleum or Miller.

The applicants' assignments of error, so far as need be considered by this court, are that the orders of the commission are arbitrary, unreasonable, and contrary to the law and the evidence, and that the commission failed to consider the inherent advantages of motor transportation over rail transportation.

Protests to granting the applications were filed by Chicago, Burlington & Quincy Railroad Company; Chicago and Northwestern Railway Company; Chicago, Rock Island and Pacific Railroad Company; Missouri Pacific Railroad Company; and Union Pacific Railroad Company, who are the appellees herein. For convenience they will be designated as the railroads except where separate mention becomes necessary.

The applicants make objection to the new findings of the commission because there was no rehearing before the commission supplied them. The evidence had been taken previous to the first appeal. The applicants had been heard before the commission. The commission had made its decision and informed the applicants of it. The previous orders were invalid because the findings required by section 84-915, R. S. Supp., 1959, were not set out in the order. This court reversed the previous order for lack of such findings. Where an order of the Nebraska State Railway Commission is reversed by this court for lack of findings and at the time of receiving the mandate the commission has before it sufficient evidence on which to base findings that will sustain its decision, it may do so without notice or rehearing.

In Young v. Morgan Driveaway, Inc., 171 Neb. 784, 107 N. W. 2d 752, this court held that an order of the

commission making ultimate findings in the language of the statutes is a sufficient compliance with the commission's statutory obligation.

We find no merit in the objections to the findings if they were sustained by the evidence before the commission.

It now becomes necessary for us to review the evidence in the proceeding before us. Before doing so we state certain rules pertinent to this case. The following are set out in Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865: "The burden is on the applicant for a certificate of public convenience and necessity to show that he is fit, willing, and able to perform the service he proposes; that he will conform to the provisions of sections 75-222 to 75-250, R. R. S. 1943, and the requirements, rules, and regulations of the commission promulgated thereunder; and that the proposed service is or will be required by the present or future public convenience and necessity.

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

The commission found that the applicants were both fit, willing, and able to properly perform the service proposed and to conform with the applicable laws and rules and regulations of the commission. Those questions are not before us. The only question presented to this court is whether the finding of the commission that the proposed service is not required by the present or future public convenience and necessity is either arbitrary or unreasonable under the evidence.

Both applicants seek authority to transport cement in bulk, in tank or hopper type vehicles. The more modern trucks engaged in such carriage are covered. The cement hauled by them on delivery is generally

pumped out by means of an auger or other type of automation and run either into storage or machines engaged in mixing cement for immediate use.

Applicant Petroleum is a Colorado corporation engaged in transportation of crude oil, fracturing oil, and other products required in servicing oil wells in Nebraska, Wyoming, and Colorado. It has authority as a motor carrier to transport these commodities in intrastate commerce in Nebraska, and similar intrastate authority in the states of Colorado and Wyoming. It has a terminal in this state at Kimball, Nebraska. Applicant has extensive equipment engaged in that service. It has power units that can be utilized in the new service and proposes to acquire any other necessary equipment if the authority is granted. It has never before transported cement either in bulk or bags. It proposes to operate from its present terminal at Kimball, Nebraska.

The applicant Miller has authority to transport cement in bulk in interstate commerce from the vicinities of Laramie, Wyoming, Boettcher, Colorado, and Rapid City, South Dakota, to points in Nebraska west of State Highway No. 27, and is engaged in such carriage. Its representative testified if the applicant was successful in securing the statewide intrastate authority requested in the application it would also service cement plants at Superior and Louisville, Nebraska, which, from the record, appear to be the only commercial cement manufacturers in this state. The contemplated service would include transportation from rail sites in Nebraska to the job site, and directly from the cement plants to various consignees at designated destinations. The witness testified that in oil wells a great amount of cement is used, most of which is more economically furnished in bulk, although for small jobs and finishing the well, sacked cement is used.

Aside from the representatives of the applicants who testified largely as to their fitness to undertake the service, there were only two supporting witnesses for the

applicants. Tom Birdsall was camp head for Halliburton Oil Well and Cementing Company at Sidney, Nebraska. His company is engaged in servicing the oil industry, including cementing and fracturing oil wells which he supervises in the field. The company has a bulk storage facility for cement at Kimball which is served with cement both by rail and truck. It has eight of its own cement trucks with which it transports cement to the wells and it intends to keep them. Halliburton carries on its principal business in Cheyenne, Banner, Morrill, and Kimball Counties, but has also worked in Red Willow, Richardson, and Hitchcock Counties, although that work is minor in volume. In the past it has on occasion used its trucks to haul cement from Cheyenne County to the southeastern part of the state. The company has no competition in the eastern part of the state because there are no oil wells there. The company's own equipment has been insufficient in boom times, though it has always been able to service its work. In some instances it would have been cheaper to hire a common carrier. It had never purchased cement at Superior or Louisville. Time is vital in oil well work and if cement is purchased in sacks they must be cut, which requires extra help, expense, and time.

Roy Garten of Garten & Garten, Inc., general contractors, with offices in Cheyenne, Wyoming, testified the company constructed heavy structures, mostly bridges, in Wyoming and Colorado. It has bid on jobs in Nebraska but has never secured a contract in this state. It has used the services of Miller in other states which have been satisfactory. Transportation costs are material in bidding and it is to a contractor's advantage to have cement delivered in bulk direct to the job site. Nearly 95 percent of its work is off rail. If it sets up a "batching plant" of its own on the job it is sometimes from $2 to $3 a yard cheaper. Whether it is cheaper to haul from the cement plant or rail head depends on the distance involved. The witness considered truck trans-

portation of bulk cement a little faster, although he had never incurred delays in rail service. He testified the company would use Miller on any work it might have in Nebraska if authority were granted.

The protestants in opposing the granting of the authority introduced a number of witnesses. They were representative of two classes. There were nine witnesses of companies engaged in selling cement products. Most of them operated Ready Mixed plants and some manufactured cement blocks or other cement products. The secretary-treasurer of Nebraska Sand, Gravel and Ready Mixed Concrete Association testified his association represented 22 cement concerns and that there were between 40 and 50 such operators in the state. All the witnesses testified their companies were against granting the applications. They were all located on railroads and received their cement by rail, most of which comes from the cement plants at Louisville or Superior. They based their position largely on three factors. They were equipped to take cement by means of an auger from a position under the railroad tracks where it was dumped by specially-built covered dump cars and they maintained new facilities would have to be built to accommodate trucks. They had been given 6 days without demurrage by the railroad on cars and in many instances the cement could be processed from them without being put through storage. During rains it was left a few days in the cars. They fear if cement is transported by motor carrier it might jeopardize rail service to them, some of whom are located on branch lines.

The other witnesses were representatives of the railroads involved. From exhibits introduced by them cement appears to be an important item of rail transportation, in some instances being the tenth or fourteenth item of traffic from the standpoint of revenue. From January to September 1959, the Chicago, Burlington & Quincy Railroad Company handled 1,619 cars of cement originally at Louisville, and 2,196 cars from Superior, all

bound to points in Nebraska. From August 1, 1958, to July 31, 1959, the Missouri Pacific Railroad Company handled 2,614 cars originating at Louisville, and 539 cars from Superior with a gross revenue of exactly $532,394, all of which were shipments terminating in Nebraska. No good purpose will be served by an extended discussion of all the statistics which in varied form were presented by each railroad. All these protestants have built at great expense large numbers of covered hopper cars and they are anxious to hold the business. In many instances they are faced with falling revenues, and are opposed to granting the applications.

Paul Hakes, owner of Ready Mixed Concrete Company at Sidney, Nebraska, testified on rebuttal that his plant at Sidney uses both rail and truck service and finds both satisfactory and needed by his company. The trucks that served it come from Laramie, Wyoming.

No representatives of either of the companies manufacturing cement at Superior or Louisville appeared or testified at the hearing.

This was in substance the evidence before the commission when, pursuant to the mandate of this court, it found that the proposed service was not required by the present or future public interest. Applicants contend that this finding is arbitrary and unreasonable under the facts disclosed by the record. They assert that it is shown that in certain instances of off-rail work sites the transportation of bulk cement by motor carrier is essential; that the railroads cannot deliver it to such locations and that it is necessary for public convenience; and the new service will not seriously impair the cement business of the railroads. They claim the Ready Mixed operators who object to the requested service are all located on rail sites and are joining with the railroads to create for themselves a monopoly of the cement business generally with a like monopoly of its carriage in the railroads.

In Neuswanger v. Houk, 170 Neb. 670, 104 N. W. 2d 235, this court stated: "In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, 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 operation without endangering or impairing the operations of existing carriers contrary to the public interest."

The first requirement of this "yardstick," as it is termed in the cited case, is whether the operation will serve a useful purpose responsive to a public demand or need. The testimony of the applicants on this feature lacks persuasiveness. Of the supporting witnesses for the applicants, one was connected with an oil well servicing company which had eight cement trucks of its own and which would require independent motor carrier service only on rare occasions in boom times. The major portion of its work was in counties in the immediate vicinity of Sidney which area was serviced by cement trucks from Laramie. It has always managed locally with its own equipment. The other witness represented an out-of-state contractor who had never been awarded a contract in Nebraska. It could never have utilized the service in the past and it is questionable whether it could do so in the future. The Ready-Mixed company concerning which the rebuttal witness testified is served by cement trucks from Laramie in interstate commerce. To what extent the new service would be used by any of them is speculative.

The evidence offered by the protestants was to a great extent aimed primarily to show that the service could be performed by existing carriers and that the authorization of new competition might endanger or impair the operations of existing carriers. It did however also tend to throw light on whether or not the new

operation would serve a useful purpose responsive to a public demand or need. It is perhaps significant also that no manufacturers of cement in Nebraska, who are the primary shippers, supported either application. The burden of showing a public demand or need is upon the applicants.

The duty of making the decision on the question of whether the operation would serve a useful purpose responsive to a public demand or need is upon the commission and not the court. Our review on appeal is to determine whether or not the commission acted arbitrarily or unreasonably and we are unable to find that it did with the evidence before it.

It follows that the order of the commission must be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

GLENN M. TIMMONS ET AL., APPELLEES, V. SCHOOL DISTRICT OF OMAHA, DOUGLAS COUNTY, NEBRASKA, APPELLANT. CONSOLIDATED WITH SCHOOL DISTRICT OF OMAHA, DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. GLENN M. TIMMONS ET AL., APPELLEES.

114 N. W. 2d 386

Filed March 30, 1962. No. 35117.

1. **Evidence: Trial.** Where evidence that is not properly admissible has been received in evidence but there was nothing in the form of the question to indicate that the evidence would be inadmissible, the aggrieved party cannot complain, unless he moves to strike out the objectionable testimony and withdraw it from the consideration of the jury.
2. **Eminent Domain.** In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation, and that the

land so sold was substantially similar in location and quality to that condemned.

3. ———. Evidence of a sale of neighboring land, no matter how similar to the land taken in condemnation, is not admissible unless the sale was so near in point of time as to furnish a test of present value, and the determination of this fact is left to the discretion of the trial court.

4. ———. While market value is determined by actual sales and not by asking prices, an offer to sell property may be proved against the owner as an admission of its value at or near the time of the offer.

5. ———. Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court to determine in the exercise of a sound discretion.

6. ———. The question of the adequacy or the inadequacy of an award is not one to which fixed formulae may be applied. Each case must be viewed in the light of the general principles of valuation applicable to that particular case.

APPEAL from the district court for Douglas County: PAUL J. GARROTTO, JUDGE. *Affirmed.*

Wm. Ross King, for appellant.

Schmid, Snow & Ford, Marvin G. Schmid, and *William E. Mooney, Jr.,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a condemnation action brought by the School District of Omaha, Douglas County, Nebraska, against Glenn M. Timmons and John L. Bilby, trustees. The appraisers made an award of $38,750. Both the condemner and the condemnees appealed. These appeals were consolidated for trial and appeal. By stipulation, the sole issue tried in the district court was the value of the real estate condemned on March 18, 1960. The jury returned a verdict of $52,500, and the condemner prosecutes this appeal.

For convenience in this appeal, the School District of Omaha, Douglas County, Nebraska, condemner, will

hereinafter be referred to as defendant as it was in the district court, and Glenn M. Timmons and John L. Bilby, trustees, will hereinafter be referred to as the plaintiffs.

The defendant condemned a tract of land in Meadow Lane, an addition to Douglas County on the west side of the city of Omaha, at approximately One Hundred Sixteenth and Leavenworth Streets. Meadow Lane is situated on a tract of about 116 acres which the plaintiffs purchased in 1955 for development and sale as residential lots. The area was engineered for grades, drainage, contours, streets, and utilities, and a preliminary plat was prepared, filed, and approved by the city planning commission of the City of Omaha in April 1955. Thereafter, the plaintiffs proceeded to develop the area by stages. The area between One Hundred Fourteenth Street and the property being condemned was developed in two stages between April 1955 and 1959.

No sanitary sewer was available to Meadow Lane, so plaintiffs constructed an outfall sewer line for a distance of 2 miles to serve the addition, at a cost of $110,000. They spent $20,000 to bring water to the addition, and $2,800 for a gas line. The pavement and all of the utilities, including gas, water, and sanitary and storm sewers, were brought to the edge of the condemned premises. All engineering data on the condemned property, which was to be the third phase of the development, had been fully completed. This particular area, which had a high hill, had been graded and leveled and the lots were laid out. The pavement was brought up to a street which was graded and cut through the condemned area preparatory to paving. The intersection was paved and all the utilities were stubbed in. The grading expense on the condemned portion, which required the removal of 107,000 cubic yards of earth, was $17,000. The area condemned consisted of 7.74348 acres, which was described by the witnesses as the highest and choicest part of the Meadow Lane development. On the tentative

plat, it consisted of 16 large lots, the front footage of which ranged from 120 to 130 feet. These lots were separated by the street referred to above, described on the plat as Arrowridge Road. Even the defendant's witnesses conceded this area to be the most desirable one in the entire Meadow Lane development.

The defendant sets forth seven assignments of error which we will list as they are discussed herein. The first assignment is that the court erred in permitting the plaintiffs to show by indirection the price paid by the defendant for three improved lots adjacent to the property condemned. There is no merit to this assignment. The testimony is as follows: "Q. Calling your attention to the lots that are generally adjacent to the condemned area from the south and going around to the east, are you familiar with the sale prices of those lots? A. Yes, I am. Q. And what is the range of sales prices on those lots? A. About forty-five hundred dollars to six thousand." This testimony went in without objection. Defendant's counsel was then given leave to cross-examine, and the following testimony was adduced: "MR. KING: I just want to ask as to those lots thirteen, fourteen and fifteen, block nine. Those were sold to the School Board, were they not? THE WITNESS: Yes, they were, *second sale,* however, not direct from Meadow Lane." (Italics ours.)

Conceding for the purpose of this opinion the correctness of the principle upon which the defendant relies, we suggest that it cannot be sustained in this case for three reasons: First, the record does not show that the testimony of the witness included the sale prices of the three lots when they were sold to the defendant; second, it was elicited by the defendant itself on cross-examination; and third, the defendant's remedy was a motion to strike the testimony and to instruct the jury to disregard it. See Carlile v. Bentley, 81 Neb. 715, 116 N. W. 772, in which we said: "Where evidence that is not properly admissible has been received in evidence over objections

to a question, but where there is nothing in the form of the question to indicate that the evidence would be inadmissible, the aggrieved party cannot complain, unless he moves to strike out and withdraw from the consideration of the jury the objectionable testimony." No such motion was made. Defendant further complains that its chief witness was cross-examined in such manner as to get this information to the jury by indirection. We find nothing improper in the cross-examination of the defendant's expert witness. It is apparent to us that he carefully refrained from testifying as to the price the defendant paid for any of the three lots in question.

Defendant's second assignment of error complains of the exclusion of the sale price of a tract of land described as Cornhusker No. 1, which one of defendant's expert witnesses considered as a comparable sale. This property, located at One Hundred Thirty-second and Dodge Streets, consisted of 88.73 acres, purchased June 1, 1959, for subdivision purposes. It was located 1⅞ miles northwest of the land condemned. It was a farm at the time of purchase. No grading or engineering had been done. None of it was platted. There was no showing as to the availability of sanitary and storm sewers in the vicinity of the property. There was no showing of improvements anywhere on the tract, as in Meadow Lane. In Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201, we held: "In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation and that the land so sold was substantially similar in location and quality to that condemned."

The court sustained the plaintiffs' objection to the offered testimony of the sale price for the reason that no comparison of similarity had been made. The defendant

then made an offer to prove the land sold for $2,986 per acre, but did not attempt to ask additional foundational questions to show the property to be sufficiently similar for comparison purposes. Objection was properly sustained.

Defendant's witnesses were permitted to testify as to nine other sales in the west Omaha area which they considered to be comparable where the sale price per acre ranged from $1,750 to $3,250.

The third assignment of error complained of by the defendant concerned the exclusion of the sale price of a tract of land at One Hundred Twentieth and Pacific Streets, known as Pinewood, which contained 79.2 acres and was ½ mile from the subject property. This land was purchased for development purposes December 30, 1958. Objection was made to the testimony as to the sale price of the tract in 1958, on the ground that during the period between its purchase and the condemnation of plaintiffs' land, this tract was developed and was selling as lots and not as farm land. The court in sustaining the objection said: "I think the fair comparison to be made between these two properties would be the condition of both of them at the time of the condemnation." There is no showing in the record that the market value of the property had not changed between December 30, 1958, and March 18, 1960. It seems apparent that a change had occurred. In any event, this is a matter within the discretion of the trial court, and the objection was properly sustained. As stated in 5 Nichols on Eminent Domain (3d ed.), § 21.31(2), p. 286: "A sale of neighboring land, no matter how similar to the land taken, is not admissible unless the sale was so near in point of time as to furnish a test of present value, and the determination of this fact is left to the discretion of the trial court." For an analogous holding on another subject, see Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891.

The fourth assignment of error argued by the defend-

ant involves the exclusion of an offer by the plaintiffs in the fall of 1958 to sell the undeveloped portions of Meadow Lane, including the subject property, to another realtor for $2,500 per acre. This was approximately 1½ years before the condemnation and included not only the 16 lots involved in the condemnation, but also the northwest portion of the area which from the plat involves another 68 lots. The evidence would indicate that the other 68 lots are much inferior to the subject property. Also, in the fall of 1959, the plaintiffs spent $17,000 in grading the area being condemned. Further, in the same year a connecting street on the south side of the area as well as the intersection was paved, and the utilities were stubbed into the intersection. The defendant relies on a Minnesota case, Minneapolis-St. Paul Metropolitan Airports Commission v. Hedberg-Freidheim Co., 226 Minn. 282, 32 N. W. 2d 569, which held: "While market value is determined by actual sales and not by asking prices, an offer to sell property may be proved against the owner as an admission of its value at or near the time of the offer." We have no quarrel with the case, but question its applicability to the facts herein. The subject property was not in the same condition on March 18, 1960, as it had been in the fall of 1958. The offer covered a large tract of which the subject property comprised less than one-fifth of the area. Much of the other property was inferior to the subject property.

We further observe that the record indicates that the surrounding area was developing almost overnight, so that a year and a half could be too remote in time to be admissible. For a collection of cases on the question of remoteness, see 7 A. L. R. 2d, § 12, p. 810. As we view the law, these are considerations which must be left to the sound discretion of the trial court. We therefore hold that whether evidence of an offer to sell is too remote in time to be admissible is for the trial court to determine in the exercise of a sound discretion. There

was no abuse of discretion in excluding the proffered testimony.

The defendant's fifth assignment of error involves the refusal of the court to give defendant's tendered instruction No. 3 which read as follows: "Mere paper divisions of the property into lots, blocks, streets, and alleys, without any material change in the physical condition or legal ownership of the property are not sufficient to permit a valuation on a lot or front foot basis and the entire tract should be valuated as a single parcel. The value is not to be fixed by what might be obtained in the future had subdivision actually taken place. You are not to consider what a speculator might be able to realize out of a resale of the property when subdivided or improved, but what a present purchaser would be willing to pay for it in the condition it was in when condemned." As we view the evidence, the first sentence of the tendered instruction is argumentative in nature, and did not accurately reflect the evidence.

The authorities cited by the defendant have no application to the facts herein. For instance, this case is not in any way analogous to Rath v. Sanitary District No. One, 156 Neb. 444, 56 N. W. 2d 741, which is the only Nebraska authority cited. In that case, Riverside Addition was platted in 1886. The streets and alleys shown on the plat had never been opened. In fact, 65 years later, when the condemnation was brought, a part of the area, including the street, was planted to a peach orchard. Definitely that is not the situation in the instant case. Here the area taken by condemnation was an integral part of a development then in progress. It is true that only a tentative plat of Meadow Lane has been approved, but final approval had been given without question on two different stages covering the area of the tentative plat up to the subject property. The undisputed evidence is that the tentative plat embraces all of the engineering data for the subject property, and there certainly had been a substantial change in the

physical condition of the property in grading down the hill, laying out the lots, and putting in the street to bring it in conformity with the tentative plat. The evidence is also undisputed that in developments of this type, after the approval of a tentative plat, final approval is a mere formality.

We also note that the defendant, in its original condemnation petition, described the property by metes and bounds, and then said: "* * * that the area above described and conforming to the legal description in the certificate, encompasses Lots 2 to 10, inclusive, Block 8, Lots 1 to 6, inclusive, Block 9, the North 115 feet of Lot 7, Block 9, and all of the abutting street labeled 'Arrowridge Road', all as shown on the tentative plat on file with the City Planning Board of the City of Omaha; that said real estate is located in the vicinity of 116th and Leavenworth Streets, in the City of Omaha."

We are in agreement with the plaintiffs that the area involved in the condemnation was not farm land with a dream of future availability for residential development. It was in actuality a present, real, existing subdivision with 6 years of planning development and construction and with a very substantial financial investment which, as near as we can estimate from the record, was approximately $28,000.

The court gave instructions Nos. 8 and 9, both of which were tendered by the defendant. Instruction No. 8 is as follows: "You are instructed that the compensation for land taken by eminent domain is measured by its market value at the time it was condemned March 18, 1960, and you should not take into consideration its value for special reasons to the owner or enhanced damages because the owner may be prevented from carrying out a particular scheme of improvement. The question is not what estimate the owners may place upon it but what it was worth on the market in its then condition."

Instruction No. 9 is as follows: "In determining the market value of the subject property, sales of a similar

unplatted and unimproved property at or about the time this property was condemned may be taken in consideration, providing such sales are in the open market, that is, by a willing seller to a willing buyer."

These instructions, with the others given, adequately and properly cautioned the jury not to consider speculative values. The jurors were told to consider the value of the property in its condition on March 18, 1960, rather than what it might have been if plaintiffs' development had not been stopped by the condemnation.

Defendant's sixth assignment of error involves the trial court's refusal to give its tendered instruction No. 6, which is as follows: "You are instructed that the availability of public improvements such as sewer, gas and water mains may be taken into consideration by you as one of the elements in determining the value of the property, but you should not determine the value of the property as though it were platted and public improvements installed by a computation of the aggregate value of such prospective subdivision into lots deducting therefrom the estimated cost of such public improvements not yet made and other expenses incident to the future developments of the property." The instruction as tendered would have been confusing and would have negated the theory on which the case was tried. Plaintiffs' witnesses on value were 2 of the 14 members of the American Institute of Real Estate Appraisers in Omaha, and 2 real estate developers who had been involved in west Omaha developments near the area involved. In each instance, the appraisers testified as to the fair and reasonable market value of the condemned tract as of the time of the taking. When asked for the basis of their opinions on the market value, they explained that they used a front foot basis, deducting expenses of installing improvements, which costs were of record without objection; selling costs; profit estimates; and other items deemed appropriate. This testimony went into the record without objection in any form. We agree that the

mere paper division of a tract is usually to be disregarded and the entire tract treated as a single parcel.

Here, however, after the filing and tentative approval of the plat, the plaintiffs proceeded to develop Meadow Lane. The area up to the subject property had been developed and sold. The subject property had been graded. Lots were marked out according to the plat. Arrowridge Road was graded in and ditched preparatory to the letting of a paving contract. A connecting intersection was paved and the utilities stubbed in. This is not a situation where use for subdivision purposes is speculative or even faintly remote. It is one where development is well on the road to completion when stopped by condemnation proceedings. This case is more analogous to Arkansas State Highway Commission v. O. & B., Inc., 227 Ark. 739, 301 S. W. 2d 5, than to the cases cited by the defendant. In that case, the court permitted consideration of the per lot valuation of an area laid out in lots and blocks, but actually enclosed. Here the appraisers considered a front footage approach. We are concerned with the market value of the property. One of the factors to be considered is the use to which the property is adapted and might be put in the immediate present, or at least a use which might be reasonably anticipated in the very near future.

We observe that although defendant's valuation witnesses used a basic acreage valuation approach, comparing the subject property with farm land that had been purchased for development purposes, as the Meadow Lane tract had in the first instance, they also testified to front foot values of several blocks in Meadow Lane. Under the facts in this case, we believe the approach of the plaintiffs' experts was much more realistic than that of the defendant's experts. The instructions of the court fairly, completely, and adequately instructed the jury as to the elements to be considered in determining the market value of the land taken as of March 18, 1960.

There is no merit to the defendant's sixth assignment of error.

Defendant's seventh and final assignment of error is that the verdict of the jury is excessive. The top figure set by the defendant's witnesses was $28,275. The lowest figure set by the plaintiffs' witnesses was $64,500. The award made by the appraisers in county court, from which both sides appealed, was $38,750. The jury, which, in addition to hearing the evidence, viewed the premises, awarded the plaintiffs $52,500.

Under the undisputed evidence in this case, the plaintiffs had an investment of approximately $28,000 in the subject property, not considering the original cost of the land. It is true that $11,000 of this figure is the pro rata share of the cost of bringing the utilities to Meadow Lane and the engineering expense. However, it should be obvious that a developer must be able to spread his costs over the area to be developed. It seems fairly evident that the jury believed the defendant's witnesses to be too conservative in their estimate of the fair and reasonable market value of the premises at the time of the taking, and entirely disregarded their testimony. As we have said many times, it is not for the court to decide which testimony the jury should believe, but we can say that it is difficult to see how it could have accepted the valuations of the defendant's experts without doing a substantial injustice to the plaintiffs.

The question of the adequacy or the inadequacy of an award is not one to which fixed formulae may be applied. Each case must be viewed in the light of the general principles of the valuation applicable to that particular case. As we view the evidence in this record, proper principles of valuation were applied. We cannot say that the verdict of the jury is manifestly wrong or palpably excessive. Consequently, defendant's seventh assignment of error cannot be sustained.

For the reasons set out above, the judgment herein should be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

KENNETH C. RAINS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
114 N. W. 2d 399

Filed March 30, 1962. No. 35140.

1. **Criminal Law: Trial.** A conviction may rest on the uncorroborated testimony of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.
2. **Evidence.** Where there is a direct conflict in the evidence relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and admissible for consideration of the jury.
3. **Criminal Law: Witnesses.** By statute, a person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition, if a proper showing is made to the trial court for the taking of such deposition.
4. **Criminal Law: Trial.** Objection that the prosecuting attorney is guilty of misconduct at the trial prejudicial to defendant must be taken at the time. It is primarily a question for the trial court.
5. **New Trial: Appeal and Error.** The granting or refusing of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion.
6. **New Trial.** It is the rule that a new trial will not be granted on the ground of newly discovered evidence when the only effect of the evidence is to impeach or discredit a witness.
7. **Criminal Law: Trial.** Where the charge to the jury, considered as a whole, correctly states the law, the verdict and judgment will not be reversed merely because a single instruction, when considered separately, is incomplete.
8. ———: ———. Where the trial court has instructed generally

as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining.

ERROR to the district court for Howard County: WILLIAM F. MANASIL, JUDGE. *Affirmed.*

Kelly & Kelly and *Harry S. Grimminger,* for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is a criminal action brought in the district court for Hall County against Kenneth C. Rains, defendant, under the provisions of section 28-504.02, R. R. S. 1943, charging that on or about May 9, 1959, in Hall County, Nebraska, Kenneth C. Rains did unlawfully, willfully, and maliciously set fire to and burn, or cause to be burned, a certain building situated in Doniphan, Nebraska, the property of Ivan Yates and Grace Ann Yates, in which there was a contractual interest running to Howard Jones. Change of venue was granted to try the case in Howard County. The jury returned a verdict finding the defendant guilty. The defendant was sentenced to a term in the Nebraska State Penitentiary. The defendant filed a motion for new trial which was overruled. The defendant brought this case to this court for review.

The defendant contends that the trial court should not have permitted this case to go to the jury for the reason that there was insufficient evidence to convict the defendant, therefore, the trial court should have sustained the defendant's motion for dismissal of the case.

We will refer to Howard Jones as Jones, to Kenneth

C. Rains as the defendant, and to the other witnesses by their last names or title, or on occasion, when it is preferable, will use the first and last names.

The testimony of Jones is in substance as follows. Jones lived at Eldon, Missouri, and had been engaged in the automobile business, and finally in the grocery business at Doniphan, Nebraska. He purchased the grocery business from Ivan and Grace Ann Yates on December 4, 1958, by a written agreement to purchase the real estate and personal property in the grocery store for the amount of $7,500. Jones testified that this money came from Jungclaus and the defendant. He further testified that he did not recall when he first met the defendant, but that he had become better acquainted with him in September 1958, and saw him quite frequently in September and early October 1958; that he became acquainted with Jungclaus through the defendant at Tulsa, Oklahoma, the last part of October or the first part of November 1958; that he and the defendant went to Tulsa, Oklahoma, in the defendant's car; and that they met Jungclaus and remained there for 2 or 3 days. The defendant introduced Jungclaus to Jones as a groceryman and a good friend from Grand Island, Nebraska. Jones left Tulsa in the Jungclaus car, and the defendant and Jungclaus told him to go to a certain hotel in a town in Arkansas, and they would meet him there. All three of them stayed at the hotel. Jones left the Arkansas town in the Jungclaus car. The defendant and Jungclaus followed him in another car to Eldon, Missouri. Jones again saw Jungclaus and the defendant sometime between November 5 and November 8, 1958. The defendant told Jones that he and Jungclaus had talked it over, and that they would get a business somewhere, would buy it, and Jones could run the business. Two or 3 weeks later the defendant saw Jones in Eldon and said he had talked to Jungclaus and Jungclaus wanted Jones to go to Nebraska and Jungclaus would fix Jones up in some kind of business or employment.

Jones stated that after he had this conversation with the defendant he went to Grand Island in December 1958, and got in touch with Jungclaus. On December 4, 1958, he signed the contract for the purchase of the store at Doniphan. After he signed the contract, he saw the defendant in Grand Island. Jungclaus explained to the defendant how the store was purchased. The defendant said he would come up with his part of the money. Jones stated that the defendant kept bragging the store up, said it was a good spot, that it would make money, and for Jones not to worry about it. Jones went to Missouri, and on the Saturday night after Christmas the defendant went to see him and asked Jones why he left Nebraska. Jones replied that he went home for Christmas. The defendant told Jones to get back to Nebraska or they would lose $1,000 on the contract. Jones told the defendant he would probably go to Nebraska the next day. The defendant told Jones to meet him at his place in Eldon and he would accompany Jones to Nebraska. Jones left Eldon in his car and the defendant followed in his car. When they arrived at Grand Island, they went straight to the Jungclaus home. They stopped their cars, and the defendant told Jones to go in and have Jungclaus come out. The three of them talked together, and the defendant said to Jungclaus: "* * * we got up here all right finally * * *." Jungclaus said to Jones: "I thought you had run out on us and wasn't coming back up here."

Jones took over the store in Doniphan on January 1, 1959, at 6 p.m. The inventory had been taken that day. Jungclaus, Jones, and the defendant were all at the store that morning with the owners of the store, Mr. and Mrs. Yates, and other help. The defendant did not remain in the store all day, but left and returned before the inventory was completed. After Ivan Yates had run the figures with reference to the inventory, he told them the exact amount, and said he wanted his money. Jungclaus said the money would be there

in the morning, and told Jones to give Ivan Yates a check. The defendant said to Ivan Yates: "You needn't worry, we will have the money in the morning." Jones gave Ivan Yates a check for the amount of the inventory. Jones stated that after he gave Ivan Yates the check, he received the keys to the store. Jungclaus and the defendant were present at that time. Jones gave Ivan Yates another check for the petty cash. After that, Jones, Jungclaus, and the defendant walked out of the store together, and Jones started to Grand Island in his car. Jones, Jungclaus, and the defendant met at a restaurant on the way back to Grand Island that evening, and Jungclaus told Jones to meet him and the defendant at Jungclaus' office in his home the next morning and he and the defendant would get Jones the money to put in the bank to take care of the check. Jones went to the Jungclaus residence and met Jungclaus and the defendant. Jungclaus and Jones first went to the bank together and returned, and Jungclaus and the defendant visited privately for a few minutes. The defendant received a check from Jungclaus and told Jones that they were going to the bank together. The defendant cashed the check at one bank and gave the cash to Jones and told Jones to deposit it, together with $3,000 that Jungclaus had given Jones, in another bank. Jones deposited the cash in an account for Jones IGA Store. The check Jungclaus had given to the defendant was signed by Jungclaus, made out to the defendant as payee, and endorsed "Cash Loan to K. C. Rains."

Jones stated that during the following 2 weeks he saw the defendant almost every night, when the defendant came to the store about the time Jones was ready to close the store; that after January 2, 1959, the defendant talked to him about the operation of the store when the defendant was present in the store after the help had left; that Jones told the defendant it looked like the bills were getting too big and he did not know how he was going to pay them; and that the defendant said he would

get some more money to put into the business. The defendant said he did not want his name on any paper connected with the store, and that he would give Jones the cash to pay the bills. The defendant told Jones not to worry about the operation because "we are going to burn it." The defendant said he would "get this ready and I will have to go back to Missouri because I have had too many fires, and I can't be here when it burns as I will be suspicioned (sic)." After this conversation was finished, Jones and the defendant went to Grand Island and had something to eat. The next time this matter was discussed with Jones was a week or 10 days later. Jungclaus and the defendant were present at the defendant's apartment in Grand Island. The defendant told Jones not to worry about it, he and Jungclaus would take care of the burning part. Jungclaus said he would do the burning and that the defendant would have to be at home when this happened. At the same meeting the defendant said that after this deal was cleaned up, the three of them would have $30,000 insurance money to split. Jones did not see the defendant in Nebraska from the last part of January or the first part of February 1959, until after May 9, 1959.

Ivan Yates testified that Jungclaus introduced Jones to him; that the inventory was taken and settled for; that Jones, Jungclaus, and the defendant, together with Mr. and Mrs. Yates and Harold Roach, were present at the time the inventory was taken; that Jungclaus introduced the defendant as an associate of Ernie Jones of Eldon, Missouri, who was supposed to be a brother of Howard Jones; that while the inventory was being completed, the defendant was somewhere around the store and had been there all day; that after January 1, 1959, he saw the defendant in Doniphan possibly half a dozen times, once or twice in the store; and that the Jones IGA Store in Doniphan burned in the early morning of May 9, 1959.

Evers testified that he was a clerk in the Jones IGA Store, hired by Jones and Jungclaus. He went with Jungclaus in the early morning of May 9, 1959, from Grand Island to Doniphan, and the two of them entered the Jones IGA Store building using a key Jungclaus had. They stayed in the store about 15 minutes. Jungclaus then went back and stayed a few more minutes. The two of them then drove west a block, south a block, then back on Highway No. 281 east toward Grand Island. At an intersection a block east on the highway they looked toward the store and saw a fire. They then went on to Grand Island where Evers took Jungclaus to the hospital because he had been burned. Later that morning Evers again saw the store and it was almost entirely burned. Evers had known of the plan to burn the store since he was hired some 3 weeks before the fire, when Jungclaus told him of the plan.

Insurance policies on the store and the contents purchased from the former owner, Yates, had been assigned to the new owner, Jones. Three additional insurance policies were purchased covering this same store and contents, one by Jungclaus and two by Jones. The aggregate amount of these insurance policies was $36,700.

Geraldine Creason testified that she worked for Jones as a clerk in the grocery store at Doniphan, Nebraska; that she had seen the defendant in the store three or four times while she was working for Jones; and that when the defendant came into the store he looked the store over.

The defendant testified that he was engaged in the business of selling liquid petroleum products at Eldon, Missouri; that prior to 1954, he lived in Grand Island and engaged in the same business; that he became acquainted with Jungclaus in 1941; that he and Jungclaus were planning on a burglar alarm sales proposition but this did not go through; that while he lived on a farm north of Grand Island, he and Jungclaus fed some cattle; that Jungclaus came to Eldon, Missouri, during the sum-

mer of 1958 with his family; that Jungclaus told the defendant that he was manufacturing burglar alarms at Grand Island and he wanted the defendant to go to Grand Island and help sell this product due to the fact that the defendant was well acquainted over the state; and that the next time he saw Jungclaus was in Tulsa, Oklahoma. This witness further testified that he had known Howard Jones since 1957; and that he saw Jones in Tulsa, Oklahoma, when Jungclaus was there. He further testified that Jungclaus came to Eldon, Missouri, prior to November 1958; that Jones was living in or near, and working in Eldon, Missouri, in 1957, and was driving cars for Ernie Jones who was engaged in the automobile business; that Ernie Jones' business was directly across the street from the motel of defendant's wife; and that in connection with the motel there was a restaurant. The defendant further testified that he saw Jungclaus and Jones together in Eldon in the fall of 1957 and at different times during 1958; and that he went to Grand Island 2 days before January 1, 1959, primarily on a business trip with reference to the burglar alarm business, and to visit his son and daughter-in-law who resided on a farm near Grand Island. The defendant testified that he located Jungclaus who told the defendant that he was going to take an inventory at a store in Doniphan on New Years Day; that he saw Jungclaus in Doniphan on January 1, 1959, when he went to the store in the morning; that he remained there until about 1:30 or 2 p.m.; that while he was in the store he said a few words to Yates, but did not discuss business with Jungclaus with reference to the burglar alarms because Jungclaus was busy taking inventory of the store; that he drove to his son's home for dinner and returned to Doniphan at approximately 5 or 5:30 p.m., and went to the store; that he did not engage in any conversation with Yates, Jungclaus, or Jones about the matter or quantity of the inventory, nor about the payment for the inventory; that he had no interest in what was known

as the Jones IGA Store; and that he was in the store when the transaction was completed. The defendant further testified that he endorsed a check for $2,000 for Jungclaus as an accommodation because Jungclaus' wife was not to know about Jungclaus investing in this particular business, which was the reason why the check was made to the defendant, endorsed by him, and given to Jones. The defendant further testified that he at no time borrowed this money from Jungclaus, nor was it ever money that he had put up to become a partner in the store. The defendant further testified that he left Grand Island on January 14, 1959.

Jerry Bock testified that he lived in Eldon, Missouri; that he was engaged in the filling station business; that he met Jungclaus at Eldon in June or July 1958; and that Jones introduced this witness to Jungclaus in July 1958.

Elena May Oliver testified that she lived in Eldon, Missouri, and was employed by the defendant's wife at the Randel Motel; that in connection with the motel there was a restaurant; that she became acquainted with Jungclaus in July 1958, when he and his family were registered at the motel; that she was acquainted with Jones who was in and out of the restaurant quite often; that she first met Jones early in 1958, when she went to work in the motel; that while she worked at the motel she saw Jungclaus and Jones together in the restaurant several times; that she also saw Jungclaus and Jones together in Eldon in October or early November 1958; and that during the visits of Jungclaus in the latter part of October or first part of November 1958, she had an occasion to hear a conversation between Jungclaus, the defendant, and the defendant's wife in the defendant's apartment in the motel, to the effect that Jungclaus wanted the defendant to come to Nebraska and sell burglar alarms. She further testified that she terminated her employment at the motel the last part of January 1959.

The defendant introduced evidence of four witnesses who lived in the vicinity of Eldon, Missouri, were acquainted with him and friends of his, and who testified to the defendant's reputation for truth and veracity as being good.

In Jungclaus v. State, 170 Neb. 704, 104 N. W. 2d 327, this court said: "A conviction may rest on the uncorroborated testimony of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused." See, also, Ruzicka v. State, 137 Neb. 473, 289 N. W. 852.

In Millslagle v. State, 137 Neb. 664, 290 N. W. 725, the case of Jahnke v. State, on rehearing, 68 Neb. 181, 104 N. W. 154, was referred to, wherein it was said: " 'The evidence of an accomplice should be closely scrutinized. If it appears that such witness has wilfully sworn falsely in regard to a material matter upon the trial, his evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty.' * * * To the extent that Jahnke v. State, *supra*, appears to declare that a conviction resting upon the uncorroborated evidence of an accomplice, who has been guilty of a conscious falsehood on a material matter, will in every case be set aside as a matter of law, it is modified to conform to the views herein expressed."

A clear explanation of the views expressed in Millslagle v. State, *supra*, with reference to Jahnke v. State, *supra*, is expressed in Smith v. State, 169 Neb. 199, 99 N. W. 2d 8, as follows: " 'The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and,

in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.' It is therefore not now the law of this state that one charged with a criminal offense may not be convicted on the testimony of an accomplice."

Without repeating the evidence in this case, it does show that the defendant was in the store in the early part of January 1959, and that Jungclaus introduced the defendant to Yates as an associate of Ernie Jones who was furnishing the money for his brother Howard Jones to purchase the store. There is no explanation given by the defendant for his presence in Doniphan and at the store at times other than when the inventory was taken. The defendant was present at the time the inventory of the store was finished. The defendant admitted the cashing of the check marked "Cash Loan to K. C. Rains," but claimed it was an accommodation to Jungclaus. We make reference to other evidence as heretofore set out.

This court said in Smith v. State, *supra:* "Definitive of what is meant by corroboration, it was said in Heusser v. McAtee, 151 Neb. 828, 39 N. W. 2d 802: 'Where there is a direct conflict in the evidence relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and admissible for consideration of the jury.' This statement does not employ the terms 'corroboration' or 'corroborative' but the opinion points out that the statement was a characterization of these terms."

The evidence upon which the case was tried was suffi-

cient to go to the jury, and sufficient for the jury to return a verdict of guilty. The trial court did not commit error in this respect as contended for by the defendant.

The defendant contends that the trial court erred in not permitting the defendant to take the depositions of Jungclaus and Jones who were confined in a penal institution. The defendant filed a motion in the trial court requesting the court to grant the taking of the depositions of the two above-named persons who were held in confinement. This motion was supported by an affidavit to the effect that the nature of the crime charged was such that it would be necessary for the defendant to ascertain various times, dates, and places which allegedly would be testified to by one or both of the witnesses (Jungclaus and Jones) in order to properly defend himself of the crime charged. We fail to find that this motion was ruled upon by the trial court. This being true, it is proper to assume that the motion was overruled.

While some discussion is made in the briefs of the defendant and the State of sections 29-1904 and 29-1905, R. R. S. 1943, it is unnecessary to analyze these sections with reference to this issue.

Section 25-1233, R. R. S. 1943, is applicable to the instant case. This section provides: "A person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition." Therefore, the depositions of persons confined in penal institutions may be taken in a criminal action.

In the instant case the showing made by the defendant to the trial court to procure an order to take depositions of the witnesses heretofore mentioned is inadequate and insufficient. There is no showing as to what material evidence would be adduced by the witness Jungclaus in behalf of the defendant relating to the defendant's de-

fense if the motion to take his deposition was granted. In a situation of this kind, the question is whether or not the trial court abused its sound legal discretion in not permitting the defendant to take the depositions as set forth in his motion. We conclude that under the circumstances as presented by the record the trial court did not abuse its sound legal discretion as contended for by the defendant.

The defendant contends that there was irregularity and misconduct on the part of the county attorney by causing subpoenas to be served upon two witnesses for the defense; and that by virtue of this action the county attorney sought to harass the witnesses for the defense.

Jerry Bock, a witness for the defense, was served with a subpoena to appear as a witness for the prosecution, and a subpoena was served on Ernie Jones, also a witness for the defense. The latter witness was used as a rebuttal witness for the State. Jerry Bock's testimony is to the effect that no one from the county attorney's office ever talked to him about being a witness or inquired of him what kind of testimony he might give on behalf of the State, nor was any attempt made to use him as a witness for the State. No specific objection to the action of the county attorney in having these subpoenas served was made by the defendant.

In Ossenkop v. State, 86 Neb. 539, 126 N. W. 72, this court said: "In a criminal prosecution, rebuttal testimony on behalf of the state may be given by witnesses whose names were not indorsed on the information."

If, as contended for by the defendant, the action taken by the county attorney was for the purpose of harassing and confusing these witnesses for the defense it would not be an irregularity, but would be misconduct on the part of the county attorney.

In Goldsberry v. State, 92 Neb. 211, 137 N. W. 1116, it is said: "Objection that the prosecuting attorney is guilty of misconduct at the trial prejudicial to defend-

ant must be taken at the time. It is primarily a question for the trial court. * * *."

The record fails to disclose any showing by the defendant of any action that in any way prejudiced any right of the defendant because of the service of these two subpoenas. The defendant's contention is without merit.

The defendant contends that the trial court should have sustained the defendant's motion for a new trial on the ground of newly discovered evidence. This is based on the evidence of one Mills, who purchased the Randel Motel from the defendant's wife, and of the defendant's wife to an alleged telephone conversation between Howard Jones and the defendant, overheard by Mills and the defendant's wife, to the effect that Jones could clear the defendant of the offense charged against him if the defendant would give Ernie Jones $3,500. There is other evidence to the effect that Jones repudiated his evidence given at the trial of this case; that he told a witness he implicated the defendant on the belief that he could obtain a parole; that he alone could clear the defendant of the charge but it would take money; and that he had sent word to the defendant to get the money to Ernie Jones. There are also affidavits of two persons to the effect that Jungclaus and Jones were seen together prior to the date that Jones claimed he met Jungclaus.

The county attorney testified that Jones appeared before the Board of Pardons of the State of Nebraska. This witness testified that he appeared before the board at the hearing for Jones in his official capacity; that he made Howard Jones no promises of any kind; and that the only remark he made was that if Jones came up for parole, this witness would not do anything to stop him. The transcript of the proceedings before the Board of Pardons discloses no exertion or special effort on the part of the county attorney to reward Jones for his testimony given for the State.

In Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874,

this court said: "The granting or refusing of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion." See, also, Smith v. State, *supra*. The court went on to say: "It is the rule that a new trial will not be granted on the ground of newly discovered evidence when the only effect of the evidence is to impeach or discredit a witness. Baskins v. State, 139 Neb. 803, 299 N. W. 188."

From a review of the affidavits and the evidence relating to the defendant's motion for a new trial on the ground of newly discovered evidence, it is concluded in this case that the trial court did not abuse its discretion in refusing to grant a new trial on the ground of newly discovered evidence.

The defendant contends that the trial court did not properly instruct the jury on the law as it relates to accomplices.

In support of this contention, the defendant asserts that the trial court gave but one instruction to the jury relating to the testimony of accomplices, which is instruction No. 16. This instruction reads as follows: "You are instructed as a matter of law that the fact that a person is an accomplice in a commission of a crime goes to his credibility as a witness, and an accomplice is not entitled to the full credit given to the other witnesses. You will receive such testimony with caution, closely scrutinize it in the light of all the other evidence in the case, and give it such weight as you may think it is entitled to have."

The defendant asserts that in Jahnke v. State, *supra*, the court held as follows: "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has willfully sworn falsely in regard to a material matter upon the trial, his evidence can not be sufficient, if uncorroborated, to support a verdict of guilty." The defendant asserts that the trial court in

failing to instruct the jury about the fact that if a witness willfully swears falsely in regard to a material matter upon the trial, that the evidence cannot be sufficient, if uncorroborated, to support a verdict of guilty, does not give the jury the correct statement of law. The defendant also asserts that the trial court did not go far enough in its instruction as to the weight and credibility that should be given to an accomplice as set forth in Jahnke v. State, *supra.* Therefore, the defendant asserts that the trial court committed prejudicial error in giving instruction No. 16.

It has been pointed out heretofore in the opinion that the rule in Jahnke v. State, *supra,* has been modified.

In instruction No. 18, the trial court instructed as follows: "If you believe from the evidence that any witness has wilfully testified falsely as to any material fact in this case, then you are at liberty to entirely disregard the testimony of any such witness, except such portions as are corroborated by other creditable witnesses or evidence."

In instruction No. 19, the trial court instructed as follows: "If the evidence introduced in this case produces in your mind an abiding conviction of the guilty (sic) of the defendant and satisfies you of his guilt beyond a reasonable doubt, it is then your duty to convict him."

The following are applicable to the above contention of the defendant.

"Where the charge to the jury, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete." Kirkendall v. State, 152 Neb. 691, 42 N. W. 2d 374. See, also, Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151.

In Smith v. State, *supra,* this court said: "Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case,

where no proper instruction has been requested by the party complaining." See, also, Martin v. State, 67 Neb. 36, 93 N. W. 161; Welton v. State, 171 Neb. 643, 107 N. W. 2d 394.

The defendant did not request an instruction relating to the testimony of an accomplice in the case at bar. The trial court did not commit prejudicial error as contended for by the defendant.

Other assignments of error made by the defendant are without merit and need not be discussed.

The verdict of the jury and the judgment rendered thereon should be, and are, affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

PORTER D. KNOLL ET AL., APPELLANTS, V. WILLIAM KNOLL, JR., ET AL., APPELLEES.
114 N. W. 2d 40

Filed March 30, 1962. No. 35155.

1. **Trial: Judgments.** The court examines the evidence on a motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.
2. ———: ———. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom.
3. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.
4. ———: ———. A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.
5. ———: ———. Where the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed.*

Kenneth H. Dryden, for appellants.

Dier, Barton & Barton, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an appeal from a summary judgment. Porter D. Knoll and Harold R. Knoll, the appellants, were the plaintiffs below. William Knoll, Jr., and Alice George, the appellees, were the defendants.

The litigation arises out of a controversy concerning the will of Elizabeth T. Knoll, deceased. Elizabeth T. Knoll died October 20, 1957, and left surviving her seven children, four of whom are the parties to this action. Her will, which was filed for probate on October 30, 1957, left all of her property to the defendants.

On November 21, 1957, the plaintiffs and another brother, F. T. Knoll, entered into a written agreement with the defendants in which the plaintiffs and F. T. Knoll agreed not to object to the probate of the will, and the defendants agreed to pay to each of the plaintiffs and F. T. Knoll the sum of $1,000 in cash on or before March 1, 1959, if the will was admitted to probate.

On November 26, 1957, Kathryn Cruise, a daughter of the testatrix, filed objections to the probate of the will. On January 31, 1958, the defendants entered into a separate settlement agreement with Kathryn Cruise, and on February 26, 1958, the will was admitted to probate. On June 11, 1958, the consideration for the settlement with Kathryn Cruise was paid to her by the executor.

On February 28, 1959, the balance of the consideration due the plaintiffs under the written agreement of November 21, 1957, was paid to them by the defendants.

On February 3, 1960, the plaintiffs commenced this action.

The motion for summary judgment was heard upon the petition of the plaintiffs, the motion of the defendants, and the evidence. The district court sustained the motion and dismissed the action. The plaintiffs' motion for new trial was overruled and they have appealed.

The amended petition alleged that at the time the written agreement was entered into on November 21, 1957, the defendants represented and it was agreed that the written agreement would not be effective unless it, or one with the same provisions, was signed by Kathryn Cruise; that if the plaintiffs did not contest the will and the defendants made a settlement with Kathryn Cruise, then the defendants would pay to each of the plaintiffs, after the estate was closed, an amount equal to that paid to Kathryn Cruise; that the plaintiffs relied upon the representations of the defendants and did not contest the will; that Kathryn Cruise did not sign the agreement entered into on November 21, 1957, or a similar one; that Kathryn Cruise filed objections to the will but later entered into an agreement with the defendants and was paid $5,000 from the estate; that a final decree was entered in the proceeding to administer the estate on July 14, 1959; that the plaintiffs received $1,000 to apply on the agreement; and that there was a balance of $4,000 due each of the plaintiffs from the defendants. The plaintiffs prayed for judgment in the sum of $8,000 and that the written agreement entered into on November 21, 1957, be reformed to express the true contract of the parties or that it be canceled.

The defendants' motion for summary judgment alleged in part that there was no genuine issue of fact because the endorsements on the checks delivered to the plaintiffs by the defendants established that the payments were made in compliance with the written agreement entered into on November 21, 1957, and not in reference to an oral agreement as alleged by the plaintiffs.

In support of the motion for summary judgment, the defendants produced affidavits denying that they had entered into any agreement with the plaintiffs other than the written agreement entered into on November 21, 1957, and stating that they had executed and delivered checks and payments totalling $1,000 each to the plaintiffs. The affidavits also identified three canceled checks bearing the following endorsement signed by each of the plaintiffs and F. T. Knoll: "Endorsement of this check cancells (cancels) balance of agreement for compromise of will contest made and entered into 21st day of November, 1957 by and between W. J. Knoll, Jr. and Alice George."

In opposition to the motion for summary judgment the plaintiffs produced their affidavits. The affidavit of Porter D. Knoll stated that the allegations of the petition were true; that upon the representation of the defendants, made at the time the written agreement was entered into on November 21, 1957, that each of the other brothers and sisters would receive the same amount as Kathryn Cruise and that she would sign the agreement, they executed the written agreement and "received funds thereunder"; and that William Knoll told the affiant at Wichita during the winter after the agreement was signed that they would receive the same amount as Kathryn Cruise. The affidavit of Harold R. Knoll stated that the allegations of the petition were true; that several times after November 21, 1957, and as late as July 30, 1959, William Knoll told the affiant that he would pay him the amount which was paid to Kathryn Cruise that fall; and that on or about July 1, 1958, the affiant received a letter from one of the attorneys for the defendants stating that the defendants would make settlement with the rest of the family. The affidavit identified a copy of the letter referred to, which stated in part: "So far, I know Bill has received nothing in the form of distribution and I suspect he and Alice will have to get something jointly before they can make

settlement as they told me they would with the rest of the family."

Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact presented, but to discover if any real issue of fact exists. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Collett v. Hendrickson, 172 Neb. 571, 110 N. W. 2d 851.

A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627. Where the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted. Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

The plaintiffs in this action admit that they entered into a written contract with the defendants but allege that it never became effective because of a contemporaneous oral agreement that it would not become effective unless it, or a similar one, was signed by Kathryn Cruise. The plaintiffs then further alleged that the defendants orally agreed that if the plaintiffs did not contest the probate of the will, the defendants would pay to each of the plaintiffs an amount equal to the amount paid to Kathryn Cruise.

The defendants deny that they made any oral agreement with the plaintiffs and allege that the $1,000 paid by the defendants to each of the plaintiffs and F. T. Knoll was paid in compliance with the terms of the written agreement entered into on November 21, 1957. In sup-

port of this contention the defendants produce canceled checks which contain a written acknowledgment signed by the plaintiffs and F. T. Knoll that the money paid to them by the defendants is in full satisfaction of the amounts due the plaintiffs and F. T. Knoll under the agreement entered into on November 21, 1957.

The plaintiffs do not question the signatures or other writing which appears on the canceled checks. They do not claim that their signatures are not genuine or that the writing was not on the checks at the time that the checks were endorsed. The record contains no explanation or allegation of any kind which if true would avoid the effect of the endorsements which appear on the canceled checks.

Initially, the plaintiffs are confronted with a written contract which provides that they are to receive $1,000 each from the defendants. They attempt to avoid the effect of the written contract by alleging a series of contemporaneous oral agreements which have the effect of rewriting the written contract so that they will receive not $1,000 but $5,000 each, and by further alleging that the $1,000 which has been paid was only a partial payment intended to apply upon the larger amount due under the alleged oral agreement. They are next confronted with receipts signed by each of them which acknowledge payment in full of the amounts due them from the defendants. In their resistance to the motion, they fail to produce any explanation or allegation which would avoid the effect of their receipts.

This court is of the opinion that the defendants in this case successfully pierced the allegations of the pleadings and that the resistance to the motion failed to show that a genuine issue of fact existed.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

GRACELAND PARK CEMETERY COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

114 N. W. 2d 29

Filed March 30, 1962. No. 35172.

1. **Eminent Domain.** The value of land taken in a condemnation proceeding is properly based on its most advantageous and best use.
2. **Eminent Domain: Cemeteries.** The most advantageous and best use of unoccupied lands which are an integral part of an existing cemetery ordinarily is its use for cemetery purposes.
3. ———: ———. A cemetery is a type of property having no market value. In determining the value of such property the fair market value rule has no application for the reason that cemeteries are not bought and sold on an open market.
4. **Eminent Domain.** When property is of such a nature that it has no market value its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown.
5. **Eminent Domain: Cemeteries.** The number of grave sites taken, multiplied by the sale price of a single grave site, affords no reasonable basis for fixing the value of the land taken by condemnation from a cemetery.
6. ———: ———. The value of cemetery land taken by condemnation may be established by a unit-price method. The unit price in such case is based on the average sale price of grave sites in the used portion of the cemetery, less the reasonable cost of development, sales, maintenance, administration, perpetual care, and any other expense affecting its value.
7. ———: ———. The amount arrived at by applying the net unit price to the number of grave sites actually taken should be reduced to present worth for the projected period in which the grave sites will be sold.
8. **Eminent Domain: Easements.** Where there is no evidence of value of an easement taken by condemnation it is error to submit such issue to the jury, other than to direct a finding of nominal damages.
9. **Trial.** A verdict based on speculation and conjecture will not be permitted to stand.

APPEAL from the district court for Douglas County: ROBERT L. SMITH, JUDGE. *Reversed and remanded.*

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Ep-

stein, Frederick A. Brown, Edward M. Stein, Steven J. Lustgarten, and *Sebastian J. Todero,* for appellant.

Wells, Martin, Lane, Baird & Pedersen, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal by the City of Omaha from a judgment awarding damages to the Graceland Park Cemetery Company for a taking and damaging of its property in a condemnation proceeding under the power of eminent domain.

The plaintiff is a private corporation owning and operating a cemetery in Omaha. It issued 367 shares of stock of which Duane Beavers, the treasurer of the company and the superintendent of the cemetery, is the owner of 254 shares. The cemetery contains 30 acres of land which was purchased in 1910. It is located in the city of Omaha, the legal description of which is stated in the petition. For the purpose of this opinion we describe it as being bounded on the east by Forty-second Street, on the north by L Street, on the south by Hitchcock Park, and on the west by a residential area. The evidence shows that room for the expansion of its acreage does not exist. The cemetery was fenced on the east and north with a 5-foot, chain-link, steel fence constructed on the property lines.

In connection with the development of a new interstate highway the city determined that it was necessary to widen the intersection of Forty-second and L Streets, and the approaches thereto. Condemnation proceedings were commenced on June 24, 1959, to acquire certain lands and a grading easement over other lands. The land taken is generally described as follows: Commencing at the northeast corner of the cemetery a wedge-shaped tract extending 813.15 feet west, approximately 19 feet wide at the east end and decreasing to zero at

the west end. A similar tract with approximately the same width and length was taken along Forty-second Street. The northeast corner was rounded off, resulting in the taking of more ground than the extended lines above described would indicate. The total amount of land taken is 14,760 square feet, slightly in excess of one-third of an acre. In addition to the above, a grading easement over 9,800 square feet of ground was taken over the adjoining cemetery property. In view of the fact that there is no evidence of damage resulting from the easement, we shall not describe the easement boundaries. It is stipulated in the record that there are no severance damages. The only question for determination is the value of the land taken, the value of trees, shrubs, and flowers removed, and the cost of relocating the fence. The jury awarded damages to the plaintiff in the amount of $28,125. It is from a judgment for this amount that the city has appealed.

The evidence shows that there have been approximately 7,800 interments in the cemetery since 1913 which occupy about 20 acres of its total area. The land taken by the city lies in the unused portion. A general plan for laying out of roads, walkways, and lots was engineered shortly after it was acquired for cemetery purposes. The land taken adjoins an area which has never been surveyed and staked out on the ground. The evidence is that a cemetery is developed a portion at a time as needed for burial purposes and that the land taken adjoins an area not yet needed for that purpose. The record is silent as to the extent of the development of this area from which the land was taken. There is no evidence that water lines have been laid, or that the land is sodded, or otherwise developed. There is evidence that the land taken was occupied by trees, bushes, and flowers, and of the damage resulting from their removal. There is evidence of the reasonable cost of moving the fence to the new property lines.

The property generally was improved as a modern

park-like cemetery in which the traditional headstones are supplanted with markers set at ground level. The 30-acre tract is a compact area put to permanent use as a cemetery. It is the general rule that in determining the fair and reasonable value of land taken under the power of eminent domain it is proper for the jury to consider the purposes for which it was being used at the time of the taking, all uses for which it is adapted and to which it might be put, and award compensation upon the basis of its most advantageous and best use. Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209. The evidence in the instant case shows that the most advantageous and best use to which the property can be put is for cemetery purposes. The measure of damage must therefore be determined upon its use for that purpose.

Recognition of the unique value of cemetery property has been noted by the courts. In Fidelity Union Trust Co. v. Union Cemetery Assn., 104 N. J. Eq. 326, 145 A. 537, the court said that land, "when dedicated to the burial of the dead, acquires an unique value by the grace of its consecration and the exclusiveness of the cemetery franchise."

There are types of property that are not bought and sold on an open market and consequently do not have a reasonable market value within the rule that the fair market value is the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. The fair market value of property implies proof of sales of similar property in the community as a means of fixing the value of the property taken. When the property is such that evidence of fair market value is not obtainable, necessarily some other formula for fixing the fair value of the property must be devised. This is true, as we view it, of such properties as school yards, church yards, college campuses, buildings under construction, and cemeteries. 1 Orgel on Valuation under Eminent Domain, § 38,

p. 175. We hold, therefore, that in the taking of land used for cemetery purposes the measure of damages is not the fair market value of the land for the simple reason that such property has no fair market value. Whenever the property is of such character and nature that it has no fair market value in the ordinary sense, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown. Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod, 20 Idaho 568, 119 P. 60, 38 L. R. A. N. S. 497; City of Chicago v. Farwell, 286 Ill. 415, 121 N. E. 795. One text writer refers to the measure of damages in such a case as the determination of the specialty value to the owner. Jahr, Eminent Domain, Valuation and Procedure, § 82, p. 116.

An appropriate method for finding the value of land taken, which was being used for cemetery purposes, is to determine the value of the burial lots or grave sites taken by applying a unit value based on the average sales price per lot or grave site in the adjoining used section of the cemetery, less the reasonable cost of development, sales, maintenance, administration, perpetual care, and any other expense affecting its value. The unit value thus determined, multiplied by the number of lots or grave sites taken, less a reduction to present worth for the deferred realization over the selling period, will constitute a guide to the jury in determining the value of the property taken. St. Agnes Cemetery v. State, 3 N. Y. 2d 37, 143 N. E. 2d 377, 62 A. L. R. 2d 1161. We approve this formula as a proper guide for the jury to consider in fixing the value of land taken from a cemetery such as we have before us. We point out that a capitalization of anticipated profits is not a proper method of fixing the value of property. Whether anticipated profits would actually be made ordinarily depends on so many contingencies that a verdict cannot be grounded on them. Experience teaches us that future paper profits are more often illusory than real.

Hamilton v. Pittsburg, B. & L. E. R.R. Co., 190 Pa. 51, 42 A. 369, 61 L. R. A. 319. Values based on current profits have a dependable foundation, while anticipated profits do not. We are of the opinion, however, that the evidence of the fair and reasonable sale price of cemetery lots or grave sites, less the deductions hereinbefore set out, when such sales can reasonably be projected over a term of years with the net sale price reduced to present worth, is not so uncertain as to bring it within the exclusionary rule. The ordinary uncertainties of the market place do not exist in such a case and the net sale price of the lots or grave sites, reduced to present worth, afford a reasonable guide for fixing the value of lands taken by condemnation. United States v. Iriarte, 166 F. 2d 800; Cementerio Buxeda, Inc. v. People of Puerto Rico, 196 F. 2d 177. It is somewhat comparable, because of the nature of the fixed income, to rental value which is always admissible because it is almost as certain as the market value of the property.

The cemetery company relies upon the evidence of Duane Beavers and Frank J. Priborsky to establish the value of the land taken. Beavers testified that each lot is 14 feet by 9 feet and contains 4 grave sites, each 9 feet by 3½ feet. The walkways shown on the original plat are 3 feet in width. He fixes the sale price of each grave site at $125. He stated that 538 grave sites were taken. He fixed the value of the grave sites taken at $67,250. He arrived at this amount by valuing the 538 grave sites at $125 each. Beavers stated that the cost of operation of the cemetery is approximately $20,000 per year and that the interest from the perpetual care fund is about $1,400. The difference of $18,600 is taken from the sale price of lots. In the year preceding the condemnation the sale of grave sites failed by $4,000 to pay operating expenses. He estimated that a minimum of 160 grave sites had to be sold to cover the expense of operation and that he had no idea as to the number actually sold. On cross-examination he admitted that

the 14,760 square feet taken would provide space for no more than 472 grave sites without taking into consideration the walkways shown on the original plat. He testified that 50¢ per square foot on all grave sites sold is set aside for the perpetual care fund, which amounts to $15.75 per grave site. There is no evidence of other deductions required to be made from the reasonable sale price in order to make use of the unit method in determining the value of the land taken.

The witness Priborsky is the assistant manager of Forest Lawn Cemetery in Omaha, a cemetery containing 359 acres. He fixed the value of the land taken at $62,500. This amount is calculated on 500 grave sites at a sale price of $125 each. He testified that sales expense usually runs 40 percent of the sale price, that perpetual care requires 25 percent, that depreciation of equipment runs 10 percent, and that there will be some development and other costs. He estimated that 75 percent of the sale price of grave sites is not attributable to the lot itself. Assuming the existence of 500 grave sites taken by the condemnation, he testified that $17,500 only would be attributable to the grave sites. He did not consider the land set aside for walkways, or a buffer area along the fences, which he stated are usually 4 or 5 feet wide. He did not consider the present value calculated for the period of time necessary to sell the grave sites.

The city called three experienced realtors as expert witnesses, none of whom had sold a cemetery property or knew of any sales of such. Their estimates of value were based largely on the value of residential property in the area. One estimated the value of the whole cemetery at $104,000 and the value of the property taken at $1,200. He fixed the damage to trees, shrubs, and flowers at $1,500 and the cost of replacing the fence at $2,100. He estimated that there were 300 grave sites taken which had a sale price of $125 each. He admitted this would produce a gross amount of $37,500. He did

not testify to any deductions to be made to determine the unit price to be applied to properly determine the value of the grave sites actually taken.

The second expert called by the city fixed the value of the cemetery at $80,000 and the land taken at $5,904. He fixed the cost of moving the fence at $2,046 and the damage to trees, shrubs, and flowers at $1,150.

The third expert fixed the value of the land taken at $11,273. He said that 73 percent of the land in a cemetery is ordinarily all that is usable for grave sites. He estimated the land taken would provide 300 grave sites which would sell for $125 each and that it would take 10 years to dispose of them. He concluded that the cemetery would produce an income of $1,605 per year for 10 years which, reduced to present value, would fix a value of $11,273. While some of the foregoing evidence was stricken by the trial court, we think it was proper evidence when the unit theory is employed to fix the value of property taken by condemnation.

The cemetery company, as the owner of the land taken, had the burden of establishing its value in the condemnation proceedings. Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200. We conclude, under the evidence shown, that the most advantageous and best use of the property taken was for cemetery purposes. We hold also that the 30 acres devoted to cemetery purposes had no fair market value as that term is ordinarily used and that the trial court was in error in submitting the fair and reasonable market value as the measure of damages. We conclude, also, that it is proper to submit the net unit sale price as a proper guide for the jury in fixing the value of the property taken.

As to the sufficiency of the evidence to sustain the verdict, we point out that the evidence is uncertain as to the number of grave sites taken. The number varies from 300 to 538 when no reason exists why the actual number taken could not be fixed with reasonable cer-

tainty. We point out also that the number of grave sites taken, multiplied by the sale price of a single grave site, affords no reasonable basis for fixing the value of the land taken. United States v. Iriarte, *supra*. The unit price to be used in making such a determination must be the fair sale price, less all deductions necessary to arrive at its net value. The amount fixed by the use of the unit price thus arrived at should be reduced to its present worth. No attempt was made to establish the net unit price and, consequently, the plaintiff did not produce evidence from which a jury could arrive at a fair value of the land taken. The evidence adduced by plaintiff left the jury where it could arrive at a verdict only by speculation and conjecture. A verdict arrived at in this manner cannot stand.

It is true that the plaintiff may rely upon evidence offered by the defendant to support a verdict if it is sufficient. But there is no evidence by the defendant in the record that will support a verdict for $28,125. We necessarily conclude that the verdict is not sustained by the evidence and that the judgment should be reversed and the cause remanded for a new trial.

The defendant tendered an instruction which substantially complied with the rule to be applied in fixing the value of land taken by condemnation under the unit sale price rule. The instruction was refused. It should have been given in substance, and the court erred in failing to do so.

The record is barren of any evidence as to the value of the grading easement. We think the trial court erred in submitting the issue of damages resulting from the taking of the easement, other than to direct the assessment of nominal damages.

In view of the conclusion reached, we will not discuss other assigned errors. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

HARVEY E. MARSH, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ALFRED E. MARSH, DECEASED, APPELLANT, V. DORA MARSH ET AL., APPELLEES, IMPLEADED WITH CLARK LEROY MARSH ET AL., APPELLANTS.
114 N. W. 2d 379

Filed April 6, 1962. No. 35058.

SUPPLEMENTAL OPINION

APPEAL from the district court for Cheyenne County: TED R. FEIDLER, JUDGE. On motion for rehearing. See *ante* p. 282, 113 N. W. 2d 323, for original opinion. *Former opinion modified. Motion for rehearing overruled. Reversed and remanded.*

Beatty, Clarke, Murphy, Morgan, Pedersen & Piccolo, L. W. Balderson, and *Lowell C. Davis,* for appellants.

Clinton & McNish, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

In our opinion previously issued in this case we directed that the judgment or judgments of the district court be reversed and the cause remanded with directions to dismiss the entire action without prejudice to a new action. Since the release of that opinion a supplemental transcript has been filed in this court showing that service of process was had on all parties having an interest in the litigation.

In a motion for rehearing appellee Dora Marsh asserts that the remand with directions to dismiss can only have the effect of delaying the proceedings, causing unnecessary expense in refiling the action and of obtaining new service of process upon the defendants. The point is well taken. We withdraw the last paragraph of our previous opinion in Marsh v. Marsh, *ante* p. 282, 113 N. W. 2d 323, and substitute therefor the following: The judgment or judgments of the district court are

reversed and the cause remanded for a new trial.

The motion for a rehearing is otherwise overruled.

REVERSED AND REMANDED.

EVERETT SATTERFIELD, APPELLANT, V. EARL PETERSON ET AL., APPELLEES.
114 N. W. 2d 376

Filed April 6, 1962. No. 35142.

1. **Deeds: Mortgages.** A conveyance of land subject to a mortgage conveys only an equity of redemption, the interest remaining after the mortgage has been paid.
2. **Mortgages.** A mortgagor may not attack the title acquired through void foreclosure proceedings unless he offers to pay the amount of the indebtedness secured by the mortgage.
3. **Mortgages: Limitations of Actions.** An action to redeem from the lien of a mortgage accrues to the mortgagor when the mortgagee takes possession of the premises after default in payment and must be brought within 10 years from the date of such possession.

APPEAL from the district court for Loup County: DONALD H. WEAVER, JUDGE. *Affirmed.*

E. L. Vogeltanz, for appellant.

Miles N. Lee, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an appeal in an action to quiet title to a tract of land in Loup County, Nebraska. In 1924, W. C. Heeter, who owned the land at that time, mortgaged the land to John H. Holcombe. Holcombe assigned his mortgage to the Merchants Mutual Burglary Insurance Company. Heeter later conveyed the land to William Heider subject to the mortgage.

In 1929 the Merchants Mutual Burglary Insurance Company foreclosed the mortgage. Heider was the

record title owner of the land but was not made a party to the foreclosure action. At the sheriff's sale the land was purchased by the Merchants Mutual Burglary Insurance Company. The sheriff's deed was recorded February 28, 1931.

The Lincoln Bonding and Insurance Company is the successor to the Merchants Mutual Burglary Insurance Company. In 1950 the bonding company entered into a contract to sell the land to Earl Peterson.

On January 3, 1951, Heider and his wife conveyed the land by quit claim deed to Everett Satterfield. On January 19, 1951, Heider conveyed the land a second time by quit claim deed to the bonding company which recorded the deed on January 24, 1951. Satterfield recorded his deed on February 2, 1951.

This action was brought by Satterfield, the appellant, against Earl Peterson and Ethel B. Peterson, his wife, the Lincoln Bonding and Insurance Company, and Clarence Bain, the appellees. Bain formerly occupied the land as a tenant and has made no appearance or defense to the action.

The district court found generally for the defendants; that the bonding company and the Petersons, and their predecessors in title, had been in adverse possession of the land since 1930; and that the deed from Heider to the plaintiff conveyed no right or claim of title. Title to the land was quieted in the bonding company subject only to the interest of the Petersons as purchasers. The plaintiff's motion for new trial was overruled and he has appealed.

The assignments of error are that the findings and judgment of the district court are contrary to the evidence and contrary to law. The action is tried de novo in this court.

The plaintiff's theory of the case, as disclosed by the amended petition, is that Heider was the owner and in possession of the land at the time he executed and delivered a quit claim deed to the plaintiff; that the bond-

ing company had notice of the plaintiff's deed and, therefore, was not a subsequent purchaser in good faith without notice; and that the subsequent quit claim deed to the bonding company was a cloud on the plaintiff's title. The defendants' theory of the case, as disclosed by the amended answers and cross-petitions, is that the bonding company acquired title to the land through the sheriff's deed; that the bonding company was in adverse possession of the land through Bain until 1950; and that Peterson as a purchaser from the bonding company has been in adverse possession of the land since 1950.

The record shows that the land involved in this action is adjacent to land owned by Clarence Bain. In 1932 Bain fenced the land involved in this action so that it was enclosed with other land which he used for pasture. Bain did not use the land for several years after that, but used it again in 1936 and later years until 1957. In 1950 Bain paid $50 to the bonding company as rent for the land for 2 years. In 1951 Bain paid rent to both Peterson and the plaintiff. From 1952 through 1956 Bain paid rent to Peterson. Bain testified that he thought he had paid rent to the bonding company before 1950, and that he never claimed that he owned the land. There is some evidence that Bain paid rent to the bonding company in 1947. In 1950 Bain entered into a contract to purchase the land from the bonding company. Later the contract was rescinded because Bain would not accept the title of the bonding company.

In December 1950, Earl Peterson entered into a contract to purchase the land from the bonding company. Peterson rented the land to Bain until 1957. In 1957 the fence was changed so that the land is now enclosed with other land used by Peterson for pasture. Since 1957 the land has been used by Peterson.

The record further shows that in 1940 a predecessor of the bonding company sent a representative to Loup County and tried to sell the land; that in 1947 and 1948 the bonding company corresponded with and inquired

concerning prospective purchasers for the land; that the bonding company and its predecessors included the land as an asset of the company in the reports filed with the Department of Insurance from 1931 through 1955; that the taxes from 1930 through 1949 were paid by the bonding company or its predecessors; and that the taxes from 1951 through 1960 were paid by Peterson except for the years 1956 through 1958 which were paid by the plaintiff.

The evidence is undisputed that Heider was never in possession of the land. Heider and his wife testified by deposition that they are residents of Thayer County, Nebraska; that they have never been in Loup County, Nebraska; that Heider never took possession of the land through anyone; that he had no tenants on the land and never received any rent from anyone; and that he knew there was a mortgage on the land but that he never paid any interest or taxes and did not know whether the taxes were paid. Neither Heider nor anyone in his behalf ever exercised any act of ownership over the land.

The plaintiff was familiar with the facts concerning the title to the land at the time he obtained the deed from Heider for $25. The plaintiff was county clerk of Loup County, Nebraska, in 1929 when the mortgage was foreclosed. As ex officio clerk of the district court, he filed the petition and other pleadings, issued the summons and order of sale, notarized the proofs of publication, and took the acknowledgment of the sheriff on the sheriff's deed.

In November 1950, the plaintiff stopped at the office of the bonding company in Lincoln, Nebraska, and inquired whether the land was for sale. Several days later the president of the bonding company wrote to the plaintiff stating that the company had entered into a contract of sale of the land; that the purchaser had raised some objections to the title; that they were trying to locate William Heider; and that they would appreciate any help the plaintiff could give. The plaintiff then

replied stating that if the price was not too high, he could handle the land without reference to Heider. Several days later the president of the bonding company called the plaintiff and attempted to sell him the land for $1,500. The plaintiff said that he would let them know within a couple of days. The plaintiff then examined the title records, contacted Heider, and obtained the quit claim deed.

The fundamental weakness in the plaintiff's case is that he has no claim to the land except through Heider. The land was conveyed to Heider subject to the mortgage which was later foreclosed. Thus, Heider acquired only an equity of redemption, the interest remaining after the mortgage was paid. McNaughton v. Burke, 63 Neb. 704, 89 N. W. 274. This was the only interest Heider could convey and it was the only interest that the plaintiff could obtain from Heider.

A mortgagor may not attack the title acquired through void foreclosure proceedings unless he offers to pay the amount of the indebtedness secured by the mortgage. Campbell v. Ohio National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546. In the absence of an offer to redeem, the plaintiff has no affirmative right to relief. The trial court properly dismissed his petition.

The remaining question is whether the bonding company and Peterson are entitled to affirmative relief upon their cross-petitions. The cross-petitions prayed that title to the land be quieted in the bonding company as against the plaintiff subject only to the interest of Peterson as purchaser.

An action to redeem from the lien of a mortgage accrues to the mortgagor when the mortgagee takes possession of the premises after default in payment and must be brought within 10 years from the date of such possession. Clark v. Hannafeldt, 79 Neb. 566, 113 N. W. 135.

The evidence is that Bain occupied the land from 1932 until 1957, and that Peterson has occupied the

land since 1957. Bain never claimed to own the land and he was not a tenant of Heider. The bonding company and its predecessors recorded the sheriff's deed and paid the taxes. Although the evidence is somewhat incomplete as to the early years, we believe that it establishes that the bonding company and its predecessors were in possession of the land from 1931 until 1950 and that Peterson has been in possession since 1950.

The only evidence to the contrary is the testimony of the plaintiff that he went to the land in 1951 and found it vacant; and that he collected rent from Bain in 1951. This is not sufficient to overcome the other evidence. By 1951 the statutory period in which an action to redeem might have been brought had expired. The lease from the plaintiff to Bain included other land, was not recorded, and there is no evidence that Peterson ever knew about the lease. The general rule is that an unauthorized attornment by a tenant to a third person is void and does not affect the possession of the landlord. Perkins v. Potts, 52 Neb. 110, 71 N. W. 1017, affirmed on rehearing, 53 Neb. 444, 73 N. W. 936. See, also, Kimble v. Willey, 204 F. 2d 238, 38 A. L. R. 2d 814.

The cases cited by the plaintiff, such as Butler v. Smith, 84 Neb. 78, 120 N. W. 1106, 28 L. R. A. N. S. 436, which hold that the possession of unimproved and unoccupied land is presumed to be in the holder of the legal title are not applicable to the facts in this case. The land involved in this case has been enclosed since 1932 and used for the purpose for which it is by its nature adapted.

The judgment of the district court quieting title to the land in the bonding company subject to the interests of the Petersons as purchasers is correct and is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

INDUSTRIAL LOAN & INVESTMENT COMPANY, A CORPORATION, APPELLANT, V. KEITH D. LOWE ET AL., APPELLEES.
114 N. W. 2d 393

Filed April 6, 1962. No. 35146.

1. **Vendor and Purchaser.** Where a vendee is in default under a contract of sale of real estate, making time the essence and providing for a forfeiture in case of default, and there has been no waiver of the provisions of the agreement or a defense thereto established, the contract will be enforced as made.
2. ———. In the ordinary contract for the sale of real estate, equity will not regard time as of the essence, but it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances.
3. **Assignments.** An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee.
4. **Appeal and Error.** Where the error concerning which complaint is made does not affect his interests in any way, one who was properly a party to the cause below, and against whom judgment was rendered, cannot predicate error upon the rendition of judgment against a defendant not properly served with process, who has failed to appeal from the judgment.

APPEAL from the district court for Harlan County: NORRIS CHADDERDON, JUDGE. *Affirmed.*

Gaines, Spittler, Neely, Otis & Moore, for appellant.

D. A. Russell and *John E. Sidner,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and SCHEELE, District Judge.

BROWER, J.

Plaintiff Industrial Loan & Investment Company, a corporation, brought this action against Keith D. Lowe and Agnes Lowe, husband and wife; Mamie E. Forbes and Vern Forbes, wife and husband; and Donald D. Bastemeyer, Commissioner of Labor of the State of Nebraska, defendants, to determine the rights and liens

and their priority in certain real estate in Harlan County, Nebraska, and to foreclose and sell the premises according to law and apply the proceeds among the liens and interests as the court should determine. By leave of court Lexington Mill and Elevator Company, a corporation, was later made a party defendant.

For convenience Donald D. Bastemeyer, Commissioner of Labor, will be referred to as Bastemeyer, and Lexington Mill & Elevator Company as Elevator. The other defendants will be referred to by their last names except where only one of the married defendants is designated.

Plaintiff's petition as it appeared at the time of trial sets out an installment contract to purchase the premises involved for $7,000, dated May 1, 1956, and recorded July 20, 1957, executed by the Forbes as vendors to the Lowes as vendees. It further shows an assignment of this contract to the plaintiff by the Lowes which was given to plaintiff to secure a note of $3,000 and interest dated July 19, 1957. The assignment was recorded July 24, 1957. The defendants Bastemeyer and Elevator were alleged to be subsequent lienholders.

The defendants Forbes filed an answer and cross-petition. They admitted the execution of the contract for sale of the real estate between themselves as vendors and the Lowes, and set out a copy of it. The cross-petition then set out that the Lowes came into possession of the premises and made certain payments thereon until September 1, 1959, and thereafter became in default and abandoned the premises; that in March 1960, the Forbes canceled the contract and notified the Lowes and the plaintiff of the rescission. It prayed that the court confirm the action of the Forbes in cancellation of the contract and quieting the title to the premises in Mamie E. Forbes as the record owner thereof.

Plaintiff filed a reply admitting certain undisputed matters and denying all others. Defendant Bastemeyer

filed a cross-petition and the defendants Lowe and Elevator defaulted.

Trial was had and on August 17, 1961, the court rendered judgment dismissing the plaintiff's petition and quieting the title to the premises in Mamie E. Forbes as against all the defendants except as to the marital rights of Vern Forbes, her husband.

The plaintiff filed a motion for new trial which was overruled by the trial court and it brings its appeal to this court.

Plaintiff's assignments of error are five in number but their substance is as follows: That the court erred in dismissing the plaintiff's petition, in finding in favor of the defendant Mamie E. Forbes, and in granting her relief under the cross-petition; and that the court erred in quieting title in Mamie E. Forbes against the plaintiff and the defendants, including certain defendants in default, but who had not been served again after the Forbes' cross-petition was filed out of time.

The facts as disclosed by the evidence in this case are not disputed in any material aspect. The legal rights of the parties that flow from the facts are the only questions in controversy.

The real estate contract executed between the Forbes and the Lowes on May 1, 1956, recited the Lowes had paid $75 down on signing the contract and were to pay $75 on the first day of each month on the principal and 5 percent interest every 3 months on the unpaid balance. It contained also the following provisions:

"Now, if the said parties of the second part shall pay the sum as above set forth, time being the essence of this contract, and shall pay all taxes and assessments whether mortgage note, special or general, which may become due on said real estate for the year 1956, and thereafter until the above payments are all made, then said parties of the first part shall at his own cost, execute and deliver to the said parties of the second part, or their assigns upon surrender of this contract, a war-

ranty deed to the above described Tract A, and a quit claim deed for Tract B.

"AND IT IS FURTHER AGREED that in case any payment, either of principal or interest, remaining unpaid for a space of thirty days after the same shall become due, or a failure to pay any taxes or assessments, at the time the same become due, then in that case, the whole amount unpaid on this contract shall become due and payable without further notice; and such delinquency in payment, or the failure in other respects by the parties of the second part to perform the stipulations of this contract, or any part of them, shall entitle the parties of the first part to immediate possession of the premises described herein, and the parties of the second part shall forfeit all payments made under this contract."

The Lowes had been in possession of the premises before buying them and continued to occupy them thereafter. They were never prompt about making payments, the last one being made on September 1, 1959. In all they had paid $3,955.03, of which $930.03 was interest. On October 1, 1959, there remained $3,925 unpaid principal and they never made payments thereafter.

Plaintiff loaned Lowes $3,000 cash on July 19, 1957, taking a promissory note in that amount payable in monthly installments of principal and interest in the amount of $142.92. Only two installments were paid and on the day of trial $2,750.42 principal and $928.27 interest were due thereon, which was secured by assignment of the real estate contract on these premises and certain school equipment and horses. No recovery could be made on the chattels because of the discovery of prior liens on a portion thereof and the inability of the plaintiff to locate the rest of the property. The plaintiff did not assume any obligation of vendees on the Lowes' contract with the Forbes in its assignment.

In December 1959, Keith D. Lowe left Nebraska and went to California, and in January or February 1960,

Agnes Lowe followed him with the children, leaving the premises unoccupied.

The Elevator recovered a judgment against Keith D. Lowe on October 21, 1957, for $5,800, and Bastemeyer, on March 6, 1959, filed a lien against him for $168.86. In their absence on May 21, 1960, the Lowes' remaining personal property was sold by an auctioneer apparently acting for them and out of the proceeds was paid a federal tax lien filed against Keith D. Lowe. Neither the plaintiff nor the Forbes received anything therefrom.

Upon learning that the Lowes had left the property and gone to California, Mamie E. Forbes, on March 3, 1960, instructed her attorney to notify the Lowes and the plaintiff that she had elected to terminate the contract, to take possession of the premises, and to retain the payments already made. She also asked that the plaintiff discharge the cloud on the record caused by its assignment of which she had learned about that time. On the same day the attorney by letter directed to plaintiff and the Lowes notified both of them of his clients' intentions, including a notice that if the plaintiff's lien was not discharged the Forbes would bring an action to quiet title. An exchange of letters between the attorneys for plaintiff and attorney for the Forbes followed in which plaintiff's counsel sought the amount still owing on the real estate contract. The Forbes' attorney at all times reiterated that his clients had rescinded the sale and the contract was at an end, though he finally gave the amount due thereon.

After the sale of the Lowes' personal effects, Mamie E. Forbes obtained possession of the premises in the latter part of May 1960. The buildings were then in bad repair. The windows and screens on the chicken house were destroyed and the storm windows and other windows were broken. The hot water heater and pipes were frozen and broken, requiring replacement, and the septic tank had to be cleaned. She spent for taxes, insurance premiums, and repairs necessary to make the prop-

erty rentable $382.07, and she estimated the total damage to the property to exceed $1,000. On June 1, 1960, she rented the premises and has collected $35 a month rent thereafter. There was testimony that the premises at the time of trial were of the value of $6,000.

Under the facts set out it is to be noted that the real estate contract involved by its express terms provided that time was of the essence. It further expressly provided that if any payment of principal or interest remained unpaid for 30 days the whole amount unpaid on the contract should become due and payable without notice, and the first parties, the vendors, should be entitled to immediate possession of the premises and the second parties should forfeit all payments made under the contract.

In Abbas v. Demont, 152 Neb. 77, 40 N. W. 2d 265, this court stated the following rule: "Where a vendee is in default under a contract of sale of real estate, making time the essence and providing for a forfeiture in case of default, and there has been no waiver of the provisions of the agreement or a defense thereto established, the contract will be enforced as made."

The cited case was an ejectment case where the defendant vendee claimed a waiver of timely payment and a counterclaim as an equitable defense. The trial court found against the defendant on the waiver and counterclaim but granted plaintiff, the assignee of the vendor, a strict foreclosure and allowed the defendant 60 days in which to redeem. This court reversed the judgment and gave the plaintiff the immediate possession of the property.

The case of Kear v. Hausmann, 152 Neb. 512, 41 N. W. 2d 850, was an action to quiet title brought by a vendor, such as is pleaded by the Forbes in the case now before the court. The defendant vendee sought to reform the contract which in effect would have extended the time of payment so there would have been no default. The lower court granted reformation and granted

specific performance to defendant. This court held that the evidence did not permit reformation and, applying the same rule as set out in Abbas v. Demont, *supra,* held the plaintiff vendor was entitled to have the title quieted. The contract contained a provision that time was of the essence and provided for forfeiture on default.

Counsel for the plaintiff argue in their brief that though the contract in the case before us made time the essence, it did not specifically say that in the event of default the vendor might rescind or cancel. Their brief seems to contend that some such precise terms must be used to give the right to rescind. They cite no cases that affirmatively sustain their position. In fact those cited are cases where such terms were used and discussed by the court and held to permit rescission. They then argue conversely therefrom that in their absence the contrary rule applies and rescission or cancellation cannot be granted.

In Kobza v. Spath, 166 Neb. 623, 90 N. W. 2d 246, the court stated: "In the ordinary contract for the sale of real estate, equity will not regard time as of the essence, but it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances." In the case quoted there were no specific words of rescission or cancellation mentioned in the opinion, yet this court reversed the judgment of the trial court which had granted specific performance to the vendees and quieted the title to the premises involved in the vendor because the vendees had defaulted in performance. Neither did the contract expressly make time the essence of the contract.

In the contract in the case before us not only was time made the essence of the contract by its express terms, but the contract further provided that in case of failure to pay any amount of principal or interest for the space of 30 days after due the whole amount should

become due and payable without further notice. It then provided that in that event the parties of the first part should be entitled to immediate possession of the described premises, and the parties of the second part should forfeit all payments made under the contract. It is quite clear that the original contract contemplates a rescission or cancellation on default. If the vendees were to lose possession and the past payments were to be forfeited it is difficult to imagine anything remaining for the benefit of the vendees. Under these circumstances it is apparent the parties considered the contract would be at an end.

The plaintiff was not a party to the original contract. Any interest which it has therein is as an assignee by virtue of an assignment of the vendees for security only. The assignment contained no clause by which the plaintiff agreed to be bound and assume the obligations of the contract. In Babson v. Village of Ulysses, 155 Neb. 492, 52 N. W. 2d 320, under such circumstances, it was held: "An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee. 4 Am. Jur., Assignments, § 102, p. 310; Tolerton & Stetson Co. v. Anglo-California Bank, 112 Iowa 706, 84 N. W. 930, 50 L. R. A. 777; Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903."

Plaintiff contends that in a court of equity Forbes should not have been granted a decree quieting title because in the present case it would be inequitable to do so. The cases cited by its counsel are however generally those involving strict foreclosure requested by the vendor in an action brought by him and have little application to suits brought to quiet title, or at law in ejectment after a forfeiture where time is made the essence of the contract.

Plaintiff assumed no obligations under the contract.

It did not get into contact with the Forbes until after the letter from their attorney in March of 1960, though its assignment was in July 1957. The agreement was between the Forbes and the Lowes and plaintiff was not in privity of contract with Forbes. Payments in March 1960, were 5 months in arrears. The Lowes had abandoned the premises. The property was in bad repair and was depreciating in value. Under the circumstances we see no reason why it would be inequitable for a court to enforce the forfeiture according to the terms of the contract.

Plaintiff contends that the judgment of the trial court was erroneous because the defendants Lowes and Elevator, although served by the plaintiff, had not been subsequently served as to the cross-petition filed by the defendants Forbes which was not filed until after the answer day of all the defendants. The plaintiff was in any event in court. It had filed its petition and took part in the trial of the cause. If Lowes and Elevator, or either of them, were not properly in court it is a matter between the other defendants and the cross-petitioner Forbes and cannot be availed of by the plaintiff. Where the error concerning which complaint is made does not affect his interests in any way, one who was properly a party to the cause below, and against whom judgment was rendered, cannot predicate error upon the rendition of judgment against a defendant not properly served with process, who has failed to appeal from the judgment. 5 C. J. S., Appeal and Error, § 1500, p. 856.

The errors complained of by the plaintiff cannot be sustained and the judgment of the trial court must be affirmed.

AFFIRMED.

HAROLD A. KOOP, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.
114 N. W. 2d 380

Filed April 6, 1962. No. 35174.

1. **Pleading.** Where a petition fails to state a cause of action against a party defendant, the plaintiff's alleged cause of action against such party should be dismissed.
2. **Estoppel.** Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality, and justice in accordance with good conscience, honesty, and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair, and necessary rule of law.

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

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, and *Steven J. Lustgarten,* for appellants.

Kennedy, Holland, DeLacy & Svoboda and *Robert L. Berry,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is a civil action brought by Harold A. Koop, plaintiff, against the City of Omaha, a municipal corporation, D. B. Anderson, clerk of the municipal court, and Frank Elias, deputy clerk of the municipal court, defendants, to recover the sum of $100 which the plaintiff had deposited as cash bail for Robert E. Timperley in the municipal court of the city of Omaha in connection with two complaints of the State of Nebraska against Robert E. Timperley, and which amount of $100 for the appearance of Robert E. Timperley had been forfeited by order of the municipal court entered on each of the complaints against Robert E. Timperley.

The plaintiff commenced this action in the municipal court of the city of Omaha on August 24, 1954. The defendants demurred to the plaintiff's petition, which demurrer was sustained. The plaintiff elected to stand on his petition, which was dismissed. Judgment was rendered in favor of the defendants on October 26, 1954. The plaintiff filed an appeal bond to appeal to the district court.

On November 22, 1954, the plaintiff filed a petition in the district court for Douglas County. After several motions had been filed and determined, the defendants, later, on October 31, 1957, filed an answer to the plaintiff's petition.

The plaintiff filed a motion for judgment on the pleadings on October 23, 1959.

On October 6, 1961, the defendants filed objections to the motion for judgment on the pleadings, and, in addition, filed a motion for summary judgment.

On October 9, 1961, the trial court rendered judgment in favor of the plaintiff and against the defendants, the City of Omaha, and Frank Elias, deputy clerk of the municipal court of the city of Omaha, in the sum of $100 with interest at the rate of 6 percent per annum, and costs.

It was stipulated by the parties that the fine of $100 had not been paid.

The defendants filed a motion for new trial. The defendants' motion for new trial was overruled. The defendants perfected appeal to this court.

The plaintiff's petition alleged in substance that on February 27, 1952, plaintiff posted the sum of $100 with Frank Elias, deputy clerk of the municipal court, criminal division, of the city of Omaha, as an appearance bond for the appearance of Robert E. Timperley in the police court of the city of Omaha; that Robert E. Timperley did appear on February 28, 1952, at 9 a.m.; that the plaintiff was advised that the case was continued by someone on that date to July 11, 1952, at which time

the matter came on for trial before the criminal court of the city of Omaha; that an appearance was made for Robert E. Timperley by an attorney; that after a hearing on the merits of the case, the trial judge found Robert E. Timperley guilty as charged, and he was fined $100 and costs on two complaints which were misdemeanors; that thereafter the plaintiff made demand upon the defendants for the return of the appearance bond, producing the original receipt as required; that there had been no lawful forfeiture of said appearance bond; that the receipt had not been transferred to anyone and notwithstanding that an appearance was made by Robert E. Timperley as required by law, the return of the $100 appearance bond posted by the plaintiff was refused; and that the plaintiff was entitled to have the money returned to him, he having in all respects complied with the requirement of the receipt which was given to him on posting the bond. The plaintiff prayed for judgment against the defendants in the sum of $100 with interest and costs.

D. B. Anderson, defendant, as clerk of the municipal court, criminal division, upon his own motion was dismissed out of the case for the reason that he had not been the clerk of the said court since December 1, 1954.

The defendants' answer admitted that Frank Elias was the deputy clerk of the municipal court of the city of Omaha in charge of the criminal division; and that on or about February 27, 1952, the sum of $100 was deposited with the deputy clerk of the municipal court, criminal division, of said city, as a bond on complaint or complaints against Robert E. Timperley. Photostatic copies of the complaints filed against Robert E. Timperley are made a part of the defendants' answer. The defendants' answer alleged that the plaintiff at no time appealed or filed any petition or writ of error to the orders of the municipal court in forfeiting the $100 heretofore mentioned; that plaintiff was barred and

estopped from collaterally attacking or questioning the order of the municipal court in this action; that Robert E. Timperley was fined the sum of $100 and costs on each of the complaints, and at no time since entry of judgment by the court had Robert E. Timperley paid said fine and costs and had not stood committed to jail until the fine and costs were paid; and that Robert E. Timperley did not appear in person at the time of the entry of judgment or subsequent thereto, and had not abided the judgment of the court. On information and belief, defendants admitted that an attorney for Robert E. Timperley appeared at the hearing without Robert E. Timperley being present. The prayer of the defendants' answer was that the plaintiff's petition be dismissed.

Exhibit A attached to the defendants' answer is a state complaint filed in the municipal court of the city of Omaha against Robert E. Timperley, charging him with being an habitual reckless and negligent driver of a motor vehicle and an habitual violator of the traffic laws, on February 28, 1952. On the back side of this complaint it shows that the accused was fined $100 and costs, and ordered to stand committed to the county jail until the fine and costs were paid, "Bond forfeited" and "Issue Capias." In the upper right-hand corner appears the figure $205.

Exhibit B is a state complaint charging Robert E. Timperley with failure to yield right-of-way to pedestrian on or about February 27, 1952. On the back side of this complaint it shows that Robert E. Timperley was fined $100 and costs, and ordered to stand committed to the county jail until the fine and costs were paid, "Bond forfeited" and "Issue Capias." Then appears the figures "7-11-52."

The plaintiff's motion for judgment on the pleadings alleged that the statements and admissions of the pleadings filed were such as to show that this plaintiff was entitled to judgment as a matter of law; and that the plaintiff posted the sum of $100 cash as an appearance

bond for the appearance of Robert E. Timperley in the police court in the city of Omaha, at a day and time certain, as evidenced by the fact that the plaintiff was given a cash receipt. This receipt is in substance as follows: No. 13398 Received $100 for the appearance of Robert E. Timperley in the police court of the city of Omaha at 9 a.m., February 28, 1952. Signed by W. McGinnis, clerk, and Harold A. Koop, depositor. "BOND WILL NOT BE RETURNED WITHOUT THIS RECEIPT NOT TRANSFERABLE." The number appearing on the receipt, 13398, is the same number as appears on the back side of Exhibit A heretofore mentioned.

The plaintiff, in his motion for judgment on the pleadings, further alleged that the appearance bond was merely security for the appearance of Robert E. Timperley at the time fixed therein, which obligation terminated when Robert E. Timperley properly appeared, pleaded, and issue was joined; that the appearance bond in no way constituted a bail bond such as secures both the appearance of the named individual and also the payment of any judgment entered; that in answer to the plaintiff's petition, the defendants, City of Omaha and Frank Elias, admit that Robert E. Timperley appeared through his attorney at the hearing on the complaint against him and by reason of which the subject appearance bond was posted; that a party may properly appear by means of his attorney, plead, join issue, and have judgment entered thereby; and that since all of the terms and conditions of the appearance bond were satisfied by the appearance of an attorney on behalf of Robert E. Timperley, this plaintiff was entitled to have returned to him the $100 cash appearance bond posted by him, for which he prayed judgment against the defendants.

The defendants filed objections to the motion for judgment on the pleadings for the reason that the pleadings establish a failure to plead a cause of action, estoppel being applicable, and plaintiff attempting to

collaterally attack a judgment of the lower court which is final.

The defendants' principal assignments of error may be summarized as follows: The trial court erred in sustaining the plaintiff's motion for judgment on the pleadings; and the judgment of the trial court is contrary to law.

In 1952, when the bail in issue was deposited, section 29-901, R. S. Supp., 1951, provided in part: "When any person charged with the commission of any bailable offense shall be confined in jail, whether committed by warrant under the hand and seal of any judge or magistrate, * * * it shall be lawful for any Judge * * * or police judge within the city of his jurisdiction, to admit such person to bail by recognizing such person in such sum and with such securities as to such judge shall seem proper, conditioned for his appearance before the proper court, to answer the offense wherewith he may be charged, * * *. All recognizances in criminal cases shall be in writing and be continuous from term to term until final judgment of the court in such cases, * * *."

Chapter 87, section 1, Laws of Nebraska 1951, page 250, changed the language in the above-cited section in some minor respects and did add thereto that all recognizances shall be in writing.

Chapter 90, section 1, Laws of Nebraska 1953, page 261, amended the foregoing statute by specifically providing for a cash bond.

Section 29-901, R. R. S. 1943, as amended, contains the same language as such section did in 1952, with the exception that a cash bond may be fixed, conditioned for the appearance of the defendant before the proper court, to answer the offense wherewith he may be charged. We are concerned here with the law of 1952 with respect to this issue.

The plaintiff contends that, in the absence of a statute so authorizing, the power to receive bail does not include the power to accept a cash deposit in lieu of

bail, that such a cash deposit would be void, and the depositor would be entitled to have the cash deposit returned upon demand.

In support of this contention, the plaintiff cites Snyder v. Gross, 69 Neb. 340, 95 N. W. 636. In the cited case it appears that the plaintiff's husband was arrested on a complaint and charged with a criminal offense. The case was continued for 10 days. The plaintiff, with the consent of the justice of the peace, deposited $130 in cash in lieu of a bond. The accused pleaded guilty to the charge. The plaintiff made demand for return of the full amount of money deposited, and this demand was refused. The plaintiff brought suit to recover the amount she had deposited. The bondsmen of the justice of the peace were let out of the case by a peremptory instruction. The court said: "The law is well settled that a magistrate or officer has no authority to accept a deposit of money in lieu of bail in the absence of a statute conferring such right upon him." The case of Appelgate v. Young, 62 Kan. 100, 61 P. 402, is cited which, under similar statutes, held the same as the above-cited case. See, also, 8 C. J. S., Bail, § 52, p. 107.

The plaintiff also cites the following cases. In Dickinson v. State, 20 Neb. 72, 29 N. W. 184, this court said: "A recognizance for the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer or person unauthorized by law, or where under the facts of the case the taking thereof is unauthorized by law, so that the same fails to be binding under the statute, Held, Also to be void as a common law obligation."

In Johnson v. Parrotte, 46 Neb. 51, 64 N. W. 363, with regard to a void judgment, the court held that such a judgment may be impeached in any action, direct or collateral. This seems to be the majority rule and the rule in this state.

Section 29-2001, R. R. S. 1943, provides in part: "Persons indicted for a misdemeanor may, at their own

request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court."

The pleadings disclose that an attorney appeared for Robert E. Timperley at the time his case was called for trial on July 11, 1952, to which the above section of the statutes applies. Judgment was rendered against Robert E. Timperley as heretofore mentioned.

It appears that the deputy clerk of the municipal court had no authority to take the cash bond. This constituted a void act on his part. The receipt, as heretofore set forth, given to the plaintiff and signed by W. McGinnis as clerk, who is not identified in the pleadings as holding such position, is meaningless. The plaintiff was privileged to bring this action in the manner and form in which he did.

Section 26-118, R. R. S. 1943, provides that the municipal court shall have concurrent jurisdiction with the county court in criminal cases. It also provides that the judges of the municipal court shall exercise the ordinary powers and jurisdiction of justices of the peace, police judges, and police magistrates as applied to criminal actions before the municipal court, in the absence of specific provisions to the contrary.

The forfeiture of the bond involved in the instant case, entered by the municipal court of the city of Omaha, was in a proceeding entitled "State of Nebraska vs. Robert E. Timperley." The proceedings being by a state complaint, sections 14-603 and 14-610, R. R. S. 1943, have no applicability to the instant case for the reason that these sections apply to the violation of city ordinances, and not to cases brought in the name of the state as was done in the instant case. We deem it unnecessary to set forth these sections of the statutes which were cited by the defendants.

There is nothing in the pleadings presented to disclose in what manner the City of Omaha would be benefited or in what manner liability would attach to it.

Under the circumstances, there was no cause of action pleaded against the City of Omaha, and it should be dismissed out of the case.

The cash bail bond in this case was put up by the plaintiff for the purpose of having Robert E. Timperley appear on February 28, 1952, at 9 a.m., to answer to the charges made in the complaints against him in the police court of the city of Omaha. Robert E. Timperley did appear and was released. The plaintiff was advised that the case had been continued to July 11, 1952. The appearance of Robert E. Timperley in the police court of the city of Omaha on February 28, 1952, did not satisfy the obligation of the cash bail bond, for the reason that it is obvious such bond was given in lieu of a written appearance bond for the appearance of Robert E. Timperley before the court. It had the same effect as a written bond for the appearance of the accused, that is, that the matter could be continued from time to time or term to term as the court would require. The recovery sought in this case is not on the bond, but for the return of the money. Therefore, it is an action for money had and received.

We believe the following to be applicable to the phase of the case relating to the defendant deputy clerk of the municipal court who took the cash bail bond.

"Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality and justice in accordance with good conscience, honesty and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair and necessary rule of law." City of Grand Island v. Willis, 142 Neb. 686, 7 N. W. 2d 457.

The doctrine of estoppel is based on the grounds of public policy and good faith, and is interposed to prevent injustice and inequitable consequences by denying to a person the right to repudiate his acts, admissions,

or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence. See City of Grand Island v. Willis, *supra.*

The factual situation in each and every case and the circumstances surrounding it are so distinctively different that, out of numerous definitions, not a single one would apply in all cases wherein the question of estoppel is raised, but where the circumstances are such that a grave injustice or inequity would be perpetrated by failing to apply the doctrine, as appears in the instant case, then it may be applied.

The doctrine of equitable estoppel is frequently applied to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel. See Securities Acceptance Corp. v. Brown, 171 Neb. 406, 106 N. W. 2d 456.

In the light of the above authorities, we conclude that the plaintiff should be estopped to recover against the defendant, Frank Elias, designated in this action as deputy clerk of the municipal court.

We reverse the judgment of the trial court and remand the cause with directions to dismiss the plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

RICHARD F. MCCARTY, APPELLEE, V. CHARLES R. MORROW, APPELLANT, IMPLEADED WITH FEDERATED MUTUAL IMPLEMENT AND HARDWARE INSURANCE COMPANY, A CORPORATION, APPELLEE.

114 N. W. 2d 512

Filed April 13, 1962. No. 35120.

1. **Pleading.** A party may at any and all times invoke the language of his opponent's pleading on which the case is being tried, on a particular issue, as rendering certain facts indisputable.
2. **Highways: Automobiles.** A pedestrian has equal rights with the operator of a vehicle in the use of public highways, and each must use reasonable care for his own safety and the safety of others.
3. ———: ———. Where a pedestrian is walking at night on the left-hand side of a highway and is struck by a vehicle approaching from the rear, it is for the jury to determine if the operator of the vehicle was negligent in not seeing the pedestrian in time to avoid an accident.
4. ———: ———. Under such circumstances the pedestrian has the right to assume that the driver of a vehicle approaching from the rear will exercise ordinary care in keeping a lookout for him and others using the highway.
5. ———: ———. A pedestrian walking along the left side of a highway is not guilty of contributory negligence in failing to look back to observe the approach of vehicles from the rear, or in failing to anticipate the negligence of the driver of a vehicle approaching from that direction.
6. **Negligence: Trial.** Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.
7. **Pleading.** A motion to amend the pleadings, after the pleadings have been made up, under section 25-852, R. R. S. 1943, rests within the sound judicial discretion of the trial court either to permit the amendment of pleadings in the furtherance of justice or to refuse the right of amendment.
8. **Automobiles.** The test of a joint enterprise between the driver of a motor vehicle and another is whether they were jointly operating and controlling the movements of the vehicle in a common purpose or had an equal right to do so.
9. **Trial: Damages.** It is the duty of the trial court without request to instruct the jury as to the proper measure of damages in a personal injury action.

10. **Trial: Appeal and Error.** Where instructions are so framed as to mislead the jury into a duplication of an element of recovery, or into an award of damages twice for the same loss, such instruction is prejudicially erroneous.

APPEAL from the district court for Custer County: S. S. SIDNER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Schaper & Schaper and *John E. Dougherty,* for appellant.

Tedd C. Huston, for appellee McCarty.

Beatty, Clarke, Murphy, Morgan, Pedersen & Piccolo, for appellee Federated Mut. Imp. & Hdwr. Ins. Co.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action for damages for injuries sustained in a collision between two motor vehicles. The jury returned a verdict for the plaintiff in the amount of $51,644.40. Judgment was entered on the verdict and the defendant Morrow has appealed.

The accident happened on October 6, 1956, at about 8:30 p.m. The accident occurred on Highway 92 in the east edge of the village of Arnold, Nebraska. It was an east-west road which is also the main street of Arnold. The street at the scene of the accident was improved with pavement 42 feet in width. A short distance east of the scene of the accident the highway is crossed by a north and south road. There are off-sets on both roads at this point, which result in a very irregular intersection. The intersection is crossed by a railroad track diagonally across the street intersection running northeast and southwest. As one enters the village of Arnold from the east, the main traveled street veers to the north in the intersection. After passing through the intersection the paved portion of the street increases in width from

24 feet to 42 feet. The evidence shows that the additional width was obtained by the construction of additional slabs of concrete, approximately 9 feet wide, on the north and south sides of the street. An expansion joint is referred to in the evidence which appears to be the junction of the south slab and the main 24-foot highway or street paving.

The plaintiff was employed by Clarence Romans as a truck driver. At about 8 p.m. on the day in question he arrived in Arnold with a load of freight for Romans, who operated an implement business. Included in the load was a new hay baler. Plaintiff was accompanied by Howard Osterhoudt, a neighbor, who rode along for social reasons. The plaintiff, Osterhoudt, and Romans proceeded to an unloading dock to unload the baler. The dock was a short distance southwest of the southwest corner of the two intersecting streets. After hooking a tractor to the baler and pulling it off the truck, Romans drove the tractor and baler to the road entering the intersection from the south, and proceeded north. On arriving at the intersection he stopped at the stop sign, looked to the east and saw the headlights of an approaching automobile about 400 feet to the east. He drove onto the highway, made a sharp turn to the left, and proceeded west with the intention of turning into his implement store less than a block away. He drove along the south curb of the 42-foot pavement at a speed of 1 or 2 miles per hour. When he had proceeded about 45 feet west of the intersection, defendant's car came from the rear and ran into the tractor. There was slight damage to the baler. The main damage was to the right rear part of the tractor.

When the tractor and baler were driven onto the highway, plaintiff walked on the right-hand side of the baler, steadying it with his left hand. Plaintiff testified that he heard a noise as defendant's car approached. He turned to look to his rear, and was immediately struck by defendant's automobile. He suffered serious injuries,

including two broken legs and a subsequent bone infection medically known as osteomyelitis.

The tractor had both headlights and a taillight burning at the time of the accident. There is evidence that the taillight was obscured by the baler to one approaching from the rear. There was no light, reflector, or flag on the rear of the baler. The baler is described as being 4 feet wide at the axle and 5 feet wide higher up because of a 1-foot overhang of the hay pickup. Romans had given no directions to plaintiff. He walked along the street with his hand on the baler for the sole purpose of steadying it. The pavement was dry.

The defendant lived a short distance east of Arnold. He and one Deidel were driving into Arnold for the purpose of buying groceries. They talked of turning south at the intersection, but changed their minds and decided to continue across the intersection into the main part of town. Defendant was driving. The lights were on dim. Defendant said he could see 50, 60, or 75 feet. He stated that he crossed the tracks and did not see the baler or tractor until just before the collision. Defendant and Deidel stated they were driving about 20 miles per hour, and that they saw no lights on either the tractor or baler.

The Federated Mutual Implement and Hardware Insurance Company was made a party because of workmen's compensation payments made by it to the plaintiff in the amount of $9,222.78, concerning which there is no dispute.

The trial court submitted the question of defendant's negligence to the jury on the following pleaded specifications: In failing to slacken his speed to avoid the collision; in failing to keep a proper lookout; in failing to stay on his right, or north side, of the highway; and in failing to apply his brakes in time to avoid the collision. The evidence is sufficient to support the submission of these specifications of negligence to the jury.

The trial court instructed the jury that defendant ad-

mitted that on October 6, 1956, the plaintiff as a pedestrian was involved in an accident with a car owned and operated by the defendant. Defendant alleged contributory negligence on the part of plaintiff in that he failed to keep and maintain a proper lookout, that he knew the hay baler was being towed along the public highway without lights, that he failed to warn approaching traffic that the hay baler was being so towed without lights, that plaintiff failed to have warning lights on the baler, that he should have seen and warned the defendant when he entered the highway, that he should have known the color of the baler would blend with the highway and therefore he should have warned of the danger, that he assumed the risk of walking in a place obviously dangerous, and that defendant was faced with a sudden emergency because of plaintiff's negligence. The trial court did not submit the issue of plaintiff's contributory negligence to the jury, nor did the court instruct on comparative negligence. The defendant asserts this as error.

The defendant contends that the trial court erred in submitting the case to the jury on the theory that plaintiff was a pedestrian. We point out that defendant admitted in his amended answer that plaintiff was a pedestrian. This is a judicial admission on which plaintiff and the court were entitled to rely without the necessity of proof. The rule is: A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required or allowed to offer such pleading in evidence in the ordinary manner. Aye v. Gartner, 172 Neb. 162, 108 N. W. 2d 798; Vermaas v. Heckel, 170 Neb. 321, 102 N. W. 2d 647; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831.

The plaintiff had a legal right to walk along the highway on the pavement. He was required in so doing, however, to use reasonable care for his own safety.

Defendant, on the other hand, was required to exercise due care for the safety of others who might reasonably be expected to be on the highway. Defendant was required to anticipate that pedestrians might be using the highway and to use due care to protect any such who might be using it at the time. Where a pedestrian clad in dark clothing upon the background of a dark road is walking at night on the left-hand side of the highway and is struck by a vehicle approaching from his rear, it is for the jury to determine if the operator of the vehicle was negligent in not seeing the pedestrian in time to avoid the accident. Under such circumstances the pedestrian had the right to assume that the driver of a vehicle approaching from the rear would exercise ordinary care in keeping a lookout for him and others using the highway. A pedestrian so walking along the highway is not guilty of contributory negligence in failing to look back to observe the approach of vehicles from the rear, or in failing to anticipate the negligence of the driver of a vehicle approaching from that direction. Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N. W. 2d 114; Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614; Carlson v. Roberts, 133 Neb. 166, 274 N. W. 473.

In the instant case the tractor towing the baler was driven onto the highway by Romans, who turned it to the left and proceeded along the south edge of the 42-foot paved street on the left side of the highway as he proceeded west. Plaintiff walked beside the baler on its right-hand side about 5 or 6 feet from the south edge of the pavement. He was walking 2 or 3 feet south of the expansion joint which placed him 15 or 16 feet to the left of the center of the pavement. Defendant contends that plaintiff was guilty of contributory negligence in so doing and that the trial court erred in not submitting that issue to the jury.

As we have pointed out, plaintiff was not guilty of negligence in not looking to the rear. He had a legal

right to walk longitudinally along the highway and to assume that defendant would not drive on the wrong side of the road and run into him, as he did. While it is true that Romans violated applicable statutes in driving on the left-hand side of the highway and in not having lights or reflectors on the rear of the baler, this is evidence of negligence on the part of Romans which is not imputable to plaintiff. Hopwood v. Voss, 172 Neb. 204, 109 N. W. 2d 170. Where contributory negligence is pleaded as a defense and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. The trial court did not err in refusing to submit these issues to the jury.

The defendant moved the court to permit the amendment of his answer after plaintiff's and defendant's evidence-in-chief had been concluded, and during the examination of plaintiff's rebuttal witnesses. The trial court refused to permit the amendment. The ruling is assigned as error. The motion to amend was to permit defendant to allege that plaintiff and Romans were engaged in a joint enterprise in moving the hay baler, that plaintiff was not a pedestrian along the highway, and that the negligence of Romans was therefore imputed to plaintiff. The motion to amend was denied as not being timely made. The motion was made pursuant to section 25-852, R. R. S. 1943. After the issues have been fully made up it rests within the sound judicial discretion of the trial court either to permit amendment of the pleadings in furtherance of justice, or to refuse the right of amendment. Commercial Nat. Bank of Omaha v. Gibson, 37 Neb. 750, 56 N. W. 616; Rawlins v. Myers, 96 Neb. 819, 148 N. W. 915. The trial court did not abuse its discretion in the instant case, if for no other reason than that the evidence conclusively shows plaintiff and Romans were not engaged in a joint enterprise. The rule is: To be engaged in a

joint enterprise in order to impute negligence there must be a community of interest in the object and purpose of the undertaking in which the vehicle is being driven and an equal right to direct and control its movements with respect thereto. Hofrichter v. Kiewit-Condon-Cunningham, 147 Neb. 224, 22 N. W. 2d 703, 164 A. L. R. 1256; Hopwood v. Voss, *supra.*

The defendant complains of the instruction given by the court on the measure of damages. The part of the instruction of which complaint is made is: "You will also allow plaintiff for such reasonable and necessary sum as he has paid or obligated himself to pay for medical and hospital expenses, and for labor necessary to be hired as the result of his injury." There is evidence that plaintiff was required to hire labor to assist in operating his farm during the first 3 years after the accident, which amounted to a total sum of $2,610.35. There is no evidence as to the necessity for the hiring of labor in the future. The giving of the instruction was prejudicially erroneous.

The jury was instructed that if it found for the plaintiff it could properly award damages for past and future disability. The instruction specifically states in part: "You should find from the evidence how much money the plaintiff would reasonably have been able and reasonably expected to earn if he had not been injured, and how much he was and is and will be able to earn with his reduced capacity, if any such you find, resulting from his injury, and the present value of the difference between these two amounts, if any, will be the measure of this element of his damages."

The instruction permits a recovery of all losses resulting from his disability caused by the accident, already lost and to be lost in the future. In permitting a recovery for labor necessary to be hired because of the disability, and also the loss of earning capacity, the instruction permits a double recovery for the same loss.

This is error. Singles v. Union Pacific R. R. Co., *ante* p. 91, 112 N. W. 2d 752. The instruction was erroneous also in permitting a recovery for labor necessary to be hired in the future when there is no evidence that such would be required, assuming the absence of double recovery for the same loss. Where instructions are so framed as to mislead the jury into a duplication of an element of recovery, or into an award of damages twice for the same loss, such instruction is prejudicially erroneous.

The appellee insurance company, which has asserted its right to subrogation, has filed a brief requesting that the appeal be dismissed as to it. During the pendency of the appeal it moved for a dismissal, which this court overruled. Its claimed right to a dismissal is based on the fact that after a verdict was returned, defendant's insurance carrier, which is not a party to the action, paid into court the sum of $10,000 with interest and costs as the maximum amount of its liability under its policy of insurance issued to the defendant. The plaintiff refused to accept the amount as a payment on his judgment against the defendant. After notice and hearing, and 78 days after the filing of notice of appeal, the trial court ordered the clerk of the district court to pay $9,365.97 of said amount to the appellee insurance company in full satisfaction of its subrogation right. This was done and the appellee insurance company asks that it be dismissed from the litigation. We remand this issue to the district court for disposition without regard to any action taken or not taken by this court.

We have examined the remaining assignments of error and find that they contain no error prejudicial to the rights of the defendant. The question of liability having been determined by the jury under proper instructions, we affirm the judgment in that respect. Because of error in the instructions on the measure of damages, we reverse the judgment and remand the cause with

directions to try and submit to the jury the question of damages only.

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

SIMMONS, C. J., participating on briefs.

EDWIN C. PRESSEY ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

114 N. W. 2d 518

Filed April 13, 1962. No. 35123.

1. **Judgments: Appeal and Error.** The overruling of a motion for summary judgment is not an adjudication of the substantive rights of a party and is not a final and appealable order.
2. **Actions.** A dismissal for want of prosecution is a dismissal without prejudice; it does not in any sense pass upon the merits of the controversy.
3. **Trial.** It is within the discretion of the trial court to require the parties to appear at a pre-trial conference to consider the matters enumerated in the rule on pre-trial procedure promulgated by the Supreme Court.
4. **Actions.** An action may be dismissed without prejudice to a future action by the court for disobedience by the plaintiff of an order concerning the proceedings in the action.
5. **Courts.** The right of a court to enforce its lawful orders is inherent in the power of the court.
6. ———. To warrant dismissal for failure to obey a court order, that order must be within the power of the court to enter.

APPEAL from the district court for Custer County: S. S. SIDNER, JUDGE. *Affirmed.*

Beatty, Clarke, Murphy, Morgan, Pedersen & Piccolo, for appellants.

Clarence A. H. Meyer, Attorney General, *Homer G. Hamilton, John H. Evans,* and *A. Paul Johnson,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action to quiet title. No issues of fact were tried in the district court. Plaintiffs filed a motion for summary judgment which was overruled on December 8, 1960. On April 18, 1961, the trial court entered an order for a pre-trial conference to be held May 10, 1961. Plaintiffs failed to appear and the court dismissed the action on May 17, 1961, for want of prosecution. A motion for a new trial was overruled and plaintiffs perfected this appeal.

The plaintiffs, 16 in number, are the heirs of Henry E. Pressey who died April 10, 1944. In December 1943, Henry E. Pressey deeded the land involved in this action to the State of Nebraska Game, Forestation and Parks Commission to be used for recreation purposes and the raising of wild life. The defendants are the State of Nebraska, the State of Nebraska Game, Forestation and Parks Commission, and Paul T. Gilbert.

The action was filed November 1, 1952, in the district court for Custer County. On November 28, 1952, the defendants filed a special appearance. On September 24, 1959, the court entered a journal entry indicating that on September 11, 1959, the special appearance, which had been previously submitted and was taken under advisement pending the furnishing of the briefs by the plaintiffs, which had recently been supplied, came on to be heard and was overruled. The defendants were allowed 45 days to answer. An answer was filed on October 19, 1959. The plaintiffs filed a reply on June 6, 1960, and on the same day filed a motion for summary judgment which appears to have been heard that day and to have been taken under submission for briefs. The motion for summary judgment was overruled on December 8, 1960.

On April 18, 1961, Judge S. S. Sidner, whose term as district judge commenced in January 1961, subsequent to the proceedings delineated above, issued an order for a pre-trial conference to be held in Broken

Bow, Nebraska, on Wednesday, May 10, 1961, at 4 o'clock p.m. The order listed the matters to be considered in almost the exact language of the rule on pre-trial procedure promulgated by this court. Page 35, Revised Rules of the Supreme Court of Nebraska (1960). The order required each party to be represented by at least one attorney who would thereafter participate in the trial of the action. The plaintiffs did not appear. The court, on May 17, 1961, signed an order of dismissal, which, excluding the caption, is as follows: "Now on this 10th day of May, 1961 this matter came before the court on the order entered by this court on April 18, 1961 directing the parties to appear before me at 4:00 o'clock p.m. on Wednesday, May 10, 1961 for a pre-trial conference for the purposes set out in said order.

"Upon consideration thereof the court finds that a copy of said order was duly served on all parties by mail. The court further finds that plaintiffs have failed to appear in person or by counsel at the time and place for said hearing as set out in the previous order of this court and have failed to appear at any time thereafter on said date and that this action should be dismissed for want of prosecution.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that this action should be and is hereby dismissed for want of prosecution.

"BY THE COURT:
/s/ S. S. Sidner
District Judge."

Plaintiffs did not attempt to reinstate the action by motion or otherwise, or make a showing of any nature of inability to comply with the order for appearance at the pre-trial conference. Instead, on May 19, 1961, they filed a motion for a new trial for the following reasons: First, the judgment is contrary to law; second, the judgment is contrary to the evidence; and third, the court erred in overruling plaintiffs' motion for summary judgment. This motion for new trial was overruled June

15, 1961. The bill of exceptions discloses that the clerk of the court testified that she notified the attorneys of the pre-trial hearing and that she received no communication to indicate the plaintiffs would not be present. The court then read the following statement into the record: "The following are the facts concerning the dismissal entered by the court on its own motion on May 10th, 1961; that on the 18th day of April, 1961, a pretrial order was entered fixing a time for pretrial hearing in Broken Bow, Nebraska, in the court house, on May 10th, 1961, at 4 o'clock p.m. The original order was filed on that date and copies were mailed to plaintiffs' attorneys on that date. No request for continuance or any communication whatever was received from plaintiffs' attorneys. The Assistant Attorney General appeared for the State of Nebraska and the case was dismissed for want of prosecution.

"Since May 10th up to this date there has been no showing of any reason why plaintiffs' counsel did not appear, nor has any explanation ever been given to the court."

The plaintiffs devote 64 pages of their brief to a discussion of the merits of their position on the summary judgment, and 5 pages to a discussion of the dismissal of the action. The overruling of a motion for summary judgment is not an adjudication of the substantive rights of a party and is not a final and appealable order within the meaning of section 25-1902, R. R. S. 1943. Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614. See, also, Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N. W. 2d 583.

A dismissal for want of prosecution is a dismissal without prejudice. It does not in any sense pass upon the merits of the controversy. As we view the record, the only question properly before this court is the propriety of the dismissal of the action, or, stated otherwise, whether or not the trial court abused its discretion.

Plaintiffs in their brief list the fourth point under

statement of the questions involved, as follows: "4. Whether a court should dismiss an action as for want of prosecution solely on the ground that plaintiffs' counsel failed to appear at an unnecessary pre-trial conference."

It should be evident that it is not within the province of one of the parties to decide whether a pre-trial conference is or is not necessary. It might occasionally happen that neither party may desire a pre-trial conference. The parties may not agree upon any of the matters which the rule sets forth as subjects to be discussed. It is the court, however, which is given the discretion to determine the advisability of a pre-trial conference and to require the parties to appear to consider the subjects listed in the rule. The purpose of a pre-trial conference is to narrow and simplify the issues in an effort to effect a more speedy determination of controversies at less expense to the litigants and the public. The pre-trial procedure in the hands of able and fearless judges can do much to promote the prompt administration of justice.

In Nebraska there is statutory authority permitting a court to dismiss an action where a plaintiff disobeys an order concerning the proceedings. Section 25-601, R. R. S. 1943, provides in part: "An action may be dismissed without prejudice to a future action * * * (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action."

In Howell v. Malmgren, 79 Neb. 16, 112 N. W. 313, we held: "* * * it is within the sound discretion of the district court to dismiss a petition without prejudice for disobedience by the plaintiff of a reasonable order concerning the proceedings in the action."

In Ferson v. Armour & Co., 109 Neb. 648, 192 N. W. 125, where the plaintiffs filed a petition containing inflammatory language and extraneous matters, the petition was stricken. The plaintiffs filed three more such petitions. After the fourth petition, the court dismissed the action with prejudice. We there said: "A court is

not a mere instrument of litigants for the settlement of private controversies. It is a separate department of government. Out of its findings and judgments in actions between private suitors grow rules of conduct applicable to society as a whole. Litigants and counsel alike are answerable to the court for violating established rules of procedure and orders made in regard to pleadings."

Bushnell v. Thompson, 133 Neb. 115, 274 N. W. 453, involved an action in which the plaintiff failed to more accurately describe certain land involved in an ejectment action when ordered to do so by the court. In affirming a dismissal, we held: "Failure or refusal of plaintiff to comply with a proper order of the court with respect to amendment of petition may be valid grounds for dismissal of the action."

Plaintiffs argue that: "* * * a pre-trial conference is not held for the purpose of dismissing a lawsuit." This is not the point involved. It is the failure of the plaintiffs to appear or to give any reason for their failure to do so which resulted in the dismissal of the action for want of prosecution. As suggested, the plaintiffs did not at any stage seek to explain or justify their conduct other than to suggest in their brief that a pre-trial conference would have served little if any purpose. They were ordered to appear and they failed to do so. Their conduct in completely ignoring the order suggests contempt of the court's right to require it. To condone such conduct would soon result in mockery of orderly trial court procedure.

Regardless of statutory authority, it has almost universally been held or recognized that courts have the inherent power to dismiss an action for disobedience of a court order. It is obvious that this is one of the more coercive measures to compel obedience of an order. It should be equally evident that it is necessary on occasions for courts to resort to such action in the interest of the orderly administration of justice.

The Florida court, in Surrency v. Winn & Lovett Grocery Co., 160 Fla. 294, 34 So. 2d 564, succinctly explains the rule in the following language: "When a plaintiff invokes the jurisdiction of a court and seeks to avail himself of it he does so with the understanding that he must abide by all lawful statutes, rules and orders applicable to him, and the court has inherent power to impose the sanction of dismissal, for its coercive effect." We say that the right of a court to enforce its lawful orders is inherent in the power of the court. Without this right, a court could not control its dockets; business before it would become congested; its functions would be impaired; and speedy justice to litigants would largely be denied.

To warrant dismissal for failure to obey a court order, that order must be within the power of the court to enter. As explained heretofore, it was within the discretion of the court to require the parties to appear at a pre-trial conference. The order therefore was a proper one. If there was any excuse for the failure to appear, it should have been addressed to the discretion of the trial court by motion or application. It is evident to us that the court was completely within its rights in entering a dismissal. There clearly was no abuse of discretion.

Since the judgment of dismissal was properly made because of plaintiffs' failure to comply with the order of the court, it is unnecessary to consider the other questions presented.

The judgment of the district court is right, and is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

LAUREN E. ELLINGSON ET AL., APPELLANTS, V. DOBSON BROTHERS CONSTRUCTION COMPANY, A CORPORATION, ET AL., APPELLEES.
114 N. W. 2d 522

Filed April 13, 1962. No. 35136.

1. **Trial.** Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
2. **Negligence.** Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence.
3. **Negligence: Trial.** Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury.
4. **Highways: Negligence.** Where a highway under construction or repair is being used permissively in a limited manner by adjacent residents, it must be kept and maintained by the contractor in a reasonably safe condition for the use of those driving thereon, who are at the same time required to exercise reasonable care under the peculiar circumstances and conditions confronting them by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work.

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

Smith Brothers and *Lawrence F. Weber*, for appellants.

Stewart & Stewart, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action based on negligence for damages to an automobile owned by the plaintiffs, Lauren E. Ellingson and Bonnie L. Ellingson, which was at the time involved operated by Bonnie L. Ellingson, against Dobson Brothers Construction Company, a corporation, and Jack C. Pentico, who are defendants. The plaintiffs are appellants here and the defendants are appellees.

The case was presented to a jury. At the conclusion of the evidence on behalf of the plaintiffs, the defendants moved in the alternative for a directed verdict in their favor or for dismissal on the ground that no actionable negligence on the part of the defendants had been shown, and that the evidence on behalf of plaintiffs showed that the driver of an automobile of the plaintiffs failed to use proper care under the circumstances. The motion to dismiss was sustained on the ground stated in the judgment that the driver of plaintiffs' vehicle was guilty of contributory negligence. Motion for new trial was duly filed. This motion was overruled. From the judgment and the ruling on the motion for new trial the plaintiffs have appealed.

The question presented on this appeal is the propriety of the removal of this case from consideration of the jury based on the proposition that the record made disclosed that the driver of the plaintiffs' automobile was guilty of contributory negligence as a matter of law which defeated any right on their part to recover. There are four assignments of error asserted as grounds for reversal, but they present only this question.

The factual situation on which the determination herein must depend is substantially as follows: On September 15, 1960, at about 4:45 p.m., the plaintiff Bonnie L. Ellingson was operating a Mercury automobile, owned in joint tenancy by both plaintiffs, northward on a highway from a street running east and west through Overton, Nebraska. The highway was being repaired. The kind and character of repair has not been described. The highway was not barricaded and it was being used generally by the public and by the plaintiffs. Its surface was hard but there was no evidence of black-top. The exact width of the used portion of the highway was not disclosed but the only inference of which the record is capable is that it had separate lanes for northbound and southbound traffic. There is no evidence of obstructions to traffic moving in either direction. In the auto-

mobile with this plaintiff was another woman and a child.

On this northward journey a water or tank truck owned by the defendant Dobson Brothers Construction Company was observed moving northward on the east or right side of the road. It was operated by the defendant Jack C. Pentico. This plaintiff followed for some distance at a rate of speed estimated at from 35 to 40 miles an hour. The distance between the vehicles was from 50 to 75 feet. After the vehicles had passed a second highway intersection north of Overton a distance of 100 to 150 yards the driver of the truck, without warning of any kind, turned right into a shallow road ditch and stopped with a small part of the rear end of the truck remaining on the highway. At that time this plaintiff was driving about 50 feet behind.

When the truck left the highway this plaintiff sounded the horn on her automobile, reduced her speed to 20 to 25 miles an hour, and moved over to the west side of the southbound lane. She attempted to stop but she is not sure that she did. At this point the truck was backed across the highway and into the side of plaintiffs' automobile.

The purpose of this backing up has not been disclosed. The driver stated that he did not hear the sound of the horn on plaintiffs' automobile and could not have heard it on account of the noise made by the truck he was operating. He made no effort to ascertain what was back of him except that while he was backing up he looked in his rear-vision mirror and saw nothing.

A well-established rule is the following: "Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144. See, also, Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

Another rule is as follows: "Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence." Welsh v. City of South Omaha, 98 Neb. 148, 152 N. W. 302. See, also Grantham v. Watson Bros. Transp. Co., on motion for rehearing, 142 Neb. 367, 9 N. W. 2d 157; Thomas v. Owens, *supra.*

There is another rule which strictly speaking has no application in this case since no evidence was adduced by the defendant, but since there is a relation to what must properly be considered in cases involving the comparative negligence doctrine it ought to be stated. This rule is as follows: "Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury." Parks v. Metz, 140 Neb. 235, 299 N. W. 643. See, also, Grantham v. Watson Bros. Transp. Co., 142 Neb. 362, 6 N. W. 2d 372.

Under the decisions of this court it must be said that the plaintiffs had the right to use this highway though it was under repair. This right however was not without limitation. The duties of the party making the repairs and of the plaintiffs were stated in Fahrenbruch v. Peter Kiewit Sons' Co., 148 Neb. 460, 27 N. W. 2d 680, as follows: "* * * where a highway under construction or repair is being used permissively in a limited manner by adjacent residents, it must be kept and maintained by the contractor in a reasonably safe condition for the use of those driving thereon, who are at the same time required to exercise reasonable care under the peculiar circumstances and conditions confronting them by keeping a constant lookout and vigilant caution for obstructions incident to the progress and completion of the work." See, also, Miller v. Abel Construction Co., 140 Neb. 482, 300 N. W. 405.

In the light of the analysis of the facts and in the light of these rules, it is difficult to see how a reasonable conclusion could be arrived at, the effect of which would

be to say that the driver of the plaintiffs' vehicle was guilty as a matter of law of contributory negligence sufficient to defeat a right of recovery. In truth on the evidence in the record a verdict which would have the effect of a finding that the driver of plaintiffs' vehicle was not guilty of any negligence causing or proximately contributing to the accident would have to be sustained.

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

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

LENA SCHUETT, APPELLANT, V. ARTHUR HARGENS ET AL., APPELLEES.
114 N. W. 2d 508

Filed April 13, 1962. No. 35162.

1. **Evidence.** It is within the discretion of the trial court under section 25-1267.41, R. R. S. 1943, to grant additional time to answer requests for admissions although the time originally limited has expired before an application for an extension is made.
2. **Trial: Appeal and Error.** The findings of a court in a law action where a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
3. **Appeal and Error.** In such case, it is not the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court, in reviewing the judgment rendered, will presume that the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong.
4. **Trial: Appeal and Error.** In considering the sufficiency of the evidence to sustain a judgment rendered by a court where a jury is waived, not only must the evidence be considered most favorably to the successful party and any controverted fact resolved in his favor, but he must have the benefit of every inference reasonably deducible from the evidence.
5. **Mortgages.** The recital in a release of a mortgage that it was executed in consideration of the payment of the debt named therein, while prima facie evidence of the fact stated, is not conclusive thereof.

6. **Payment.** A debt cannot be extinguished by the payment of less than is actually due, unless based on a new and sufficient consideration.
7. **Bills and Notes: Interest.** Where a negotiable instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument.
8. **Bills and Notes.** A promissory note in the usual commercial form is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence.

APPEAL from the district court for Hall County: WILLIAM F. MANASIL, JUDGE. *Reversed and remanded with directions.*

E. Merle McDermott and *E. E. Hannon,* for appellant.

Kelly & Kelly, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is an action at law to collect interest alleged to be due on a promissory note on which the principal was paid. A jury was waived. After a trial to the court, judgment was rendered for defendants. Plaintiff appeals.

The plaintiff, Lena Schuett, hereinafter referred to as plaintiff, was the payee on a note dated January 12, 1956, in the amount of $5,000, payable on or before 6 months after the date of the death of Heinrich J. Hargens. The note was signed by Arthur Hargens and Anna Hargens, husband and wife, defendants herein, hereinafter referred to as defendants. The note contains the following: "* * * with interest at 6% per cent per annum from _____ until due, and with interest at nine per cent per annum after due until paid, interest payable _____ annually." Except for "6%" which was typed in a blank space, these provisions were a part of the printed portions of the note.

Plaintiff's petition sets out the note; alleges that plaintiff is the owner and holder thereof; that defendants paid

the principal sum of $5,000 on January 16, 1959; that no part of the interest has been paid; and that there is $900 due from the defendants as interest.

Defendants in their answer allege that the note was executed and delivered at the request of Heinrich Hargens, the father of the plaintiff and the defendant, Arthur Hargens. They specifically allege that the note was not to draw interest if payment was made within 6 months of the date of the death of Heinrich Hargens, and that said note was paid within 6 months of the date of his death. Defendants further answered that said note was given without consideration on the part of the plaintiff; and that there is no interest or other amounts due the plaintiff. Plaintiff filed a reply in the form of a general denial of all new matter alleged in defendants' answer.

A mortgage release was executed by the plaintiff at the time the $5,000 was paid, and reads in part: "IN CONSIDERATION of the payment of the debt named therein, I release the Mortgage for $5,000.00, made by Arthur Hargens and Anna Hargens, husband and wife, to Lena Schuett * * *."

Plaintiff testified that there was no mention of interest at the time she accepted the $5,000 payment and signed the release. There is a dispute as to whether plaintiff had the note with her when payment was made. She testified that she had it with her but did not show or produce it because she was not asked to do so. She also testified she understood at that time that she was getting her money for releasing the mortgage.

In a pre-trial order, the parties stipulated that the note and mortgage, the release, and a copy of the will of Heinrich J. Hargens, might be received in evidence. At the trial, the parties stipulated that demand had been made for the payment of the note; that no interest had been paid; and that the principal sum of $5,000 had been paid on January 16, 1959. The record does not disclose the date of the death of Heinrich J. Hargens.

The note was not due until 6 months after his death. Defendants alleged it was paid within that time. The case was tried on the theory that January 16, 1959, was within 6 months of the date of his death, and we accept that premise.

Plaintiff sets out seven assignments of error. For the purpose of consideration by this court, they may be grouped into three classifications: First, the overruling of plaintiff's motion for summary judgment; second, the overruling of plaintiff's motion to strike certain exhibits; and third, that the judgment is not sustained by the evidence. We will consider them in that order.

Plaintiff served a request on the defendants for certain admissions pursuant to section 25-1267.41, R. R. S. 1943. Defendants did not comply with the request within the time limited. Plaintiff, after the time had expired, filed a motion for summary judgment. The defendants then filed a motion for additional time to comply with the request for admissions. The trial court overruled the motion for summary judgment and gave the defendants 10 days to answer the request. The request was answered within that time. Plaintiff cites Kissinger v. School District No. 49, 163 Neb. 33, 77 N. W. 2d 767, in support of her contention that after the time originally limited had expired without application for additional time, the request for admissions was admitted by operation of law. In that case, improper responses were made and were treated as no response at all, and no request was made for additional time to answer. Here, an application for additional time was made after the time limited by the plaintiff had expired. The court, upon proper showing, saw fit to extend the time. This was clearly within the court's discretion. Section 25-1267.41, R. R. S. 1943, provides that the period designated shall be not less than 10 days after service or within such shorter or longer time as the court may allow. There was no abuse of discretion in granting the

additional time. The motion for summary judgment was properly overruled.

The next assignment involves the overruling of the plaintiff's motion to strike the mortgage which said note was given to secure, and the release of the mortgage given January 16, 1959, at the time the $5,000 was paid. This assignment as such is not discussed in the plaintiff's brief. We note that the admission of these exhibits was covered by the pre-trial order and also that they were admitted into evidence without objection. There is no merit to this assignment.

Plaintiff's third assignment, that the judgment is not sustained by the evidence, is controlled by well-settled legal principles. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. In such case, it is not the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court, in reviewing the judgment rendered, will presume that the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong. Shreve v. Agricultural Products Co., *ante* p. 219, 113 N. W. 2d 58.

In considering the sufficiency of the evidence to sustain a judgment rendered by a court where a jury is waived, not only must the evidence be considered most favorably to the successful party and any controverted facts resolved in his favor, but he must have the benefit of every inference reasonably deducible from the evidence. Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797.

Applying these rules to this case, can we say that there is sufficient evidence to sustain a judgment for the defendants? The most that can be inferred from the evidence is that the plaintiff executed and delivered a mortgage release to the defendants which recited that the debt had been paid. There is no question this re-

lease was prima facie evidence of payment. However, it is not conclusively so. Pettit v. Louis, 88 Neb. 496, 129 N. W. 1005, 34 L. R. A. N. S. 356. In the absence of other evidence, this release would be sufficient. The difficulty herein is that the parties stipulated that only the principal but no interest had been paid. This stipulation has the effect of nullifying the presumption of payment in the absence of some evidence of settlement of a disputed matter, if such was the case. A debt cannot be extinguished by the payment of less than is actually due unless based on a new and sufficient consideration. Jensen v. Lincoln Hail Ins. Co., 125 Neb. 87, 249 N. W. 94.

The note provides for 6 percent interest. It does not specifically state the date from which interest is to run. However, section 62-117, R. R. S. 1943, reads in part: "* * * (2) where the instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument, * * *." On its face, therefore, the instrument provides for interest at 6 percent from January 12, 1956, to 6 months after the date of the death of Heinrich J. Hargens. On January 16, 1959, at the time of the execution of the release of the mortgage, there was due on the obligation $5,000, plus interest for 3 years at 6 percent. To discharge the obligation of the note, interest would need to be paid in the absence of other facts.

Defendants attempted to vary the terms of the instrument by parol testimony. In Farmers Nat. Bank v. Ohman, 112 Neb. 491, 199 N. W. 802, we said: "A promissory note, in the usual commercial form, is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence."

The defendants' remedy, if competent evidence existed to prove their contention, was to reform the instrument to reflect the facts, and not to attempt to vary or contradict its terms.

On the record before us, the plaintiff is entitled to

judgment for the amount due upon the note.

For the reasons stated in the foregoing opinion, the judgment is reversed and the cause is remanded to the district court with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

LENA SCHUETT, APPELLANT, V. REIMER HARGENS ET AL., APPELLEES.

114 N. W. 2d 512

Filed April 13, 1962. No. 35161.

APPEAL from the district court for Hall County: WILLIAM F. MANASIL, JUDGE. *Reversed and remanded with directions.*

E. Merle McDermott and *E. E. Hannon*, for appellant.

Kelly & Kelly, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a companion case to Schuett v. Hargens, *ante* p. 663, 114 N. W. 2d 508. It is similar in all respects to that case except that the note in this case, which also is for $5,000, is signed by the defendants herein, and the mortgage covered different property. By agreement, the cases were consolidated for trial and appeal.

The issues raised herein are identical with the companion case and are controlled by our holding therein. For the reasons stated therein, the judgment of the trial court is reversed and the cause is remanded to the district court with directions to enter judgment in conformity with that opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

WILLIAM A. EHLERS, APPELLANT, V. CHURCH OF GOD IN CHRIST, INC., ET AL., APPELLEES.
114 N. W. 2d 716

Filed April 20, 1962. No. 35168.

1. **Appeal and Error.** 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.
2. **Pleading.** When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary.

APPEAL from the district court for Douglas County: JOHN E. MURPHY, JUDGE. *Affirmed.*

William A. Ehlers, for appellant.

Eugene D. O'Sullivan, Jr., and *Samuel J. Hunter,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This action was commenced on June 10, 1952, by plaintiff and appellant William A. Ehlers filing his petition to foreclose a mortgage on the real estate of the defendant and appellee Church of God in Christ, Inc., at 2318 North Twenty-sixth Street, Omaha, Nebraska. England Halcomb, Howard Kinney, Earl Perkins, and Rev. Booker T. McDaniels were joined as defendant-trustees of the church, and individually.

Hereafter the defendant Church of God in Christ, Inc., will be designated as the church; and the other defendants by their last names, except Kinney whose true last name seems to be Kimsey, which will be used.

The allegations of plaintiff's petition as originally filed state that the mortgage was given on November

21, 1951, by the church, acting through its trustees and duly qualified officers, the said Halcomb, Kimsey, Perkins, and McDaniels, to secure a note for the sum of $2,339, with 6 percent interest payable in monthly installments, drawing 9 percent after maturity; and that the note was given for a balance due for labor and materials furnished to construct, reconstruct, remodel, and repair the church building at the address hitherto given. The note and mortgage were given to Hoschel L. Wright who furnished the labor, pursuant to a written agreement attached to the petition, and the materials were furnished at the request of the church officers. The petition alleged that at a meeting called for that purpose the church, by its members and officers present, approved the claim of Wright and authorized its officers to execute the note and mortgage. It also pleaded an assignment of the note and mortgage from Wright to the plaintiff, and all claims under the contract. The prayer was for an accounting, and a decree of foreclosure and sale of the premises.

The church answered separately. The first paragraph of its answer contained a general denial and the second paragraph was as follows: "By way of further answer, the defendant, Church of God in Christ, Inc., alleges that the proported (sic) note and mortgage which are the basis of the plaintiff's law suit are null and void and of no legal force and effect in this case; that they were procured by fraud; that they were not procured with the consent of the membership of the Church, nor with the consent of the trustees of the Church; that there was no notice of any meeting to mortgage the Church property as required by law; that there was no meeting of the congregation at which the subject was discussed; that there never was a resolution ever presented to the congregation; that there was never a resolution passed by the congregation authorizing the mortgage of the property; that the persons that signed the note and mortgage had no right to do so."

A third paragraph merely stated the plaintiff was not a bona fide holder of the note and mortgage.

Plaintiff's reply was a general denial. The defendant Perkins was never served with summons. The defendants Halcomb and Kimsey made no defense.

A trial was had after which the court made findings by memorandum in the form of a letter addressed to the attorneys which however contained no order but which indicated that it would hold in favor of the church. Plaintiff thereupon moved to amend his petition which, after hearings had, was allowed. By separate amendments he then set out that the church, by Mabel M. Butler, Kimsey, and McDaniels, whose official status was unknown to the plaintiff, entered into the contract with Hoschel L. Wright attached to the original petition; that the church permitted Wright to perform the work, furnish the materials, accepted the building so erected, and used it; that it made partial payments thereon; and that it was liable on the contract in the sum of $2,469.75, and legal interest from March 1, 1961, in which amount he asked a money judgment therefor in case his mortgage, set out in the plaintiff's original petition, could not be sustained.

After these amendments a second memorandum in the form of a letter containing new findings was made by the court, but again no order was included.

Afterward the matter was again argued to the court before a different judge and, on August 29, 1961, the court rendered a judgment which adopted both of the findings previously made.

The court in its judgment held in favor of the church and dismissed the cause of action against it, but judgment was entered against Halcomb and Kimsey, and each of them, on the note in the amount of $4,350.54.

Plaintiff filed a motion for new trial as did the defendants Halcomb and Kimsey. The motions having been overruled the plaintiff has appealed to this court. Halcomb and Kimsey have not appealed.

The plaintiff assigns as error that the court's judgment is not responsive to valid pleadings and its findings and conclusions are contrary to the laws applicable to the case. The other assignments concern evidence which is not before the court.

A trial was had below but no bill of exceptions was filed in this court, and in such case this court has repeatedly held that: "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." Brierly v. Federated Finance Co., 168 Neb. 725, 97 N. W. 2d 253.

The plaintiff seems to be under the impression that all matters in the plaintiff's petition must be specifically denied by the defendant. However, in the case before us the answer contained a general denial. Therefore all the allegations of substance necessary for the plaintiff to prove to sustain his petition were denied.

Plaintiff alleged the execution and delivery of the note, mortgage, and contract by the church. They were matters which the plaintiff was required to prove to maintain his action against the church. In Alberts v. Pickard, 148 Neb. 764, 29 N. W. 2d 382, this court said: "When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purposes no other allegations in the answer are necessary." In the cited case a minor was the plaintiff in the action which was brought to recover triple damages for the sale of an automobile at a price over the ceiling set by federal statute. It was held that under a general denial it could be shown that someone else purchased the automobile. In the instant case any evidence tending to show the church did not execute the mortgage, note, or contract, or that they were executed by others without authority to

bind the church, would have been proper under the general denial.

The plaintiff asserts the second paragraph of the answer, which has been set out herein, contains matters which are mere conclusions of the pleader and do not set out the facts necessary to be pleaded to raise an issue thereon. In view of our conclusion that the general denial was sufficient to authorize the decision of the court and to sustain the findings of the court discussed herein, it is unnecessary to consider this feature further than they are mentioned later.

Though perhaps not necessary for the determination of the cause, the plaintiff raises certain objections to the findings of the trial court, claiming they are not authorized by the issues. He contends that the court erred by stating in one instance in the findings that the only question before the court was the right of the plaintiff to foreclose his mortgage against the church. An examination of the record reveals that this was one of those findings adopted before the amendment of the petition by the plaintiff and the subsequent findings of the court clearly show it considered the cause anew, including the questions of liability on the note and on the contract after the amendment. The finding complained of appears therefore to be but a tentative one adopted by the court before the final decision, all of which is clearly shown from the judgment taken as a whole. There is no merit therefore in the plaintiff's contention.

Plaintiff avers the court erred in including fraud in its findings, arguing that the allegation of fraud in the second paragraph of the answer is a mere conclusion and that fraud must be alleged and proved. He concludes that from the fact that fraud at one time was mentioned by the court that it was the basis for its decision. The court found that when the pastor signed the mortgage and certificate as to the action of the congregation required by section 21-838, R. R. S. 1943, but did not sign the note, he committed a fraud on the con-

gregation. There is no finding of fraud on the part of those in privity with the plaintiff. This appears to be a collateral matter. The finding of the court as to the fraud of the pastor was not necessary to its decision as shown by the judgment as a whole. The judgment makes it clear that the questions considered by the court were whether under the evidence it was shown that the church, or anyone authorized to act for it, entered into the contract or executed the note and mortgage. The court found no such proof was made and held only that the signers of the note were personally liable. Plaintiff claims the church accepted the benefits of the contract, ratified it, and should be liable thereon. This, of course, is also a matter of proof. The special findings were followed by further general findings of the court.

The plaintiff's brief contains a great many other allegations which he urges as reasons for reversal of the trial court's judgment. They involve questions of evidence before the trial court and in several instances plaintiff frankly discusses the evidence. No bill of exceptions is before us and we cannot consider the matters upon which the findings were made.

It follows that the judgment of the trial court must be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

DORMAN B. HALL, APPELLANT, V. JESS J. HADLEY ET AL., APPELLEES.
114 N. W. 2d 590

Filed April 20, 1962. No. 35170.

1. **Trial: Judgments. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial.**

2. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.
3. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.
4. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.

APPEAL from the district court for Lincoln County: CLARENCE S. BECK, JUDGE. *Reversed and remanded.*

Robert E. Roeder and *I. J. Nisley,* for appellant.

Maupin, Dent, Kay & Satterfield, Thomas O. David, and *Clinton J. Gatz,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

This is an action brought by Dorman B. Hall, plaintiff, against Jess J. Hadley and Jack O. Clouse, defendants, in the district court for Lincoln County, Nebraska, to recover damages for injuries sustained by the plaintiff to his right leg when it was caught between a hay-wagon and a gate. The trial court sustained the defendants' motion for summary judgment, denied the plaintiff's cross-motion for summary judgment, and dismissed the plaintiff's petition. The plaintiff filed a motion for new trial which was overruled, and plaintiff perfected appeal to this court.

For convenience we will refer to Dorman B. Hall as plaintiff, to Jess J. Hadley as Hadley, and to Jack O. Clouse as Clouse.

The plaintiff's amended petition alleged in substance that the plaintiff and Clouse were employed by Hadley as ranch hands assisting in the operation of Hadley's cattle ranch; that on May 5, 1959, at approximately 9:30 a.m., while Clouse was in the regular course of his employment he was driving a tractor attached to a hay-

wagon hauling hay to Hadley's cattle; and that it became plaintiff's duty to open a wooden swinging gate and pull it back out of the path of the tractor and haywagon Clouse was operating when Clouse, suddenly and without prior warning to the plaintiff and while the plaintiff had his back to Clouse and the tractor, carelessly and negligently started the tractor forward before the plaintiff had completely opened the gate; and that as a result thereof caught, crushed, and pinned the plaintiff's right leg between the corner of the haywagon and the edge of the gate causing the plaintiff permanent injuries. The plaintiff further alleged that the direct and sole proximate cause of the accident and injuries which the plaintiff sustained was the negligence of the defendant Clouse, as follows: Failure to give plaintiff sufficient notice and warning of the approach of the tractor and haywagon; failure to have the tractor under proper control so as to avoid pinning the plaintiff against the gate; failure to keep a proper lookout for plaintiff; operating the tractor in a careless manner in total disregard for the safety of the plaintiff under the conditions and circumstances then and there existing; failure to allow the plaintiff to completely open the gate so as to clear the tractor and haywagon; failure to allow the plaintiff to move to a place of safety; failure to warn plaintiff of the starting of the tractor; and in causing and permitting the tractor to be moved in such a manner without first seeing that the plaintiff had sufficient clearance and time to completely open the gate.

The defendant Hadley filed an answer to plaintiff's amended petition wherein he alleged that at the time of the occurrence of the accident the plaintiff was engaged in performing the duties of his employment as a ranch hand and working with Clouse, a ranch hand experienced in the operation and management of mechanical equipment used upon this ranch, including tractors and the operation thereof; that this defendant had no

knowledge of any careless traits or habits of work of Clouse, and believed him to be a safe, careful, and efficient ranch worker; that the plaintiff was an experienced ranch hand before the time the accident happened, and was experienced in the operation and management of mechanical equipment used on the ranch, including tractors and haywagons, and of the manner and use of opening and shutting gates on said ranch through which mechanical equipment might pass; that the injuries received by the plaintiff were the proximate result of his own negligence and failure to exercise reasonable protection for his own safety; and that if the plaintiff's injuries were the result of the negligence of Clouse, the plaintiff was guilty of contributory negligence more than slight in comparison with the negligence of the defendant Clouse. The defendant Hadley denied generally the allegations of the plaintiff's amended petition, and prayed for dismissal of the plaintiff's action.

The defendant Clouse filed an answer to the plaintiff's amended petition admitting that he was an employee of Hadley and that the plaintiff was injured while in the employ of Hadley on May 5, 1959. This defendant's answer denied all the allegations of the plaintiff's petition except the admissions made thereto, and alleged that the plaintiff's injuries were the proximate result of his own negligence; and that the plaintiff was guilty of more than slight negligence in comparison with the alleged negligence of this defendant which would bar his right of recovery. The prayer was for the dismissal of the plaintiff's action.

The plaintiff, in reply to both defendants' answers, denied all of the allegations contained therein.

The principal question to determine in this case is whether or not there was a genuine issue of material fact under the affidavits and depositions received in evidence which would warrant the rendition of a sum-

mary judgment by the trial court. In this connection the following are applicable.

"The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial." Ingersoll v. Montgomery Ward & Co., Inc., 171 Neb. 297, 106 N. W. 2d 197.

In Ingersoll v. Montgomery Ward & Co., Inc., *supra,* this court also said: "The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to discover if any real issue of fact exists. * * * In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the Summary Judgments Act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled."

"In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom." Ingersoll v. Montgomery Ward & Co., Inc., *supra.*

With the foregoing authority in mind, we proceed to a summary of the evidence material to a determination of this appeal.

The evidence shows that on this ranch, on the morning of the accident, they used three haywagons of three different lengths, one 12 by 14, one 12 by 18, and one 14 by 16 or 18. Just which one was involved in the accident is not known.

The plaintiff's testimony shows that he was 63 years of age at the time of the accident, and had been engaged for the most part in farm and ranch work; that

he had been employed on the Hadley ranch for approximately 12 years; that he lived at Maxwell, Nebraska, which is about 4½ miles west of the Hadley ranch; and that his duties as a ranch hand were to rake hay, run the tractor, and do general farm work. On May 5, 1959, the day of the accident, the plaintiff met Clouse at the ranch about 7:45 a.m. The haywagon was hooked to the tractor. In arriving at the place where they were to unload the hay and feed the cattle, the plaintiff testified that he walked to the gate to open it and permit the tractor and haywagon to pass through. The haywagon was loaded with hay. Clouse was operating the tractor. As they approached the corral where the cattle were located, Clouse stopped the tractor 14 to 16 feet east of a double swinging gate, a sufficient distance to allow the gate to be brought back across in front of the tractor and to allow the equipment to pass through the gate. The gate was 20 feet in width, with each side of the gate being 10 feet wide. The gate was chained in the center to hold it in place. After the plaintiff unfastened the chain holding the gate in place, he swung both parts of the gate to the west to scare the cattle back. The plaintiff then walked into the corral, let the north half of the gate remain inside of the corral, and commenced to bring the south half of the gate outside of the corral to the east directly in front of the tractor and haywagon. As the plaintiff was pushing the south half of the gate back out of the corral to the east in front of the tractor, he remained on the west side of the gate, facing southwest and watching the cattle. The plaintiff further testified that the tractor motor was running at all times while he was opening the gate. The plaintiff pushed the south half of the gate out of the corral in front of the tractor, and commenced to walk around the end of the gate. As the plaintiff stepped around the end of the gate to pull it back, Clouse, without the knowledge of the plaintiff, began to move the tractor forward while the plaintiff was looking away

from the tractor to the southwest watching the cattle. His leg was caught between the left corner of the haywagon and the edge of the gate, which caused his injuries. The plaintiff further testified that Clouse at no time advised him that he was going to move the tractor forward. The plaintiff had no knowledge that the tractor was moving forward until he was injured. The plaintiff had not completely opened the south half of the gate at the time Clouse commenced to move the tractor forward, had not completely stepped around the end of the gate, and was caught while he was doing so. The plaintiff and Clouse had done this type of work in the same place and in the same manner on many occasions prior to the time of the accident. There were no obstructions between the plaintiff and Clouse which would cause Clouse to fail to see that the plaintiff had not completely opened the gate at the time Clouse commenced to move the tractor forward.

The testimony of Clouse showed that he was 29 years of age and had worked with the plaintiff on the Hadley ranch in 1959; that he had worked as a ranch hand for practically 2 years for Hadley, the owner of the ranch; and that he fed cattle, put up hay, and did any farm work that was required. When the plaintiff arrived on the job the morning of the accident, the first thing they did was to haul hay to feed the cattle. The haywagon had been loaded the day before. This witness was driving the tractor, and the plaintiff hooked the haywagon onto the tractor and walked over to the gate. This witness waited for the plaintiff to open the gate. They had performed this type of work in the same manner on previous occasions. He stopped the tractor about 15 feet east of the gate. The plaintiff opened the gate and pushed the north half of the gate to the west and brought the south half of the gate to the east. Clouse further testified that he watched the plaintiff as he was bringing the south half of the gate back to the east, and the plaintiff was standing at the end of the gate facing

north while Clouse had the equipment at an angle because it would be impossible to drive the equipment straight through the opening in the gate to the corral. Clouse further testified that in the position in which he had the equipment, there was sufficient clearance on the south side of it to completely clear the gate as he passed through; that he made this observation before he started to move the tractor and continued to watch his load and the gate on the north side as he came forward with the equipment; and that he was endeavoring to come out the north side of the opening for the gate as close as he could to get to the corral. This witness was unable to testify as to how the accident happened, or in what manner the plaintiff was caught between the edge of the gate and the haywagon because he was watching to the north side of the corral as he started the tractor and haywagon in motion and started through the gate. Clouse's testimony was to the effect that the plaintiff was not facing southwest toward the cattle in the corral while he was opening the south half of the gate, but was facing north as he brought the south half of the gate across in front of the tractor. Later Clouse changed his testimony to the effect that the plaintiff was facing south, away from the tractor, as he was opening the gate.

It appears from the evidence that there are questions of fact as to whether or not the plaintiff had the gate completely open when Clouse started the tractor forward through the gate; whether or not the plaintiff had any knowledge that Clouse had commenced to move the tractor forward through the gate; whether or not the plaintiff was injured while he was in the process of opening the gate and while he had his back to the defendant Clouse; and whether or not the defendant Clouse was watching the movements of the plaintiff while he was in the process of opening the gate at the time Clouse moved the tractor forward.

We believe, from the evidence, that there is a genuine

issue as to material facts presented and, under the authority heretofore cited, conclude that the trial court was in error in rendering a summary judgment in favor of the defendants.

For the reasons given herein, we reverse the judgment and remand the cause for trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

WAYNE OSTERHOLT ET AL., APPELLANTS, V. FRED OSTERHOLT ET AL., APPELLEES.
114 N. W. 2d 734

Filed April 27, 1962. No. 35065.

1. **Habeas Corpus: Infants.** The writ of habeas corpus may be used in controversies regarding the custody of infants.
2. ———: ———. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.
3. ———: ———. After a court's jurisdiction has been invoked by petition for habeas corpus seeking the custody of children, the children become wards of the court and their welfare lies in the hands of the court.
4. **Parent and Child.** The right of parents to the custody of minor children of tender years is not to be lightly set aside and the court may not deprive parents of such custody unless they are shown to be unfit to perform the duties imposed by that relationship, or they have forfeited their right.
5. **Infants.** In a controversy for the custody of infants of tender years, the court will always consider the best interests of the children and will make such order for their custody as will be for their welfare without reference to the wishes of the parties.

APPEAL from the district court for Nance County: ROBERT L. FLORY, JUDGE. *Affirmed.*

Muffly & Snyder, for appellants.

Philip T. Morgan, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This is a habeas corpus action seeking the custody of two children. The application was denied and relators appeal.

Relators and appellants, Wayne Osterholt and Rowena Osterholt, are the parents of the two children, Christina, who was born June 18, 1955, and Cindy Kay, who was born January 20, 1957. Respondents and appellees are Fred Osterholt, the paternal grandfather of the children, and Lena Irwin in whose home at Belgrade, Nebraska, Fred Osterholt, hereinafter referred to as the grandfather, lives with the grandchildren.

Wayne Osterholt, who will be hereinafter referred to as the father, was placed in the Beatrice State Home when he was 14 years of age, and stayed there until he was 17. He married Rowena, the mother of the children, hereinafter referred to as the mother, on September 15, 1950.

Sometime prior to 1960 the father had pleaded guilty to a charge of breaking and entering in the State of Iowa. During January of 1960, he was serving a jail sentence in Iowa on a check charge. At the time of the trial, the father was on parole with the Nebraska State Probation Officer. There is nothing in the record to indicate the nature of the charge on which he was paroled in Nebraska, but we assume that it was one of the Iowa offenses.

On January 13, 1960, the mother brought the two children to the Irwin home to live with the grandfather. At that time the children were in bad physical condition, were emotionally disturbed, and were in need of medical and psychiatric attention. The mother lived with the children in the Irwin home until March 31, 1960. During that period she left the home on two occasions for a few days. On one of them, which was when she received her first aid to dependent children check, she was gone for 5 days. On that occasion Mrs. Irwin was in the hospital, and the children were cared

for by a neighbor of Mrs. Irwin. The mother left the Irwin home permanently March 31, 1960.

On three occasions when the mother came to visit the children she was brought to Belgrade by two different men, one of whom is alleged to be the father of a child subsequently born to her.

There is in the record evidence that on several occasions one or the other of the parents contemplated a divorce and that this was the situation as late as 3 weeks before the filing of the application herein. The testimony of the parents was to the effect that they had resolved their difficulties, were living together in Lincoln with the third child, and now wanted the custody of their other two children. The welfare director of Nance county and several other witnesses testified that the home now being provided for the children is a good one and that the children are receiving adequate care.

We have repeatedly held that the writ of habeas corpus may be used in controversies regarding the custody of infants. Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161.

After the court's jurisdiction has been invoked by a petition for habeas corpus seeking the custody of children, the children become wards of the court and their welfare lies in the hands of the court. Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388.

The law is equally well settled as to the respective rights of these parties. We have said that the right of parents to the custody of minor children of tender years is not to be lightly set aside and that the court may not deprive parents of such custody unless they are shown to be unfit to perform the duties to be imposed by that relationship, or they have forfeited their right. West v. Ofe, 110 Neb. 443, 194 N. W. 464; Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543.

In a controversy for the custody of infants of tender

years, the court will always consider the best interests of the children and will make such order for their custody as will be for their welfare without reference to the wishes of the parties. Schroeder v. State ex rel. Filbert, 41 Neb. 745, 60 N. W. 89; Barnes v. Morash, 156 Neb. 721, 57 N. W. 2d 783.

In the instant case, the indifference of the mother on occasion, her willingness to let others assume her burden, her recent moral dereliction, coupled with the instability and irresponsibility of the father, certainly would sustain a finding of present unfitness to perform the duties of parenthood.

The children have been cared for in their present surroundings for more than 2 years. Their physical and mental condition has improved, although one of them is still receiving medical attention. To take these children from an environment of stability and security to try an experiment elsewhere does not appear to us as being for the best interests of the children. This is particularly so when the previous environment provided by the parents has been one of constant instability and insecurity.

It is apparent that the trial judge, who had an opportunity to observe the parties and the witnesses, was convinced that until the parents had proved by their conduct rather than mere words their fitness to assume their obligation, the welfare of the children required a denial of the application for a writ of habeas corpus.

For the reasons given above, we find that the application was properly denied, and that the judgment should be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPEAL OF HARMS.
DIETRICH W. HARMS, APPELLANT, V. COUNTY BOARD OF SUPERVISORS OF DODGE COUNTY, NEBRASKA, APPELLEE.
IN RE APPEAL OF RATHBUN.
MARIAN RATHBUN ET AL., APPELLANTS, V. COUNTY BOARD OF SUPERVISORS OF DODGE COUNTY, NEBRASKA, APPELLEE.
114 N. W. 2d 713

Filed April 27, 1962. Nos. 35100, 35101.

1. **Appeal and Error.** The mode and manner of appeal is statutory, and a litigant who complies with the requirements of the applicable statute is entitled to a review of his case to the extent of the scope provided by law.
2. ———. The failure of the statute to provide any procedural method for lodging jurisdiction in the district court defeats the right of appeal mentioned therein.
3. ———. A petition in error in a district court to test the validity of a final order of an inferior tribunal is an independent proceeding the object of which is to obtain a reversal of the order presented for review.
4. ———. An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law.
5. ———. If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein.
6. ———. Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation.
7. ———. In proceedings under section 25-1901, R. R. S. 1943, it is mandatory that a petition in error and the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter.

APPEAL from the district court for Dodge County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Spear, Lamme & Simmons and *Richards, Yost & Schafersman*, for appellants.

A. C. Sidner, for appellee.

Edward J. Robins, amicus curiae.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

The appellant Dietrich W. Harms has brought this appeal from a judgment of the district court for Dodge County, Nebraska, which dismissed an appeal taken by the appellant from an order of the county board of supervisors of Dodge County, Nebraska. The order of the county board of supervisors directed the cleaning and widening of a drainway in that county and made an assessment of the benefits against the appellant's land. The case was docketed in this court as case No. 35100.

The appellants Marian Rathbun and Ruth Hopkins likewise appealed from the judgment of the district court dismissing a like appeal from a similar order of the county board of supervisors directing the same work to be done. It assessed the benefits against their land and awarded damages for the taking of certain real estate owned by them in the project. This was docketed in this court as case No. 35101.

By stipulation the cases were briefed and argued together and the bill of exceptions filed in the first case was made applicable to both. They involve the same procedure and turn on the same questions, and both will be disposed of in one opinion.

The factual situation involved, so far as is necessary to relate in view of our decision, is that the proceeding before the county board of supervisors involved the cleaning, widening, and changing of a drainage ditch known as Fremont Cut-off Ditch and certain related ditches under sections 31-901 through 31-933, R. R. S. 1943, designated as the County Drainage Act of 1959. The original drain which is designated herein was established in 1885 under the original County Drainage Act which as it now exists is set out in sections 31-101 to 31-138, R. R. S. 1943, and to this several tributaries and extensions were later added. The petition by certain

landowners for the improvements mentioned was filed with the county clerk on October 2, 1959, and thereafter the county board of supervisors on October 28, 1959, adopted a resolution declaring that the proposed improvement be undertaken and that a licensed engineer be employed to assist the county board of supervisors to develop a plan for the improvement. Such a plan was prepared for cleaning and enlarging the ditch. The proposal with plans, specifications, and an estimate of the cost of the work, together with plats showing the location of the work, the assessment of benefits to the lands of the owners benefited, and right-of-way damages, were presented to the county board of supervisors and approved by it and filed with the county clerk. Notice was thereupon given to the landowners, including the appellants, as provided by section 31-909, R. R. S. 1943. The appellants in each case appeared and filed objections to the proposed plan and to the assessment for benefits against their lands. The appellants Rathbun and Hopkins objected to the amount of the award for damages allowed them for taking a portion of their lands for the building of the ditch. On the hearing thereof the county board of supervisors by order approved the plans, directed the work to be done, and established the assessments and the award as originally proposed. From this order appellants appealed to the district court which dismissed the appeals. From these judgments the appellants have appealed to this court. They assign certain errors as to the rulings of the trial court with respect to its interpretation and application of the County Drainage Act of 1959, sections 31-901 through 31-933, R. R. S. 1943, which in view of our decision it will neither be necessary nor proper to discuss.

It is evident from section 31-911, R. R. S. 1943, that the Legislature intended to grant the right of appeal to persons who felt aggrieved by the action of the county board of supervisors in such a proceeding. It is equally apparent that this section and the entire act wholly fail

to set out the necessary procedure for taking an appeal therefrom. In From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441, this court held that: " 'The mode and manner of appeal is statutory, and a litigant who complies with the requirements of the applicable statute is entitled to a review of his case to the extent of the scope provided by law.' "

In the cited case the court was construing a provision of a statute which purported to grant a right of appeal but set out no method for its being perfected. It was held that the failure of the statute to provide any procedural method for lodging jurisdiction in the district court defeats the right of appeal mentioned therein. The cited case was thereafter quoted with approval as to this ruling in Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508.

Section 25-1901, R. R. S. 1943, provides a right of review by error proceedings from final orders of other tribunals or boards. This statute has been held applicable in case of erroneous assessments made by the county board for the benefits under other statutes involving drainage. From v. Sutton, *supra;* Loup River Public Power Dist. v. Platte County, 135 Neb. 21, 280 N. W. 430.

In From v. Sutton, *supra,* a proceeding in which the petition was designated a "Petition on Appeal," this court said that what a petition may be denominated in the caption is not necessarily controlling. The court there pointed out that the allegations of the petition sufficiently set forth the contentions of the appellants in that case to meet the requirements of a petition in error. Likewise, in the cited case a summons was issued and served as provided in error proceedings and the transcript containing the final order sought to be reversed was filed with the petition. Therefore in that case the proceeding before the district court was held to be one in error and the court considered the matter as having been so instituted.

However, in the case of Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49, where this court considered an appeal from the judgment of the district court brought to the trial court by error proceedings it was made clear that the provisions of the statutes granting the right of review in such cases must be followed. In that case the court laid down the following rules: "A petition in error in a district court to test the validity of a final order of an inferior tribunal is an independent proceeding the object of which is to obtain a reversal of the order presented for review.

"Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation.

"An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law.

"If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein."

The resolution of the county board of supervisors containing the order complained of was entered by it on April 7, 1960. On April 27, 1960, the appellants severally filed with the county notices of appeal. Transcripts of the proceedings before the county board of supervisors containing the order in question certified by the county clerk were not filed with the clerk of the district court in either action until May 23, 1960. No petition of any sort was filed by either of the appellants in the district court until August 11, 1960. The petitions when filed were in each instance designated as Petition on Appeal. No summons in error was issued or served. It appears that the proceedings were considered by the parties as appeals from the action of the county board of supervisors and must under this record be so considered by us. Furthermore, it is not possible to con-

sider them as proceedings in error as neither the petition nor the transcript in either case was filed in district court within 1 month of the decision of the county board of supervisors as required by section 25-1931, R. R. S. 1943. Keedy v. Reid, 165 Neb. 519, 86 N. W. 2d 370; Chicago, R. I. & P. Ry. Co. v. Sporer, 72 Neb. 372, 100 N. W. 813.

In proceedings under section 25-1901, R. R. S. 1943, it is mandatory that a petition in error and the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter. Anania v. City of Omaha, *supra*. While it is regrettable that the act in question did not provide the procedural steps to effectuate an appeal, it is apparent that the district court acquired no jurisdiction of the subject matter, and that this court under the circumstances acquired none either. It follows that the action of the district court dismissing the petitions on appeal must be affirmed.

AFFIRMED.

IN RE ESTATE OF ALBERT D. BRADNER, DECEASED.
AGNES ROBINSON, APPELLANT, V. LEONARD A. HAMMES, EXECUTOR OF THE ESTATE OF ALBERT D. BRADNER, DECEASED, APPELLEE.
114 N. W. 2d 730

Filed April 27, 1962. No. 35151.

1. **Automobiles: Negligence.** By the terms of section 39-740, R. R. S. 1943, the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle.
2. **Negligence.** What amounts to gross negligence must be ascer-

tained from the facts and circumstances of each particular case, and not from any fixed definition or rule.

3. **Automobiles: Negligence.** In an action for gross negligence under the automobile guest statute, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that the evidence fails to approach the level of proof of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.
4. ———: ———. Gross negligence, within the meaning of section 39-740, R. R. S. 1943, is negligence in a very high degree, or the absence of even slight care in the performance of a duty.

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

Fitzgerald, Hamer, Brown & Leahy and *Lyle E. Strom,* for appellant.

Kennedy, Holland, DeLacy & Svoboda and *Robert A. Skochdopole,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action growing out of an accident which occurred at the intersection of U. S. Highway 275-30 Alternate, also known as West Dodge Highway, and Douglas County Road 275 in Douglas County, Nebraska, between an automobile operated by Albert D. Bradner and a truck operated by one Adam Becker, on January 1, 1959, at about 5 p.m. Bradner died as a result of the accident and Agnes Robinson was injured thereby. On June 2, 1959, after the death of Bradner, Agnes Robinson filed a claim against his estate for damages for personal injuries and property damage. Leonard A. Hammes is executor of the estate.

The executor filed objections to the claim. The claim was disallowed. An appeal from the order of disallow-

ance was taken to the district court by Agnes Robinson. She will be referred to hereinafter as plaintiff. The estate and the executor will be referred to as defendant.

The plaintiff, on October 22, 1959, filed a petition in the district court charging that the injuries and damages she sustained were caused by grossly negligent acts and omissions of Albert D. Bradner, the defendant's deceased. The acts and omissions charged were that Bradner failed to maintain a reasonable lookout for traffic on West Dodge Highway at the time he approached the intersection when he knew or in the exercise of reasonable care should have known of the presence of the truck operated by Adam Becker; that he failed to bring his automobile to a stop in obedience to a stop sign which directed him to stop before entering West Dodge Highway, which failure was a violation of the laws of the State of Nebraska; and that he failed to heed the warning by the plaintiff of the approach of the truck, and in failing to bring his automobile to a stop in response thereto in obedience to the laws of the State of Nebraska.

By amendment to the petition plaintiff made other charges of negligence as follows: That Bradner failed to yield the right-of-way to the truck in violation of the laws of the State of Nebraska; that he failed to make a timely sounding of his horn when to have done so might or would have avoided the accident; and that he drove his automobile at a rate of speed which under the circumstances was greater than was reasonable and prudent, having regard for the conditions then existing.

The defendant filed an answer which, to the extent necessary to state herein, contained a denial of the charges of negligence made against Bradner by the plaintiff.

The case was tried to a jury and a verdict was returned in favor of the plaintiff and against the defendant for $13,228.71. Judgment was rendered on the verdict. A motion for judgment notwithstanding the ver-

dict or in the alternative for a new trial was filed. The verdict and the judgment were vacated and set aside "in accordance with the defendant's motion for directed verdict at the close of all the evidence." From this order vacating the judgment the plaintiff has appealed.

There is no material dispute as to the controlling facts in this case. The question is that of whether or not on the evidence which was adduced, and not denied except by pleading, it could be said it was sufficient to sustain a verdict of gross negligence, within the meaning of the law, against the defendant. The defendant adduced no evidence on the trial.

It is clear that the plaintiff at the time in question was a guest in the automobile of Bradner. It is of course true that under the terms of section 39-740, R. R. S. 1943, as follows, the plaintiff may not recover unless Bradner was guilty of gross negligence: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. * * *."

The pertinent evidence substantially is that on January 1, 1959, the plaintiff left Waterloo, Nebraska, as a guest passenger in an automobile operated by Bradner. There was another guest passenger, by name Mabel Sholseth, riding in the automobile. The three occupied the front seat. Bradner was in the left or driver's seat, the plaintiff was seated next to him, and the other person was on the right side. As they left Waterloo they started west and then turned onto a road extending in a southerly direction toward West Dodge Highway. The half mile extending north from West Dodge Highway is straight, level, and at right angles to West Dodge Highway. The view to West Dodge Highway and for a considerable distance to the east is open and

unobstructed. The surface is referred to as black-top. This is a county road. To the north and 32 feet back from the north edge of the paving on West Dodge Highway, on the west side of this road, is a regular highway stop sign. West Dodge Highway is a four-lane U. S. highway, two lanes for eastbound and two lanes for westbound traffic. It extends westward from Omaha, Nebraska, and has a traffic load heavier than does any other highway from the west entering and leaving that city.

At about 5 p.m., Bradner approached this intersection from the north. His speed, according to an estimate of a witness, was from 30 to 40 miles an hour. At about the same time Adam Becker was operating a semitrailer truck westward on West Dodge Highway in the outside lane at about 50 miles an hour. He saw Bradner's automobile approaching from the north and, assuming Bradner would stop before entering the intersection, did not substantially reduce his own speed. Visibility was good and the roads were in good condition at the intersection. There is evidence that Bradner reduced his speed from the previously indicated speed of from 30 to 40 miles an hour to a variously estimated speed of from 10 to 25 miles an hour. There is no evidence that he ever attempted to stop, none that he sounded his horn, and none that he attempted to turn aside to avoid a collision with the truck of Becker.

The location of the automobile and the truck with relation to the intersection is not made certain. It is made certain that the truck was seen when Bradner's automobile was as much as a block to the north. Bradner was addressed as "Brad." When he and his guests were about a block away the witness Sholseth said to the plaintiff: "'Agnes, does Brad see that truck coming?'" There was no response from Bradner. The plaintiff addressed him directly: "'Brad, do you see that truck coming?'" There was no reply. The witnesses said that he did reduce the speed but looked

straight ahead and drove the automobile past the stop sign across the path of the truck.

The consequence was that when the truck driver saw that the automobile was not stopping he attempted to and did turn slightly to the left, and when the front of the automobile was probably past the centerline of the westbound lanes of West Dodge Highway and the rear end was off the north edge of the paving, the front end of the truck struck the left side of the automobile near its front end.

It is pointed out here that Bradner and his guests conversed freely on their way from Waterloo, and that from this a reasonable inference could flow that he could and should have, in the exercise of ordinary care, heard and heeded the warnings of his guests, and that for his failure so to do he was guilty of negligence.

If there was evidence of gross negligence the judgment notwithstanding the verdict in favor of the defendant is erroneous and it should be vacated and set aside, and the original judgment in favor of the plaintiff should be restored.

There is no fixed rule for the ascertainment of what is gross negligence. What amounts to gross negligence depends upon the facts and circumstances of each particular case. See, Swengil v. Martin, 125 Neb. 745, 252 N. W. 207; Covey v. Anderson, 130 Neb. 702, 266 N. W. 595; Montgomery v. Ross, 156 Neb. 875, 58 N. W. 2d 340; Pester v. Nelson, 168 Neb. 243, 95 N. W. 2d 491.

As to the determination upon whether or not negligence is gross, this court has said: "In an action for gross negligence under the automobile guest statute, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordi-

nary negligence." Smith v. Damato, 172 Neb. 811, 112 N. W. 2d 21. See, also, Thompson v. Edler, 138 Neb. 179, 292 N. W. 236.

A general definition by this court is the following: "Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547. See, also, Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310.

Whether or not there was evidence upon which to submit the question of gross negligence to a jury depends upon the proper conclusions and inferences to be drawn from the facts in the light of the legal principles which have been set out herein. Conclusions related to the charges of negligence which find support are that Bradner failed to maintain a reasonable lookout; that he failed to bring his automobile to a stop in obedience to a stop sign in violation of the laws of the State of Nebraska; that he failed to heed a warning by the plaintiff; that he failed to yield the right-of-way; and that he failed to sound the horn on his automobile.

A further conclusion is that there was no evidence of any other act on the part of Bradner which could be said to amount to an effort to avoid the collision between the two vehicles.

In the light of this it must be said that there was evidence on which to submit the question of gross negligence of Bradner to the jury, and for the jury to find that he was guilty of negligence in that degree. Accordingly the order of the court rendering judgment notwithstanding the verdict in favor of the defendant and against the plaintiff was erroneous.

The order of the court vacating the judgment in favor of the plaintiff and in rendering judgment in favor of the defendant notwithstanding the verdict is vacated and set aside, and the cause is remanded to the district

court with directions to reinstate the original judgment in favor of the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

LEE HAGLER, APPELLEE, V. THORVAL JENSEN AND STANLEY JENSEN, DOING BUSINESS AS ARNOLD LIVESTOCK COMMISSION COMPANY, A PARTNERSHIP, ET AL., APPELLANTS.
114 N. W. 2d 755

Filed April 27, 1962. No. 35166.

1. **Workmen's Compensation.** Section 48-151, R. R. S. 1943, provides in part: "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."
2. ———. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment.
3. ———. Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability.
4. ———. Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act.
5. **Workmen's Compensation: Appeal and Error.** On appeal to this court in a workmen's compensation case the cause is considered de novo upon the record before us.
6. ———: ———. Where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others.
7. **Workmen's Compensation.** For workmen's compensation purposes, "total disability" does not mean a state of absolute help-

lessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

APPEAL from the district court for Custer County: S. S. SIDNER, JUDGE. *Affirmed.*

Stewart & Stewart, Allan F. Black, Chambers, Holland, Dudgeon & Hastings, and *John C. McElhaney,* for appellants.

Miles N. Lee, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The plaintiff, Lee Hagler, filed a petition in the Nebraska Workmen's Compensation Court against the defendants Thorval Jensen and Stanley Jensen, doing business as Arnold Livestock Commission Company, a partnership, and Iowa Home Mutual Casualty Company, an insurance corporation, for alleged injuries received by the plaintiff while in the employ of the defendants Jensen doing business as the Arnold Livestock Commission Company. The case was tried before one of the judges of the Nebraska Workmen's Compensation Court who entered an order of dismissal of the plaintiff's action. The plaintiff waived rehearing before the entire compensation court and appealed directly to the district court for Custer County. The trial court made the following findings: That on January 13, 1960, plaintiff sustained personal injuries in an accident while working for Thorval Jensen and Stanley Jensen doing business as Arnold Livestock Commission Company, in Custer County, Nebraska; that the plaintiff received said injuries within the course and scope of his employment by said defendants, and as a result thereof plaintiff suffered total and permanent disability for which he was entitled to compensation from the defendants; that

the plaintiff was entitled to recover for total disability the sum of $23.32 for 300 weeks beginning March 6, 1960, and $17 a week thereafter for the remainder of his life; that in addition the plaintiff was entitled to recover from the defendants the sum of $242.05 for medical, drug, and travel expenses in connection with his injuries, with credit of $320 to be given defendants for payments made; that the plaintiff, at the time of receiving his injuries, was being paid $1 an hour, which averaged $35 a week for the 6 months immediately preceding the accident; that 80 weeks had elapsed since the plaintiff quit work on March 5, 1960, which was the date total disability commenced; that there was due from defendants to plaintiff the sum of $1,865.60 (being 80 weeks at $23.32 a week) together with medical, travel, and drug expenses of $242.05, making a total of $2,107.65, less $320 for which defendants should be given credit, making a net sum due plaintiff from defendants of $1,787.65; and that thereafter plaintiff should receive from defendants the sum of $23.32 a week for the remaining 220 weeks commencing September 23, 1961, together with $17 a week thereafter for the remainder of the plaintiff's life. Judgment was rendered in accordance with the findings.

The defendants filed a motion for new trial which was overruled. Defendants perfected appeal to this court.

The petition filed by the plaintiff in the Nebraska Workmen's Compensation Court alleged in substance that on January 13, 1960, the plaintiff sustained personal injuries in an accident arising out of and in the course of his employment by defendants Jensen, doing business as Arnold Livestock Commission Company, which accident occurred at defendants' saleyard in Arnold, Custer County, for which injuries plaintiff was entitled to compensation from the defendants; that at the time of the accident the plaintiff was employed as a yardman and was receiving wages from the defend-

ants Jensen of approximately $35 a week; that the extent and character of the injuries sustained by the plaintiff was total and permanent disability; and that the defendants did pay workmen's compensation for 16 weeks, but stopped such payments and refused to pay any further amount.

The defendants' answer admitted that on or about January 13, 1960, the plaintiff was involved in an accident while in the employ of the defendant commission company, from which he sustained total and permanent disability and for which he was paid workmen's compensation payments for a period of 16 weeks at the rate of $20 a week; denied that the plaintiff was then disabled as a result of an accident arising out of and in the course of his employment; and denied that the plaintiff suffered from any disability other than such disability as he might have from an arteriosclerotic heart disease which had been present for some period of time predating the accident of January 13, 1960.

The plaintiff filed his petition on appeal in the district court, alleging in substance the same facts as were alleged in his petition in the Nebraska Workmen's Compensation Court.

The defendants' answer on appeal is substantially the same as the answer filed in the Nebraska Workmen's Compensation Court.

For convenience we will refer to Lee Hagler as claimant, and to the defendants Thorval Jensen and Stanley Jensen, doing business as Arnold Livestock Commission Company, a partnership, as defendants, and there is no occasion to mention the Iowa Home Mutual Casualty Company, an insurance corporation, which was the insurance carrier for the defendants heretofore mentioned.

The defendants' pertinent assignment of error is that the judgment of the trial court is not sustained by the evidence and is contrary to law.

We deem the following authorities to be pertinent to a determination of this appeal.

Section 48-151, R. R. S. 1943, provides in part: "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." See, also, Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739.

In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment. See, Pittinger v. Safeway Stores, Inc., 166 Neb. 858, 91 N. W. 2d 31; Tilghman v. Mills, *supra*.

Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Rose v City of Fairmont, 140 Neb. 550, 300 N. W. 574; Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Tilghman v. Mills, *supra*.

Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act. Knudsen v. McNeely, 159 Neb. 227, 66 N. W. 2d 412; Tilghman v. Mills, *supra*.

It is sufficient to show that the injury and preexisting disease combined to produce disability, and it is not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the disability arose out of the employment. Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698,

230 N. W. 688; Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891; Tilghman v. Mills, *supra.*

On an appeal to this court in a workmen's compensation case the cause will be considered de novo upon the record before us. Anderson v. Cowger, *supra;* Tilghman v. Mills, *supra.*

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

The claimant testified that he worked for the defendants Jensen for 3 years; that he was 58 years of age at the time of the accident; that he worked as a clean-up man in the defendants' commission yards; that his duties were to pen up cattle and hogs on sales days, clean up the yard, and do the haying and feeding of the livestock on sales days; that he would pick up bales of hay and put them over a fence 5 or 6 feet high into feed racks; and that these bales of hay would weigh from 40 to 110 pounds. He further testified that the accident occurred in the hog yard at about 11 a.m., on January 13, 1960; that at the time of the accident he was engaged in helping to pen up hogs; that a hog ran down the alley, and the claimant grabbed a scoop shovel and ran after the hog to head it off; and that there was ice on the alley, the claimant's feet went out from under him, and the scoop shovel came down and hit him on the left leg above the ankle. The claimant further testified that his leg hurt so badly that he took his hand and rubbed it to ascertain whether or not he had broken it; that a big lump appeared on his leg in just a short time; that his leg hurt, but he did not do anything about it at that time; and that his leg began to get red, and he went home early. As time went on his leg became redder, and it seemed as though there were a lot of lumps which would go up his leg a little bit farther each day until his leg got to hurting him so badly that he went to the hospital to see Dr. Chaloupka on March 5, 1960. The claimant further testified that he tried to work, but could not do as much work as he had done; that from

January 13, 1960, his leg pained him all the time, and as soon as he got home he would lie on the bed and keep his leg elevated, which afforded him some relief; that he was unable to sleep nights and would get up two or three times in the night, walk around, sit down for a while, and then go back to bed; that when he went to see Dr. Chaloupka on March 5, 1960, the doctor informed him there was no room in the hospital where he could be taken care of, and told him to return home; and that the same night the claimant's back started to hurt him, he called the doctor, and the doctor told him to come back to the hospital which the claimant did the next morning, March 6, 1960. While the claimant was in the hospital he was ordered to remain in bed and not get up to go to the bathroom. The doctor ordered hot packs applied to the claimant's leg. While he was in the hospital he felt all right, otherwise than that his leg pained him to the extent that he could not stand on it. After he left the hospital and had been home 2 or 3 days, he got short of breath and developed chest pains which hurt him. He went back to see the doctor, and the doctor told the claimant to walk around a little bit, but that did not seem to help him and his chest pains kept hurting him. The pain in his chest continued all the time and hurt him at the time of trial. When he tried to walk the pains in his chest hurt him, and his leg hurt so badly that he was unable to walk very far or do any work. Before the accident he had no trouble with his legs, nor any aches or pains, and was able to carry on his work. The claimant further testified that since the accident he had been unable to do any substantial amount of work; that he tried to work but was unable to do so; that he had worked all of his life at hard physical labor; that his education was limited to the sixth grade; and that he was a farmer, lived on a farm, and rented his land. The claimant further testified that before the accident he was in good physical condition and had done his work all of the time; that if he had varicose veins

before the accident they never troubled him; and that his average wages amounted to $36.77 a week, based on $1 an hour.

On cross-examination the claimant testified that the wooden part of the scoop shovel hit his shin on the left leg; that it did not break the skin; that there was a concrete floor where the accident happened; that he was hospitalized on March 6, 1960, and remained in the hospital 9 days; that Cecil Lewis was present when the accident happened; and that after the accident his granddaughter took care of all the chores at his home.

Cecil Lewis testified that he worked at the defendants' commission yards and was working there on January 13, 1960; that he had known the claimant since 1928; that he would see the claimant several times a week; that he was the yard foreman and it was his duty to see how things were coming along in the yards; that during the week it was the claimant's duty to feed the cattle; that sometimes there were 100 head of cattle in the yard, and the claimant was to keep the livestock penned up and would come to this witness to see about feeding the livestock; that this witness worked along with the claimant; that the baled hay was piled up on the outside of the lots and had to be put into feed racks; that the bales had to be lifted 5 feet because the fence was 4 to 5 feet in height; that the bales of hay would weigh from 40 to 100 pounds; that before the accident the claimant would do everything that had to be done right along with anybody; and that claimant's health was good and he never complained, but was able to do a full day's work. This witness further testified that when he went to work the morning of January 13, 1960, the claimant was in the hog alley; that there was a small amount of snow which had melted and caused ice to form; that the claimant was trying to get the snow and ice away from the gates; that while the claimant was doing this, this witness unloaded a sow which weighed from 400 to 450 pounds; that the sow started to run by

the claimant who had a scoop shovel in his hand and the claimant was trying to herd the sow into the pen when he slipped and fell; that the sow hit the claimant or he slipped and fell down; and that the sow was between this witness and the claimant, and this witness could not see just how the scoop shovel lit. This witness further testified that the claimant said that his leg hurt, and he kept complaining about it all day; that the claimant had a lump on his shin which was sort of red in color; and that the claimant usually stayed at night until everything was loaded, but when he was halfway through his work on the day of the accident he asked permission to go home, which was granted. This witness further testified that the claimant worked between January 13, 1960, and March 5, 1960, but this witness did a lot of work that the claimant had done prior to the accident; that the claimant limped quite a bit, and when he was not walking he would stand so as to relieve the leg of its weight as much as he could; and that the longer the claimant worked during the day the more of a limp he would develop. When this witness saw the claimant after he left the hospital he would either be lying down or sitting on a couch with his leg elevated on a chair. This witness never saw the claimant do any work after he got out of the hospital.

LeRoy Christensen testified as to the heavy work performed by the claimant before the accident, such as lifting the bales of hay weighing from 80 to 100 pounds; that the claimant worked from early morning until late at night; that this witness worked along beside the claimant on sales days and never heard the claimant complain or saw him limp before the accident; that after the accident the claimant acted as if he was not able to work and this witness would help the claimant get the work done; that the claimant walked with a limp; and that the evening after the accident this witness saw a red lump on the claimant's leg where it had been hit.

Alvina Lewis testified that she was a cook at the

commission company owned by the defendants Jensen; and that she saw the claimant after the accident when he came in for lunch around noon. She asked the claimant about the accident, and he pulled up his pants leg and showed her his leg. She testified: "* * * his leg was swelled up, oh, I would say about like a hen egg, something like that, and it was red," and that it hurt him. After the accident she went to see the claimant a couple of times between January 13, 1960, and March 6, 1960, and the claimant was sitting with his leg elevated upon a chair. She could tell by the expression on the claimant's face that his leg was hurting him.

A sister-in-law of the claimant, who was a practical nurse, testified that she saw the claimant's leg a day or two after the accident and it was swollen and red, and there was a bump on his leg where he had been hit; and that after the accident the claimant's leg got worse all the time, and was swollen and turning blue. This witness described a cluster of several lumps, some larger than others, hard and inflamed, on the claimant's leg. She testified that before the claimant went to the hospital it was difficult for him to walk at all; that her husband took the claimant to the hospital to see Dr. Chaloupka, and that at that time the claimant was exhibiting terrible pain, holding his propped-up leg, and almost groaning with pain; that after the claimant came home from the hospital he still looked bad and would always put his leg up on a chair or lie down on a couch with his leg elevated; and that the claimant told this witness that he was getting short of breath.

The claimant's brother testified that he took the claimant to the hospital because his leg was hurting him and it looked bad. After the claimant returned from the hospital he was not able to do anything, he limped, and was short of breath. He was unable to walk, and would have to sit down. This witness saw the claimant occasionally during the summer of 1961, and the claimant was walking with a limp and was unable to do anything.

The claimant's daughter testified that she was at home a week before her father went to the hospital; that his leg was swollen, "puffy," and red; and that she felt along the vein and could feel the lumps that felt like beans in a pod, or like something running up the vein.

The claimant's wife testified that on the day of the accident the claimant came home early. His leg was swollen, feverish, and very red, and it became progressively worse. The clots kept forming in the vein above the bump until it was almost a solid vein at the time he went to the hospital, and every day he did less and less work. About the third day the lumps started to appear. The claimant followed the doctor's orders and kept off of his leg. The third or fourth day after he returned from the hospital he commenced complaining about his chest hurting. The doctor said that he had better move around a little, but that did not help matters any. The claimant could not work over 15 minutes at a time, and he worked very slowly.

This record discloses the testimony of five doctors who took the claimant's history, made laboratory tests, and took X-rays and electrocardiograms. To detail the evidence of these doctors would unnecessarily lengthen this opinion, but this evidence has been reviewed carefully, and we deem it only necessary to set forth the diagnosis and the opinions of the separate doctors relating to the disability of the claimant.

Dr. Melville Louis Chaloupka testified that he was engaged in the general practice of medicine at Callaway, Nebraska, and had been the family physician of the claimant since 1958; that he attended the claimant on August 12, 1958, when the claimant had hit his left wrist with a hand ax and cut three tendons which were sutured and from which the claimant recovered uneventfully; that on September 29, 1958, the claimant had an acute bursitis of his right shoulder; that in April 1959, he saw the claimant for a cerebral spasm of one of his cerebral arteries from which he recovered un-

eventfully; that the claimant usually recovered quickly with treatment; and that in August 1959, he saw the claimant for an acute prostate infection from which the claimant made a full recovery and returned to his usual work. On March 5, 1960, the claimant walked into this doctor's office with a decided limp. The claimant was a well-developed white male. The claimant had varicose veins which were nonsymptomatic. An examination revealed an acute thrombophlebitis of the left leg involving the superficial and deep veins. This doctor testified, with reasonable medical certainty, that the most probable pathological cause of any phlebitis is trauma, a bruise, a bump, or some form of hurting the vein so that the lining of the vein becomes inflamed, forming a clot, with secondary infection, and that is what happened to the claimant. The doctor further testified that the claimant received an injury on January 13, 1960, which slowly and progressively became worse through the weeks that he did not see a doctor. The doctor further testified that the thrombus in the deep vein of the left leg when it first formed was not secured, and that many times little pieces will break off of the thrombus and flow with the blood stream through the veins to the heart and through the heart into the lungs, and usually stop and plug a vessel in the lungs. If the emboli are large enough, the pain and shock usually kills the patient. If the emboli are small showers, usually they damage the lung vessels so that there is a compensatory increased pressure in the pulmonary blood system which causes dilatation of the heart and the resulting symptoms of heart failure. The symptoms are pain in the chest and shortness of breath. The claimant had a shortness of breath, pain, and swelling of the ankles. The doctor testified that the accident or trauma the claimant suffered in January was the originating cause of the emboli, causing the superficial and deep thrombophlebitis. The doctor further testified that the claimant was very definitely disabled from doing

any type of strenuous labor. He was unable to work at the saleyard, and was unable to carry on any gainful occupation which required the use of his arms, his legs, and his body. The doctor's opinion was that the claimant's disability was permanent, that he would not get any better, and that he was totally and permanently disabled as a result of the accident. This doctor further testified that he found no arteriosclerosis of the general circulatory system, and no arteriosclerotic heart disease; and that, based on reasonable medical certainty, there was a direct causal connection between the accident of January 13, 1960, and the condition of the claimant at the time of trial.

Dr. William Nutzman testified that within reasonable medical certainty the claimant's condition on April 19, 1960, showed that undoubtedly the claimant experienced a traumatic episode to the lower portion of his left leg which resulted in damage of venous structures in the area to the extent that thrombosis formed in the superficial veins of the left leg and probably the deep venous structures of the left leg became secondarily involved, and subsequent to such event claimant experienced emboli from this area which lodged in his lungs; and that with reasonable medical certainty on March 29, 1960, the claimant was experiencing an acute episode consisting of showers of small emboli lodging in the lung fields, resulting in an acute dilatation of his heart and pulmonary vessels. Emboli more than likely originated from the deep venous structures of the left leg. The claimant experienced a traumatic episode which resulted in damage to superficial venous structures and consequently these structures exhibited thrombosis, and subsequently the deep venous structures became involved. This situation was caused by a thrombophlebitis occurring prior to April 19, 1960. History of the claimant indicated the thrombophlebitis process occurred sometime between the traumatic incident on January 13, 1960, and April 19, 1960. With reasonable

medical certainty, the doctor's impression was that the claimant was not disabled in any way prior to January 1960. His history indicated that he was an able-bodied man before the accident. After securing the history, it was this doctor's impression that the claimant had not been able to pursue his usual occupation from the time of the accident until he saw him on April 19, 1960. When this doctor saw the claimant, he was not able to work. The doctor further testified that on April 19, 1960, the claimant's physical examination did not reveal evidence of arteriosclerotic heart disease.

Dr. Robert C. Rosenlof testified that his practice was limited to internal medicine and diagnosis. His diagnosis, with reasonable medical certainty, was that on the basis of the history, physical findings, and laboratory and X-ray studies, the claimant had pulmonary hypertension with cardiac dilatation when he saw the claimant on May 31, 1961. At that time the claimant had pulmonary hypertension and enlargement of the heart with dilatation of the pulmonary artery. The heart enlargement and dilatation of the pulmonary artery were secondary to repeated pulmonary emboli arising from the deep vein thrombophlebitis of the left lower extremity. The doctor further testified that, with reasonable medical certainty, the thrombophlebitis resulted in a thrombus or thrombi of the lower left extremity. The most usual cause of thrombophlebitis, or the clot forming in the vein, is injury, any sort of trauma. The most important cause of thrombosis is injury to the lining of the vessels. On the basis of reasonable medical certainty, the doctor testified that the injury played an important aspect in the claimant's case, and there was definite causal connection between the injury and the disability that the claimant had at the time of the examination. When the doctor examined the claimant, the claimant was not capable of doing what he had previously done prior to January 1960. He could not go

back to work as a handyman at the salesyard and do strenuous work.

On cross-examination Dr. Rosenlof testified that his opinion was that the injury to the claimant's left ankle ultimately affected his heart; that he did not think it was unusual that the first evidence of heart symptoms appeared 2 months after the accident; and that within 24 hours after the accident the left leg was swollen and the claimant noticed lumps along the medial and anterior aspects of the left leg. On May 31, 1960, the claimant was complaining of shortness of breath on exertion. There was no direct evidence of arteriosclerotic heart disease. This doctor testified that a slight stroke on May 13, 1959, would have no bearing on the claimant's condition at the time of the examination. The shower of emboli affected the lungs and the heart, and that came from a thrombus of the left leg.

Dr. D. A. McGee, a physician and surgeon, testified on behalf of the defendants. He gave as his opinion that the claimant probably had emboli from a clot; that from his history this could have occurred in 1959 at the time he had a stroke; that it is an established and accepted fact that emboli are not broken off from the thrombus or clot 72 hours after their formation; that it is also an established fact that the throwing off of the emboli when a patient is suffering from a thrombophlebitis is in the realm of a rarity; that the claimant must have had heart failure with his impaired circulation; and that he was treated for it and was still taking medicine to prevent this condition recurring. Dr. McGee's final conclusion was that there was no factual or physical correlating of this claimant's history and the findings at the time of the examination, which was on August 30, 1961, to the claimant's present complaints, nor to his described accident of January 1960. The doctor's conclusions and opinion were that none of the claimant's present disability was caused by the shovel-handle accident as described in his history given to the doctor.

Dr. John C. Thompson, who confines his practice to internal medicine and diagnosis, testified on behalf of the defendants that so far as the story of the thrombophlebitis, it is noted by the claimant's history that this condition dates back to January 1960, when the lump appeared, and he went to see a doctor on March 5, 1960; that the most that could have happened as a result of the bruise on the claimant's leg to a previously existent vein which was dilated would be a bruising, and this happens often with people who have varicose veins; and that one may get a little clotting of blood in this vein which is sometimes painful and lasts only a few days as a general rule. The doctor's opinion was that there was no connection between the lump which occurred in the claimant's left leg in January 1960 and the thrombophlebitis which occurred in March 1960, and there was no relationship between the claimant's injury and the things that happened subsequently. The doctor did not believe there was any connection between the claimant's injury and his complaints during the examination that this doctor made of the claimant on July 25, 1960. The doctor testified that there was a swelling of the claimant's leg which follows thrombophlebitis, but the claimant was not wearing an elastic stocking which would relieve this condition and permit him to work. The doctor's opinion was that the claimant was perfectly able to work on the basis of anything which could have occurred as a result of the accident; that the accident was a temporary, little injury that occurred to the claimant's leg, which had no connection with the subsequent events which occurred sometime later; and that the claimant's cardiogram showed his heart to be normal.

The following rules apply in the instant case.

"* * * where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony

of others." Knaggs v. City of Lexington, 171 Neb. 135, 105 N. W. 2d 727.

"For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Tilghman v. Mills, *supra*. See, also, Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262; Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561.

The record discloses that the claimant was an unskilled, common laborer. If he can work at all, it would have to be the lightest kind of common labor. The evidence demonstrates that the claimant is unable to earn wages in the same kind of work, or work of a similar nature, that he was trained for or accustomed to perform.

From a review of the evidence and the authorities herein cited, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

PAUL MORGAN, APPELLEE, V. LOUIS WEINER, APPELLANT, 114 N. W. 2d 720

Filed April 27, 1962. No. 35171.

1. **New Trial: Appeal and Error.** During the pendency of a motion for new trial timely filed, no appealable order is rendered until the motion for new trial is disposed of.
2. **Trial.** Where a default has been regularly entered, it is largely within the discretion of the trial court as to whether a defendant shall be permitted to come in afterwards and make his defense.
3. **Trial: Appeal and Error.** The discretion of the district court upon a motion to set aside a default judgment is a legal one,

and in the absence of a showing of an abuse of discretion, the Supreme Court will not interfere.

4. ———: ———. The facts and circumstances in each case, as shown by the record, determine whether there has been an abuse of discretion.

APPEAL from the district court for Douglas County: JOHN E. MURPHY, JUDGE. *Affirmed.*

Warren C. Schrempp and *Truman Clare*, for appellant.

Bernard E. Vinardi and *Edward Shafton*, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an appeal from a judgment by default in an action for an accounting. Paul Morgan, the appellee, was the plaintiff in the lower court. Louis Weiner, the appellant, was the defendant.

Both of the parties are licensed real estate brokers and, at one time, were partners in a real estate business. The partnership was dissolved in November 1956. On January 1, 1957, the defendant and the plaintiff entered into a written contract of employment which provided in part that the plaintiff would receive "10% Bonus of Net Profit." The defendant's employment of the plaintiff under this contract continued until June 7, 1958, when the parties entered into a second contract. The second contract provided in part that the plaintiff would receive "20% of net profit." The defendant's employment of the plaintiff continued under the second contract until November 15, 1959, when it was terminated.

The petition, filed April 20, 1960, prayed for an accounting between the parties and judgment for the amount due the plaintiff under the employment contracts. On May 23, 1960, the defendant obtained additional time to plead and on June 6, 1960, filed a motion. On September 30, 1960, Irvin C. Levin in open court

and in the presence of the defendant obtained leave to withdraw as counsel for the defendant. On October 10, 1960, the court entered an order overruling the defendant's motion and granting the defendant 2 weeks to answer.

On October 26, 1960, the plaintiff filed a motion to enter the default of the defendant and on October 28, 1960, an application for a restraining order. On October 28, 1960, the defendant again appeared in court in person and with James E. Fellows. Mr. Fellows advised the court that the defendant had contacted his office on the preceding day and requested that the defendant be granted additional time to plead. The court overruled the plaintiff's motion for default, denied the application for a restraining order, and granted the defendant 1 week to plead.

On November 4, 1960, the defendant filed a motion for a hearing on the defendant's motion which had been previously overruled. On November 9, 1960, the plaintiff filed a motion to strike the defendant's motion and to enter the default of the defendant. On November 16, 1960, the court overruled both motions, granted the defendant 2 weeks to answer, and set the case for trial in January 1961. On December 5, 1960, the court granted the defendant 10 days to answer. On December 12, 1960, James E. Fellows appeared in open court and obtained leave to withdraw his appearance as attorney of record for the defendant.

On March 30, 1961, the court entered an order finding that the defendant was in default as to pleadings and as to compliance with orders for the production of records, and setting April 7, 1961, as the date for a hearing to enter his default and such other order or judgment as might be just and equitable. On the same day a copy of this order was served upon the defendant by the sheriff, and copies were mailed to Warren Schrempp and John Sloma. Later Mr. Sloma testified that he re-

ceived a copy of the order but Mr. Schrempp stated that he did not receive a copy of the order.

On April 7, 1961, the defendant failed to appear at the time specified in the order of the court. The plaintiff appeared and produced evidence in support of the petition. At the conclusion of the hearing the court announced that after examination of the evidence, it found generally for the plaintiff and against the defendant and that there was due the plaintiff from the defendant at least the sum of $12,430.84. At that moment the defendant entered the courtroom with Henry C. Rosenthal, Jr., an associate of Mr. Schrempp. The defendant was carrying a certified copy of the order entered on March 30, 1961, and admitted that he had received it several days before. The court advised the defendant that trial had been had, that the court had announced its findings, and that there was nothing further to be done except the formal entry of the judgment. There was some discussion off the record between the court and Mr. Rosenthal but Mr. Rosenthal made no statement or other appearance for the record at that time.

On April 17, 1961, the defendant filed a motion to set aside the default judgment and a separate motion for new trial. Attached to each of the motions were affidavits of the defendant, Mr. Schrempp, and Mr. Rosenthal. On May 5, 1961, the defendant filed an answer. On the same day the court heard the motion to set aside the default judgment and overruled it.

On May 12, 1961, the defendant filed another motion for new trial. On September 8, 1961, the defendant filed a notice that he had retained Truman Clare as co-counsel with Mr. Schrempp. On September 19, 1961, the defendant filed a motion "for a rehearing of the above motions for new trial and for default judgment." On September 25, 1961, the motions of the defendant for a new trial, for rehearing, and to set aside the judgment were overruled. The defendant then perfected this appeal.

The first question that must be determined is whether this court has jurisdiction of the appeal. The plaintiff contends that the defendant's time for an appeal expired 1 month after May 5, 1961, the date on which the motion to set aside the default judgment was overruled. The plaintiff argues that both motions filed on April 17, 1961, actually sought a new trial, that the overruling of one was a denial of both, that successive motions will not extend the time for appeal, and that the defendant's second motion for new trial filed on May 12, 1961, demonstrates that the defendant considered the order of May 5, 1961, to be a final order.

There is considerable merit in the plaintiff's contention, but in view of the somewhat confused state of the record in this case, we do not believe that this appeal should be dismissed as filed out of time. The record indicates that the district judge considered the motion for new trial on April 17, 1961, as still pending on September 25, 1961. During the pendency of a motion for new trial timely filed, no appealable order is rendered until the motion for new trial is disposed of. Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385. For that reason, and that reason only, we hold that the defendant's time for appeal did not commence to run until the motion for new trial filed April 17, 1961, had been overruled.

The defendant's assignments of error which require consideration are that the findings and judgment are not sustained by sufficient evidence, are contrary to law, and that the trial court abused its discretion in refusing to set aside the default judgment.

The evidence which supports the findings and judgment in this case consists of the testimony of the plaintiff and his wife, the written contracts of employment, and adding machine tapes identified by the plaintiff. The plaintiff testified that he, his wife, and his attorney examined the defendant's books at his office prior to May 12, 1960; that as a part of the examination the receipts

and disbursements for the periods involved were totaled; that according to the plaintiff's computation based upon his examination of the defendant's books, there was $12,430.84 due the plaintiff. The plaintiff's wife testified that she was a former office employee of the defendant; that she thought that there were receipts from a number of real estate transactions which were not shown on the defendant's books and she identified six or seven such transactions; that she thought that some of the disbursements which were included in the plaintiff's computations were properly chargeable to other business activities of the defendant; and that the plaintiff's computation was as accurate as possible. Although, as the defendant now suggests, the plaintiff's method of accounting may leave much to be desired, under the circumstances of this case the evidence is sufficient to support the findings and judgment against the defendant and they are not contrary to law.

The remaining question is whether the trial court erred in refusing to set aside the default judgment. The general rule is that where a default has been regularly entered, it is largely within the discretion of the trial court as to whether a defendant shall be permitted to come in afterwards and make his defense. Benson v. General Implement Corp., 151 Neb. 234, 37 N. W. 2d 223. The discretion referred to is a legal one and in the absence of a showing of an abuse of discretion, this court will not interfere. The facts and circumstances in each case as shown by the record determine whether there has been an abuse of discretion.

The record in this case shows that on March 30, 1961, the plaintiff's petition had been on file for approximately 1 year. The defendant had obtained five extensions of time in which to plead but had filed no responsive pleading. The defendant was in default and had no counsel of record. The court had twice overruled motions by the plaintiff to enter the default of the defendant. This was the state of the record when the court entered the

order setting April 7, 1961, at 9 a.m., as the time for a hearing to enter the default of the defendant.

On April 7, 1961, some 40 minutes after the time set in the order which had been served upon him by the sheriff, the defendant appeared in court. The hearing had been concluded and the court had announced its findings. The defendant had no satisfactory explanation or excuse for his failure to appear or defend. Although accompanied by a lawyer, no formal plea, motion, statement, or other appearance for the record was made.

On April 17, 1961, the motions to set aside the default judgment and for a new trial were filed. The affidavits attached to the motions alleged substantially that the defendant did not understand that the plaintiff intended to take judgment on April 7, 1961; that Mr. Schrempp did not receive a copy of the order of March 30, 1961, and was out of the city on April 7, 1961; that at about 8 a.m., on April 7, 1961, the defendant told Mr. Rosenthal by telephone that he had to be in court at 9 a.m.; that Mr. Rosenthal talked with the district judge by telephone at about 8:50 a.m. in an attempt to get the matter continued; and that the district judge stated that the matter would proceed to trial at 9 a.m. There was nothing in the affidavits which required the court to sustain either motion.

The defendant places much emphasis upon the fact that Mr. Schrempp denies receiving a copy of the order of March 30, 1961. As we view the record, this is of little importance. The record in this court shows that the defendant had no counsel of record on that date. Nevertheless, plaintiff's counsel mailed copies of the order to both Mr. Schrempp and Mr. Sloma. The affidavits allege that after the defendant was served with a copy of the order, he talked to Mr. Schrempp by telephone about it. If the defendant misrepresented the contents of the order to his own lawyer, it is no ground for relief in this case.

The answer filed on May 5, 1961, is very brief and amounts to a general denial and a plea of accord and satisfaction. Attached to the answer is a copy of a written agreement dated April 29, 1959, more than 6 months before the plaintiff claims his employment was terminated. There is no explanation in the record as to why the answer was not filed in time or during one of the five extensions of time in which to plead.

On September 7, 1961, and September 13, 1961, the defendant delivered to the district judge audit reports and working papers prepared by an accountant employed by the defendant. On September 25, 1961, at a hearing on the motion filed September 19, 1961, the defendant offered the testimony of the accountant in an attempt to show that the plaintiff's computation of the defendant's profits was not correct. There is no explanation in the record as to why the defendant did not produce this evidence in response to the orders entered on November 25, 1960, and March 1, 1961, which directed him to produce his books and records for the inspection of the plaintiff.

The record in this case shows more than negligence and lack of diligence. It shows a course of conduct deliberately designed to disrupt the orderly administration of justice. The record does not show an abuse of discretion by the trial court in refusing to set aside the default judgment.

The judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

SHARON SMITH, SPECIAL ADMINISTRATRIX OF THE ESTATE OF LOYD COWMAN, DECEASED, APPELLANT, V. PLUMB R. STEVENS ET AL., APPELLEES.
114 N. W. 2d 724

Filed April 27, 1962. No. 35185.

1. **Workmen's Compensation.** In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment.
2. ———. A causal connection must be shown between the accident suffered by the claimant and the cause of his disability.
3. ———. It is sufficient to show that the injury and preexisting disease combined to produce disability.
4. ———. An employee is totally disabled when he is unable to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.
5. **Witnesses: Trial.** A conflict in the evidence of expert witnesses will be determined in the same manner as conflicts in the evidence on any material fact.

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

Neighbors, Danielson & Van Steenberg and *Beatty, Clarke, Murphy, Morgan, Pedersen & Piccolo*, for appellant.

Joseph H. McGroarty, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action arising under the provisions of the Nebraska Workmen's Compensation Act. The case was first tried before one of the judges of the compensation court, who dismissed plaintiff's claim. The case was then heard by the entire compensation court, which likewise dismissed plaintiff's claim. An error proceeding was

taken to the district court for Scotts Bluff County, where the judgment of the compensation court was affirmed. The plaintiff thereupon appealed to this court.

We shall refer to Loyd Cowman as plaintiff throughout this opinion, irrespective of the revivorship of the action in the name of a special administratrix.

The evidence shows that plaintiff was employed by Plumb R. Stevens for several years prior to April 7, 1958, the date of the first of a series of accidents. Plaintiff was employed by Stevens, a construction contractor, as a cement worker at an hourly rate of $1.50. The ordinary work day was 9 hours and the work week was 5½ days. Plaintiff worked when there was work to be done and the weather permitted. Plaintiff was 63 years of age at the time of the incidents giving rise to this litigation.

On April 7, 1958, plaintiff, while unloading steel forms for Stevens, mashed his left thumb. Blood poisoning set in which required his hospitalization for 11 days. He was paid compensation benefits for this injury.

On May 24, 1958, after returning to his employment, he slipped while unloading some 2 x 4's used for constructing cement forms. While carrying the 2 x 4's on his right shoulder the slipping occurred, causing him to fall on one knee. As he got back on his feet the 2 x 4's scissored and kinked his neck. He told his foreman that evening of the kinking of his neck. There was no work the next 2 days. He returned to work on May 27, 1958, as usual.

On the latter date the work crew was engaged in lining an irrigation lateral with cement. After shoveling the mixed cement upon the sides of the lateral, plaintiff and three other employees were smoothing it out with an implement referred to in the record as a strike-off. The strike-off was a form, fitting the inside contour of the lateral which smoothed the cement in the bottom and on the sides of the lateral. It rested on 2 x 4's laid parallel on each side of the lateral. Two

employees pulled on the tongue of the strike-off while two other employees held the strike-off down and pushed on it from the rear. Plaintiff was on his hands and knees pushing the left end of the strike-off when it hit an obstruction, probably an uneven joint in the 2 x 4's on which the strike-off rested. Plaintiff's right hand and arm went through the strike-off into the wet cement and plaintiff fell partially into the lateral. He jerked his arm and head back and as he did so, according to his testimony, he suffered a stabbing pain in his neck between his shoulder blade and spine. He was unable to work the balance of the afternoon and rested in the shade until the crew quit for the day. He suffered pain throughout the night. He applied liniment and heat to his neck. He sat up all night because of extreme pain when he laid down. He returned to the employer's tool yard for work the next morning and went to Dr. Stuart Wiley's office when the doctor arrived at 11 a.m. The testimony of plaintiff as to the accident is corroborated by other employees.

The happening of the accident is established by the record. The evidence establishes that plaintiff at the time of the hearing before the one judge of the compensation court was totally and permanently disabled from performing the kind of work he was qualified for and customarily performed. The issue before the court is whether or not a causal connection exists between the accident and the resulting disability. The plaintiff contends that the disability is the result of the accident within the meaning of the Workmen's Compensation Act. The defendants assert that the disability is the result of disease in which trauma played no part. The conclusion of the court must rest on medical findings and the opinions of medical experts.

The case is heard de novo in this court. The burden of proof is upon the plaintiff to prove an accident arising out of and in the course of his employment and the disability resulting therefrom. Plaintiff must show a causal

connection between the accident suffered by him and the alleged disability. It is sufficient to show that the injury and preexisting disease combined to produce disability. These rules are of long standing and we shall not elaborate on them in this opinion. Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739.

The evidence of Dr. Wiley, the attending physician, is substantially as follows: He first saw the plaintiff on April 10, 1958, after plaintiff had mashed his thumb on April 7, 1958. The thumb became infected, which necessitated hospitalization and treatment for blood poisoning from May 5 to May 16, 1958. He found no heart murmurs or any discernable enlargement of the heart at this time. He found that plaintiff had an emphysematous chest of long standing which he associated with the limitations of excursions of respirations. There was no excessive fluid in the chest and his blood pressure was normal. He found no abnormalities in the heart, lungs, or thoracic cavity during this period.

He next saw plaintiff on May 28, 1958, the day after the accident with the strike-off, when plaintiff came to his office complaining of dizziness, pain, and stiffness in his neck. His examination revealed that plaintiff's blood pressure was normal. The heart, lungs, and thoracic cavity appeared normal. He discovered fine rales in the lungs and a shortness of breath. There was no fracture or dislocation of the bone structure, but he found evidence of advanced osteoarthritis of the cervical spine. Plaintiff entered the hospital on June 10, 1958, at which time he was suffering extreme pain in the neck area, a shortness of breath, bodily weakness, limitation of motion, rales in the lungs, and a mild cardiac enlargement. There was some peripheral edema and some fluid in the lungs. He was placed in traction and treated by physiotherapy. He was also treated for a decompensated heart. The plaintiff became progressively weaker until he became a bed patient. On August 5, 1958, Dr. Leon Schreiner, a neurologist practicing in Cheyenne, Wy-

oming, was in the hospital on other business and was asked by Dr. Wiley to look in on the plaintiff. Dr. Schreiner gave Dr. Wiley a tentative diagnosis of degenerative spinal cord damage, possibly amyotrophic lateral sclerosis, which is an incurable disease that progresses to inevitable death without any significant improvement at any time. Dr. Wiley agreed with Dr. Schreiner, advised plaintiff that further hospitalization would be ineffective, and discharged him from the hospital. Plaintiff thereupon entered a resthome in North Platte. On October 16, 1958, Dr. Wiley again saw plaintiff at which time he showed a remarkable improvement. Plaintiff was able to walk and his arms were much stronger. Dr. Wiley testified that his improvement was so pronounced as to be inconsistent with amyotrophic lateral sclerosis and consistent with a traumatic neck injury with spinal cord damage. On March 24, 1959, Dr. Wiley again saw plaintiff. He showed further improvement. He breathed well. His heart was compensated, although there was some enlargement. It was Dr. Wiley's opinion that plaintiff's condition was the result of trauma to his cervical spine area and associated structures.

Dr. Schreiner testified to his tentative diagnosis on August 5, 1958, of degenerative cord disease with other closely related syndromes possible. On January 16, 1959, he made a complete examination and diagnosis of plaintiff's ailments. Due to the great improvement in plaintiff's condition he ruled out the presence of a degenerative central nervous system syndrome, including amyotrophic lateral sclerosis. His diagnosis was that plaintiff was suffering in part, at least, from a post-traumatic cervical spine injury in which trauma is a contributing factor. He testified further that he found no objective evidence by laboratory or neurologic tests of Guillain-Barre syndrome which defendants assert as the sole cause of plaintiff's disability. He stated further that plaintiff's condition could be explained only on

the basis of a traumatic injury to the cervical spine and associated soft tissues, including the nerves and spinal cord.

Dr. Charles F. Heider, Sr., first saw plaintiff in a North Platte nursing home on August 11, 1958. On November 24, 1958, he took X-rays of the cervical spine. He found a marked osteoarthritis of that area and a narrowing of some of the vertebral discs. He found definite evidence of heart disease and advanced arteriosclerosis for a man of his age. He gave as his opinion that plaintiff suffered an acute traumatic condition to his spinal cord at the time of the accident.

Dr. Harold A. Ladwig, a neurologist practicing in Omaha, was called by the defendant. He examined plaintiff on July 25, 1959. He testified that at the time of Dr. Schreiner's examination of plaintiff on August 5, 1958, it was his opinion that plaintiff was suffering from an inflammatory disease known to the medical profession as Guillain-Barre syndrome. He found a shortness of breath and a congestive heart failure. He also found a grade I narrowing of the arteries which was consistent with plaintiff's advanced arteriosclerosis. He found a limitation of movement in both shoulders and the joints of the hands. He found some atrophy of the hand muscles, although plaintiff had an 80 percent grip. Certain reflexes were weak, which could have been normal in a man of his age. There was a definite limitation of movement of the neck. He found no evidence of injury to the spinal cord. He found fibrillations in the shoulder girdle which, accompanied by muscle weakness, is consistent with Guillain-Barre syndrome. He pointed out that there were no manifestations of a long track involvement which is present in a cord injury, and would give rise to hyperactive reflexes, slowness, and abnormal toe signs which plaintiff did not show. He pointed to the fact that plaintiff did not have a loss of bowel and bladder control which is contrary to a finding of cord injury. The conclusion reached

was that the injuries sustained in the accident would not produce injury to the spinal cord nor damage the cervical nerve roots and produce the symptoms testified to. Dr. Ladwig testified that the cause of Guillain-Barre syndrome is unknown. It is an inflammatory cord disease as distinguished from a degenerative cord disease such as amyotrophic lateral sclerosis. Infection often precedes Guillian-Barre syndrome according to Dr. Ladwig, but he did not feel that the blood poisoning which developed from the mashed thumb was a specific cause. He pointed out that recovery is common in cases of Guillain-Barre syndrome and that it is not in degenerative cord diseases. His opinion is that the existing arteriosclerosis, osteoarthritis, and the accidents testified to were coincidents, and that the sole cause of plaintiff's disability was Guillain-Barre syndrome.

Dr. Edmond M. Walsh, a physician specializing in diagnosis and internal medicine, examined plaintiff on and following July 22, 1959. He stated that plaintiff appeared older than his age. His examination revealed a limitation of movement of the head, a clear lung field, a moderately enlarged heart with sounds distant with no murmurs, and some disturbance of the lower extremities due to arteriosclerosis. He had a high red blood count and an excess of hemoglobin which could produce dizziness, shortness of breath, fatigue, and minor strokes. He stated that the foregoing could have been influenced by long standing congestive heart failure. By X-ray he found a spurring of the vertebral bodies and a calcification of the upper cervical lymph nodes due to plaintiff's arteriosclerotic condition. Plaintiff's heart was doing well at the time of his examination. He attributes the heart condition to a severe infection. He found no evidence of a degenerative cord disease or cervical nerve injury. He found plaintiff's blood pressure to be high. His opinion is that plaintiff had Guillain-Barre syndrome and that he was disabled by arteriosclerosis and cardiac damage. In his opinion the dis-

ability of plaintiff was not attributable to any accident. He refused to state, however, that a severe injury would not contribute to plaintiff's condition following the accident.

We have attempted to fairly summarize the findings and opinions of the medical experts without describing all the clinical and laboratory tests sustaining their conclusions. It is from these conflicting medical opinions that we must determine if there was a causal connection between the accident and the disability. The value of the opinion of an expert witness is dependent on and no stronger than the facts on which it is predicated. Such an opinion has no probative force unless the assumptions upon which it is based are shown to be true. In resolving conflicts in expert testimony a court is required to weigh and consider the evidence the same as any other conflict in the evidence on a material fact.

The evidence shows that plaintiff suffered an accident arising out of and in the course of his employment on May 27, 1958, which produced objective symptoms of injury. The symptoms continued and the disability existed unabated until the time of trial. The evidence of the attending physicians and the medical expert who examined him first during the period of disability is that trauma was a contributing cause of the disability. Their evidence appears to be both logical and credible.

The medical experts who testified for the defendants state that they found no evidence of injury to the spinal cord or the nerve root processes of the spinal area when they examined plaintiff more than a year after the accident of May 27, 1958. They assert that plaintiff's disability is due to Guillain-Barre syndrome and that the accident was not a contributing factor. Both admit that the cause of Guillain-Barre syndrome is unknown, which does not rule out accident as a contributing cause. One of defendant's experts testified that the accident as he understood it was not, in his opinion, a factor in the case, but he would not testify that trauma of a more

serious nature than he understood the accident to have been would not, or could not, be a contributing cause. The medical evidence of defendants appears to be more speculative and conjectural than that of the plaintiff. The medical experts all agree that symptoms of degenerative cord damage and inflammatory cord disease are quite similar in many respects. It is not disputed that improvement and recovery occur in inflammatory cord damage, due to its basic character as an infectious disease. The evidence shows the plaintiff did have a serious case of blood poisoning a few weeks before May 27, 1958. It appears just as logical to say that improvement and recovery could occur in traumatic injury to the spine or the nerve processes of the spinal area. The existence of advanced arteriosclerosis and osteoarthritis appears to be conditions and not predisposing factors. The history of heart decompensation and shortness of breath, according to the medical testimony, could well have been secondary results of the blood poisoning, or spinal or nerve injuries. While it is true that the accidents, physical conditions, and the symptoms indicating disability, could have been coincidents, it does not seem at all probable in a man who had no knowledge from experience or information of any latent disease or physical impairment. After giving due consideration to all the evidence, the history and nature of the accident, and the sequence of events following the accident, we are of the opinion that the evidence of plaintiff preponderates over that of the defendants and that plaintiff was totally disabled because of injury within the meaning of the Workmen's Compensation Act.

We find that plaintiff was totally and permanently disabled and entitled to the benefits of such disability authorized by the workmen's compensation law. An order of revivor appearing in the record shows that plaintiff died on December 24, 1960, during the pendency of this litigation. The cause of death is not shown. See § 48-123, R. R. S. 1943. There is no evidence of de-

pendency in the record. See §§ 48-122 and 48-124, R. R. S. 1943. We are unable to fully determine from the record the rights of the parties under the circumstances shown. We deem it appropriate under the circumstances to reverse the judgment and remand the cause to the district court with instructions to remand the same to the workmen's compensation court to determine the rights of the parties, the amount of compensation, and the medical, hospital, nursing home, and other expenses to which plaintiff is entitled, and to make a proper award of same.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

RUSSELL D. JOHNS, APPELLANT, V. CALVIN B. GLIDDEN ET AL., APPELLEES.
114 N. W. 2d 767

Filed May 4, 1962. No. 35104.

1. **Trial.** Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law.
2. **Automobiles: Negligence.** When one, being in a place of safety, sees or should 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 in failing to keep a proper lookout for his own safety constitutes contributory negligence more than slight in degree as a matter of law and precludes a recovery.

APPEAL from the district court for Douglas County: FRANK G. NIMTZ, JUDGE. *Affirmed.*

John J. Lawler, for appellant.

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an action for damages sustained by the plaintiff as the result of a collision between a vehicle driven by the plaintiff and an automobile operated by the defendant Calvin B. Glidden and owned by his father, Benjamin Glidden. The trial court directed a verdict for the defendants at the close of plaintiff's evidence and plaintiff has appealed.

The collision occurred on Sunday, April 26, 1959, at approximately 3 p.m., on the concrete apron of Neal's Mobil Service Station located at the southeast corner of the intersection of Maple and Seventy-fifth Streets in the city of Omaha. Immediately east of the service station was an asphalt parking area used by a supermarket. The asphalt pavement of the supermarket was built up to and joined the concrete apron of the service station. The operator of the service station had given directions that the automobiles of employees be parked on the south end of the boundary line between the service station and the supermarket to prevent supermarket customers from driving onto the concrete apron of the service station in the area of the pumps and grease bay doors of the station. On the afternoon of the accident three automobiles and a truck were so parked facing west on the south portion of the boundary line, leaving an open space of approximately 30 feet at the north end. The north car belonged to the plaintiff.

The evidence shows that plaintiff did some repair work on his car on the afternoon in question. Upon completing his work he decided to take a ride in a Go-Kart used as a demonstrator by the operator of the service station. The Go-Kart is described as a four-wheeled vehicle driven by a 2½ horsepower motor mounted just behind the back of the seat. The wheels were 6 or 7 inches in diameter with pneumatic tires. The seat was 6 or 7 inches above the ground. Power was transmitted to one rear wheel by a V-belt. A belt tightener was used in lieu of a clutch, much the same

as in the ordinary power lawn mower. Plaintiff started the engine and proceeded north from the service station building. He lifted the front and back wheels over a water hose that impeded his progress, got back into the Go-Kart, and proceeded north at a slow rate of speed. He proceeded along the front of the parked cars about 3 feet to the west of them. As he came by the northernmost of the four parked vehicles, he was struck by the automobile driven by Calvin B. Glidden. Plaintiff suffered a broken right ankle and other injuries. The Go-Kart was not damaged. Plaintiff states that he did not see the Glidden automobile until the moment of impact. One witness estimated the speed of the Glidden car at 20 to 25 miles per hour as it entered and crossed the supermarket parking lot. A state patrolman testified to skid marks on the pavement from the front wheels of the Glidden car to a point 2 or 3 feet behind its rear wheels.

It was a warm, spring day. The pavement was dry. The supermarket was not open because of it being Sunday. Since the accident happened on private property it is not affected by the statutory rules of the road.

The plaintiff was a former employee of the service station operator. He was familiar with the premises. He drove along in front of the parked cars in the low-slung Go-Kart which, because of the very nature of things, could not be seen by one approaching from their rear. He did not look for cars from that direction and admits that he did not see the Glidden car until the moment of impact. There is evidence of the speed of the Glidden car at the time of the collision as being 10 miles an hour. The physical facts indicate that he was driving at a slow speed in view of the length of the skid marks and the lack of damage to the Go-Kart.

We think the plaintiff was guilty of contributory negligence more than slight when compared with that of the defendant, as a matter of law. He was operating a vehicle which was completely hidden by the parked

cars. He did not look for vehicles approaching onto the service station apron where the owners of vehicles were invited to drive in furtherance of the service station business. The fact that the day was Sunday and the supermarket was closed does not excuse the failure to exercise due care. The nature of the vehicle he was operating, his failure to look for approaching vehicles, and the nature of the circumstances surrounding the accident afford convincing proof of negligence more than slight on the part of the plaintiff when compared with that of the defendant. The case is controlled by the rules announced in Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727, and Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655.

The trial court arrived at the same conclusion and, it being correct, the judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE ESTATE OF EMMA NISSEN, DECEASED. MELVINA HILLIGAS, APPELLANT, V. FRANK M. FARR, ADMINISTRATOR OF THE ESTATE OF EMMA NISSEN, DECEASED, APPELLEE.
114 N. W. 2d 764

Filed May 4, 1962. No. 35169.

1. **Contracts: Executors and Administrators.** The burden of proof is upon the claimant seeking compensation for services rendered during the lifetime of a deceased person to prove an agreement express or implied to pay for the services.
2. ———: ———. Where a family relationship exists between the deceased and the claimant, in order to make a prima facie case claimant is required to rebut by competent evidence the presumption that the services were rendered gratuitously.
3. **Contracts.** Evidence to establish a contract must show something more than a mere possibility, guess, or conjecture.
4. **Contracts: Executors and Administrators.** Where one renders personal service to another merely upon the expectation of a

legacy, unless there is a contract obligation, the promisee takes his chance of receiving the legacy, and, if his expectations are disappointed, he can recover nothing.

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

E. Harold Powell, for appellant.

John E. Dougherty and *Charles J. Whitney,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This action arises out of a claim against an estate for alleged services claimed to have been performed between 1945 and 1957 under an implied contract. A jury in district court rendered a verdict for the plaintiff. The court sustained a motion for judgment notwithstanding the verdict, and dismissed plaintiff's petition. Plaintiff appeals.

Plaintiff and appellant, Melvina Hilligas, and her husband, Ralph Hilligas, hereinafter referred to by their proper names, filed a joint claim in the county court for $1,791.50 against the estate of Emma Nissen, deceased. After a hearing, the county judge rendered judgment on the joint claim for $145. The pertinent part of that order is as follows: "This Court now upon consideration of the evidence and the pleadings and written argument submitted finds that claimants have and recover for the following items in the following amounts, to-wit:

"August, 1954, Melvina took Mrs. Nissen to Illinois	$35.00
"Ralph Hilligas helped repair horse barn roof	20.00
"In 1956, Ralph Hilligas helped repair cattle barn roof	30.00
"Ralph Hilligas helped clean and plaster cistern	15.00
"July 28-30, Melvina Hilligas assisted her when	

she was in hospital before her death in 1957 25.00
"Melvina Hilligas cleaned the milking machine in 1957 10.00
"Ralph Hilligas hauled calf to town and arranged for sale of chickens in 1957 10.00

$145.00

and that the claim of Ralph and Melvina Hilligas is allowed in said sum, and that the balance of their claim is disallowed." From this judgment Melvina appealed. Ralph did not join in the appeal but was the chief witness for Melvina in the district court. He also was surety on her appeal bond which was subsequently amended in district court by substituting another surety for him.

The petition on appeal eliminated certain items in the statement in the county court, and prayed for judgment for $1,407.50. The claimed services were in the main for transporting the decedent, who did not drive, to town or to club meetings and on one occasion to Illinois; for fixing her hair; for helping her prepare chickens for the freezer; for helping her with work around her home; for comforting her on one occasion when she had trouble with her hired man; and for taking care of her at the hospital during the last 3 days of her life when Melvina could spare the time away from her son who was hospitalized by the accident which caused Emma Nissen's death. There are also items for caring for and disposing of her bird and her dog during the period of her hospitalization.

Melvina and the deceased lived on neighboring farms. The deceased was a sister of Melvina's mother-in-law, and consequently Ralph's aunt. It is evident from the record that there was a close personal relationship between the two families.

Melvina assigns as error the sustaining of the motion for judgment notwithstanding the verdict. The appellee, administrator of the estate of Emma Nissen, deceased,

contends that Ralph was an incompetent witness; that the statute of limitations barred all of the claim prior to 4 years preceding Emma Nissen's death; that there was no competent evidence of the value of the services alleged to have been rendered; and essentially, that the evidence was insufficient to sustain a verdict.

As we view this record, while there is merit in the other contentions, it is not necessary to consider other than the last one because it is evident that the evidence was insufficient to sustain the verdict.

The law involved is well settled in Nebraska. The burden of proof is upon the claimant seeking compensation for services rendered during the lifetime of a deceased person to prove an agreement express or implied to pay for the services. In re Estate of Benson, 128 Neb. 138, 258 N. W. 60; Breuer v. Cassidy, 155 Neb. 836, 54 N. W. 2d 75.

Where, as here, there is a family relationship between the deceased and the claimant, in order to make a prima facie case claimant is required to rebut by competent evidence the presumption that the services were rendered gratuitously. Christ v. Nelson, 167 Neb. 799, 95 N. W. 2d 128.

Ralph testified that a year prior to her death Emma Nissen said on an occasion when he was present, that: "* * * for the things that Melvina had done for her that she'd be well paid some day." He also testified that during the summer of 1956 Emma Nissen said: "* * * that she had no one else to do anything for her; to take her anywheres; that Melvina would take her and she'd be well paid some day." Subsequent to the death of Emma Nissen, Ralph found an envelope among some discarded papers containing a folded sheet from a memorandum book of some nature. The following in Emma Nissen's handwriting appeared on this sheet, which is exhibit No. 1: "I went (want) Melvina to have my money in bank when I ded (dead) She is the won

(one) helped me always and my farm goes to my little boy Deryl Mrs. Emma Nissen."

The above extracts are the sole and only items in the entire record which Melvina could conceivably claim inferred an agreement on the part of Emma Nissen to pay for any services rendered. The above statements and the memorandum are obviously testamentary in character and lack the formalities prescribed to establish a contract. As suggested, there is no question the relationship between the parties was close. It would be natural to assume Mrs. Nissen expected to leave some property to Melvina or her family for past kindnesses. Exhibit No. 1 is an attempt to do just that. Unfortunately, exhibit No. 1 is a testamentary document which is not properly executed to be effective as such.

It is evident from the record that neither Melvina nor Ralph expected to be paid for their services as such. No record was kept of the services as they were rendered. There was never any talk of payment for specific services. The statements used in the county court and the district court were compiled by Melvina and her counsel after the death of Emma Nissen. The fact that no accounts were kept at any time over the 12-year period leads to the suspicion that the implied contract was an afterthought when no valid testamentary document was found. No bill or claim was ever presented to Emma Nissen nor was any demand made for any payment during her lifetime. The alleged services covered a period of 12 years from the death of Emma Nissen's husband to her own death, yet the declarations set out above were made within the last year of Emma Nissen's life. There is no way of knowing when the memorandum was written.

Shortly after her husband's death, Emma Nissen procured a hired man who, there is an inference in the record, may have been a relative. This hired man exchanged work with Ralph. He was also killed in the accident which claimed Emma Nissen's life.

Evidence to establish a contract must show something more than a mere possibility, guess, or conjecture. The acts performed are entirely consistent with neighborliness, friendship, and the relationship which existed between the parties. With reference to the portion of the claim for transportation of the deceased, there certainly was no agreement to pay mileage on any of the occasions listed. With specific reference to transportation to club meetings, Melvina was also a member of the club, and the deceased was her neighbor. With reference to the charge for dressing the hair of the deceased, Melvina was not a professional hairdresser and it would not be in the least unusual for her to help her husband's aunt with her hair. Nor does it seem unusual for her to help her husband's aunt with particular household tasks such as dressing chickens. There is some evidence that the deceased on occasion also helped Melvina.

It will serve no purpose to analyze each of the individual items in Melvina's claim because we do not feel that the services were performed under circumstances sufficient to establish an implied contract. We believe the services when rendered were intended to be gratuitous, with the hope of eventual reward in the form either of a gift or as the beneficiary of Emma Nissen's estate. Where one renders personal service to another merely upon the expectation of a legacy, unless there is a contract obligation, the promisee takes his chance of receiving the legacy and, if his expectations are disappointed, he can recover nothing. In re Miller's Estate, 136 Pa. 239, 20 A. 796.

As suggested above, the testimony falls far short of establishing an implied contract to pay for the services rendered. The motion for a directed verdict should have been sustained. Consequently, the motion for judgment notwithstanding the verdict was properly sustained and the judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, RELATOR, V. ROSCOE E. STORY, AS COUNTY ASSESSOR OF ADAMS COUNTY, ET AL., RESPONDENTS.

114 N. W. 2d 769

Filed May 4, 1962. No. 35205.

1. **Constitutional Law: Taxation.** Taxes must be levied by valuation uniformly and proportionately upon all tangible property. Article VIII, section 1, Constitution of Nebraska.
2. ———: ———. The rule of uniformity prescribed by Article VIII, section 1, of the Constitution of Nebraska, inhibits the Legislature from discriminating between taxpayers in any manner whatever.
3. ———: ———. The Legislature does not have the power to release or discharge a tax, such action being prohibited by Article VIII, section 4, of the Constitution of Nebraska.
4. ———: ———. Laws 1961, chapter 382, section 1, page 1173, which amended section 77-1242, R. S. Supp., 1959, is unconstitutional as in violation of Article VIII, section 1, and Article VIII, section 4, of the Constitution of Nebraska.

Original action. *Judgment for Relator.*

Clarence A. H. Meyer, Attorney General, for relator.

Jack Devoe, James E. Ryan, and *Donald L. Brock,* for respondents.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and SCHEELE, District Judge.

MESSMORE, J.

This is an original action brought under the Uniform Declaratory Judgments Act, sections 25-21,149 to 25-21,164, R. R. S. 1943.

In the instant case it is not questioned that this court has jurisdiction to determine the constitutionality of Legislative Bill No. 489, Laws 1961, c. 382, § 1, p. 1173, which amended section 77-1242, R. S. Supp., 1959.

The relator's petition alleged in substance that the Seventy-second Session of the Nebraska Legislature in 1961 passed L. B. 489, which amended section 77-1242,

R. S. Supp., 1959, by adding thereto the language italicized in the following quotation of said section: "Dealers in motor vehicles shall report their vehicles on hand January 1 at 12:01 a.m. of each year as merchandise, describing each vehicle thus returned for ad valorem tax assessment, in the same manner and at the same proportion of actual value as other merchandise is assessed. *When a motor vehicle which has been reported for taxation is sold to and registered by a Nebraska resident, prior to July 1, the dealer shall file a copy of the invoice required by section 60-617 with the county assessor, together with proof of such registration, and such dealer shall then be credited on his ad valorem tax assessment with the proportionate amount of tax for the balance of the registration year.*"

The relator's petition further alleged that L. B. 489 became law without the signature of the Governor June 22, 1961, and on that date the Governor requested that an action be brought by the Attorney General to determine the constitutionality of such legislation. The petition then set forth certain reasons why L. B. 489 is unconstitutional. Those we deem pertinent to a determination of this action will be discussed in the opinion.

The respondents motor vehicle dealers denied that the act was unconstitutional, and affirmatively asserted it was constitutional.

The answer of the respondent county assessor did not deny facts that had been alleged, and alleged that his only interest in the controversy was whether or not the act was constitutional so that the county assessors would know how to perform their official duties.

The sole issue involved is the constitutionality of L. B. 489, and the relator has filed a motion for judgment on the pleadings which is now before this court.

In 1952, at the general election held that year, the voters of the state approved a constitutional amendment whereby Article VIII, section 1, of this state's Constitution was amended to read in part as follows: "Taxes

shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, *except that the Legislature may provide for a different method of taxing motor vehicles; * * *.*"

In 1953, the Legislature, pursuant to the 1952 amendment to the Constitution, adopted a procedure for taxing motor vehicles in part as follows.

Section 77-1240.01, R. S. Supp., 1959, provides in part: "Beginning January 1, 1954, in addition to the registration fees provided by Chapter 60, article 3, a motor vehicle tax is hereby imposed on motor vehicles registered for operation upon the highways of this state, * * * which motor vehicle tax shall be in lieu of all ad valorem taxes to which such motor vehicles would otherwise be subject."

Section 77-1240.02, R. R. S. 1943, provides: "In the event an application is made after the beginning of the registration year for registration of any motor vehicle not previously registered by the applicant in this state, the motor vehicle tax for such year on such motor vehicle shall be reduced by one-twelfth for each full month of the registration year already expired as of the date such vehicle was acquired. An application shall first be submitted to the county assessor on a form prescribed by the Auditor of Public Accounts who shall compute the tax and certify the same to the county treasurer."

Section 77-1240.03, R. R. S. 1943, provides: "Upon the transfer of ownership of any motor vehicle, the transferor shall be credited with the number of unexpired months remaining in the registration year; Provided, that where such vehicle is transferred within the same calendar month in which acquired, no refund shall be allowed for such month. Should such transferor acquire another motor vehicle at the time of such transfer, such transferor shall have the credit herein provided applied toward payment of the motor vehicle tax then owing and otherwise such transferor shall file a

claim with the county assessor upon a form prescribed by the Auditor of Public Accounts. The county assessor shall certify to the county treasurer the amount of tax refund and the taxing unit where the motor vehicle is registered. The county treasurer shall make payment to the claimant from the undistributed motor vehicle taxes of the taxing unit where the tax money was originally distributed."

Section 77-1241.01, R. S. Supp., 1959, provides: "Motor vehicles not subject to a motor vehicle tax, including dealers' motor vehicles on hand on January 1 at 12:01 a.m. and not registered for operation on the highways, shall be subject to the ad valorem tax on tangible property; such tax shall be computed according to the schedule of values fixed by the State Board of Equalization and Assessment; Provided, that in the event a motor vehicle which has been assessed for ad valorem tax purposes, except dealers' motor vehicles on hand January 1 at 12:01 a.m., is later registered during the registration year for which taxes have been assessed, the owner against whom such ad valorem taxes have been assessed shall be credited with the proportionate amount for the period during which the motor vehicle tax has been paid."

The phrase "ad valorem" means literally "according to the value," and is used in taxation to designate an assessment of taxes against property at a certain rate upon its value. See, Powell v. Gleason, 50 Ariz. 542, 74 P. 2d 47, 114 A. L. R. 838; State v. Wynne, 134 Tex. 455, 133 S. W. 2d 951.

The procedure adopted by the 1953 Legislature, shown by the above-cited sections of the statutes, has continued to be followed. There have been a few minor changes made in these statutes by the Legislature which have not changed this procedure. Under this procedure, a private owner of a motor vehicle who buys such a vehicle has the tax on it reduced by one-twelfth for each month that has expired at the time he acquires the

motor vehicle. In the event the private individual sells his motor vehicle, he obtains a refund of taxes based upon the number of months remaining in the year, as indicated by one of the preceding sections of the statutes. A motor vehicle in the hands of a private owner is taxed for a full 12 months.

Dealers are required to list their motor vehicles on hand at 12:01 a.m. on January 1 each year, and the following November they pay the tax on those motor vehicles for the full year. However, a motor vehicle dealer does not have to pay any tax on any motor vehicle he owns at any time during the year if he at any time in the month of January sells those motor vehicles he listed on January 1 of the year. He does not pay any tax on motor vehicles he acquires after he has listed his stock of motor vehicles at 12:01 a.m. January 1 in each year. A motor vehicle dealer may sell any number of motor vehicles during January of each year and by so doing avoid taxes on such motor vehicles.

The foregoing is an aid in putting L. B. 489 in its proper perspective. However, the constitutionality of the procedure in taxing motor vehicle dealers prior to the adoption of L. B. 489 is not being questioned in this action.

When the constitutional amendment of 1952 authorized the Legislature to provide "a different method of taxing motor vehicles," it did not authorize it to provide a different method of taxing motor vehicle dealers.

Article VIII, section 1, of the Constitution of this state, is in part as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles; * * *."

The relator contends that the Legislature may not withdraw any property from the principle of uniformity of taxation, and one owner of property cannot be com-

pelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay.

The relator argues that a private owner of a motor vehicle pays taxes on such vehicle all the time he owns it, and is required to pay such taxes in advance; that the Legislature has permitted motor vehicle dealers to escape certain taxation on vehicles owned by them in the manner heretofore mentioned; and that the Legislature has discriminated between individuals who own motor vehicles and motor vehicle dealers as taxpayers.

In the case of Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85, this court construed Article VIII, section 1, of the Constitution as inhibiting the Legislature from discriminating between taxpayers in any manner. See, also, City Trust Co. v. Douglas County, 101 Neb. 792, 165 N. W. 155.

In the case of Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment, 170 Neb. 77, 101 N. W. 2d 856, this court said: "Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay." See, also, Union P. R. R. Co. v. State Board of Equalization & Assessment, 170 Neb. 139, 101 N. W. 2d 892.

Article VIII, section 1, of the Constitution, deals with the taxation of property, not people.

In Boyd Motor Co. v. County of Box Butte, 159 Neb. 514, 67 N. W. 2d 774, this court pointed out that the amendment of that section dealing with motor vehicles authorized motor vehicles to be placed in a separate class, but there was no intimation that the people who owned motor vehicles could be divided into two classes.

The language used in Article VIII, section 1, of the Constitution, heretofore mentioned, does not indicate

that the Legislature can depart from or dispense with the requirement of uniformity. The words "a different method," as appear in Article VIII, section 1, do not refer to the terms "uniformly and proportionately" for the reason that the only method referred to in that sentence is by valuation. Uniformity of taxation of motor vehicles is still maintained. The amendment only authorized taxation of motor vehicles by a method other than by valuation.

In State ex rel. Cornell v. Poynter, 59 Neb. 417, 81 N. W. 431, the court said: "In every instance where this court has spoken upon the subject it has been determined that the legislature is powerless to relieve from the burdens of taxation the property of any individual or corporation, but that the constitutional rule of uniformity requires all taxable property within the taxing district where the assessment is made shall be taxed, except property specifically exempt by the fundamental law. This doctrine is entirely sound, and the language of the constitutional provision we have been considering will not authorize or permit of any other or different interpretation."

In the light of that doctrine, the Legislature could not exempt certain classes of owners from any amount of taxes on their motor vehicles, nor could the Legislature provide that dealers in motor vehicles pay a smaller percentage of the taxes on such vehicles, or, in effect, pay no taxes for a certain period of time on such vehicles unless the Constitution clearly provided for such an exemption.

In Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650, this court said: "Taxes must be levied by valuation uniformly and proportionately upon all tangible property. Const. art. VIII, sec. 1."

It is apparent that the 1952 amendment relating to motor vehicles permitted taxation by a method other than by valuation. The amendment contains no language which would permit the Legislature to disregard

the basic principle of uniformity which must be followed in matters of taxation. The new language appearing in L. B. 489 violates the requirement of uniformity of taxation.

The respondents assert that L. B. 489 was to correct tax burdens placed upon motor vehicle dealers that existed prior to its enactment or, under the 1953 law enacted by the Legislature, to provide a different method of taxing motor vehicles. While it may be true that the Legislature intended by the enactment of L. B. 489 to correct certain tax burdens relating to motor vehicles as contended for by respondents, we are concerned only as to whether or not L. B. 489 is in violation of our Constitution.

The respondents further assert that the amendment of 1952 to Article VIII, section 1, of the Constitution, which provides that the Legislature may provide for a different method of taxing motor vehicles, creates an exception to previous requirements that all taxes shall be levied by valuation uniformly and proportionately on tangible property and franchises, and such exception is now a part of our fundamental law.

In this connection, the respondents cite State ex rel. Meyer v. County of Lancaster, *ante* p. 195, 113 N. W. 2d 63. In that case this court had before it L. B. 159, which was the legislative implementation of a constitutional amendment adopted by the electorate in 1960. The constitutional amendment provided that the Legislature could authorize any county, incorporated city or village to acquire real or personal property and lease the same to manufacturing and industrial enterprises, and to issue revenue bonds for the purpose of defraying the costs, etc. Prior to the adoption of the amendment to the Constitution, this court held in State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269, that such procedure was in violation of the Constitution.

After the constitutional amendment had been adopted, in the case of State ex rel. Meyer v. County of Lan-

caster, *supra,* the court said: "Even though we may question the wisdom of a given enactment as a matter of policy, that gives us no right to strike it down if it violates no provision of the fundamental law. We clearly stated our position on this type of legislation previous to the amendment in State ex rel. Beck v. City of York, 164 Neb. 223, 82 N. W. 2d 269. Now, however, L. B. 159 must be viewed in the light of the adoption of the amendment, which has changed our fundamental law in an attempt to validate that which we held to be invalid. * * * While we may still feel the financing of private enterprises with public funds is foreign to the fundamental concept of our constitutional system, as we said in State ex rel. Beck v. City of York, *supra,* the constitutional prohibition has been removed by amendment and it is now a part of our fundamental law."

The respondents assert that in the instant case the 1952 amendment heretofore mentioned is now a part of our fundamental law; that an exception can be written into the Constitution which will effectively withdraw a class of property from the principle of levy by valuation, uniformly and proportionately; and that therefore, L. B. 489 relates itself to what was said by this court in the above-cited case.

The respondents argue that we now have an exception which has been carved out of the Constitution and permits legislation which could not have validly existed before the enactment of L. B. 489; and that under the authority of the Legislature to provide a "different method of taxing motor vehicles" the prohibition argued by the relator has been removed.

We are in accord with the respondents' assertion that the fundamental law may be changed by constitutional amendment, and that legislation may be enacted in compliance with such amendment. We are not in accord that a statutory amendment to existing statutory law can be held valid when such amendment is in violation of the provisions of our Constitution. We believe in

what has been said previously regarding the constitutionality of L. B. 489. The following is also pertinent to the constitutionality of L. B. 489.

The Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever. Article VIII, section 4, Constitution of Nebraska.

This constitutional provision makes it clear that the Legislature cannot release either persons or property from a proportionate share of taxes. That would be the effect of L. B. 489.

In Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317, this court, referring to Article VIII, section 4, of the Constitution, said: "Clearly, under this constitutional provision, the legislature cannot reduce the amount of the tax, extend the time of payment, or in any manner change the method of payment." See, also, County of Lancaster v. Trimble, 33 Neb. 121, 49 N. W. 938; County of Lancaster v. Rush, 35 Neb. 119, 52 N. W. 837. The opinion went on to say: "It will be noted in the cases last above cited that a law which makes it possible for a taxpayer to escape his tax obligation to the state is violative of section 4, art. VIII of the Constitution. It must be conceded that, if the legislature has the power to extend the time in which taxes must be paid, as was done in the instant case, it could repeat the extensions or extend them for such a duration of time that it would amount to a remission of the tax. Under the cases cited, the legislature is without power to so do. The legislature cannot accomplish indirectly what it may not do directly. As has often been said, it is not what has been done but what can be done under a statute that determines its constitutionality. We submit that, under the act before us, the legislature could effect a complete

remission of taxes by the indirect method mentioned." See, also, Peterson v. Hancock, *supra*.

By Article VIII, section 4, of the Constitution of Nebraska, the Legislature, in plain and unequivocal language, is inhibited from enacting any law releasing or discharging any individual, corporation, or property from their or its proportionate share of the taxes to be levied for state or municipal purposes.

It seems clear in the light of what has heretofore been said that applying Article VIII, section 4, of the Constitution to the provisions of L. B. 489, such legislative act is violative of the Constitution because it constitutes a release or discharge from a proportionate share of taxes in favor of motor vehicle dealers.

There are other constitutional questions raised in this case which need not be determined.

We conclude that L. B. 489 is violative of Article VIII, section 1, and Article VIII, section 4, of the Constitution of Nebraska, and therefore must be declared unconstitutional. Judgment on the pleadings should be rendered in favor of the relator.

JUDGMENT FOR RELATOR.

NOEL COVER, APPELLANT, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE.
115 N. W. 2d 133

Filed May 11, 1962. No. 35139.

1. **Evidence: Trial.** The determination as to whether evidence as to weather conditions 1 mile away is relevant and material to the issues in a case is largely within the discretion of the trial court.
2. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred.
3. ———. To establish a cause of action based on negligence it is not sufficient for the plaintiff to show that negligence existed,

but he must also show that the negligence pleaded and proved was the proximate cause of the injury complained of.

4. Trial. A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.

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

Baskins & Baskins, for appellant.

Crosby & Nielsen and *Stewart & Stewart,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BOSLAUGH, J.

This is an appeal in an action for damages to personal property. Noel Cover, the appellant, was the plaintiff in the lower court. Platte Valley Public Power and Irrigation District, the appellee, was the defendant.

In 1947 the plaintiff, with Armour and Company, was engaged in feeding sheep at a feed yard near Cozad, Nebraska. The feed yard is located about a quarter of a mile west of a draw or swale which runs generally north and south. An irrigation canal constructed by the defendant is located south of and adjacent to the feed yard. The canal crosses the draw about a quarter of a mile east of the east line of the feed yard and forms an embankment or dam across the draw except for a 42-inch drain under the canal.

As the result of a rain which occurred on June 21, 1947, an area north of the defendant's canal was flooded for about 3 days. This action was brought to recover damages alleged to have been caused by the flooding which was the result of the defendant's negligence in failing to provide an adequate drain under its canal for intersecting waters. Armour and Company assigned all of its interest in the cause of action to the plaintiff.

This is the third appeal in this action. The first trial resulted in a verdict and judgment for the defendant. Upon appeal this court held that the defendant was negligent as a matter of law, reversed the judgment, and remanded the cause for a new trial. Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661.

The second trial also resulted in a verdict and judgment for the defendant. Upon the second appeal this court again held that the trial court should have directed a verdict against the defendant on the issue of negligence and should have submitted to the jury only the issue of damages. The judgment was reversed and the cause remanded for a new trial limited to the issue of damages. Cover v. Platte Valley Public Power & Irr. Dist., 167 Neb. 788, 95 N. W. 2d 117.

The third trial resulted in a verdict for the plaintiff in the amount of $16,180. The plaintiff's motion for new trial was overruled and he has appealed. There is no cross-appeal.

The assignments of error which require consideration are that the trial court erred in admitting evidence as to the amount of rainfall in Cozad, in giving certain instructions to the jury, and that the verdict is inadequate.

The defendant's theory of the case was that all or a part of the damages suffered by the plaintiff were the result of rain or some cause other than the flood. In support of its theory the defendant produced the testimony of Harry E. Rickel to the effect that on June 21, 1947, at least 6 inches of rain fell in Cozad at a point approximately 1 mile from the feed yard. The evidence was admitted over the plaintiff's objection that it was incompetent, irrelevant, and immaterial. The jury was instructed that the testimony of Rickel should be considered only to the extent that it might indicate that an equal amount of rain fell on the plaintiff's property.

The plaintiff was required to prove by a preponderance of the evidence that his damages were caused by the negligence of the defendant, and the amount of the damages. Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661. Conversely, the defendant was entitled to prove that the damages were the result of rain or some cause other than the flood. It was largely within the discretion of the trial court as to whether evidence as to the amount of rainfall 1 mile from the feed yard was too remote. Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661. Under the circumstances in this case the admission of the evidence was not error.

The authorities cited by the plaintiff may be distinguished upon the facts. Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333, involved testimony concerning fog 15 miles away. Southern Utilities Co. v. Murdock, 99 Fla. 1086, 128 So. 430, involved wind velocity measured at a point 30 or 40 miles distant.

The court instructed the jury that the plaintiff was entitled to recover only those damages which were caused by the flooding; and that in the event an item of property was damaged first by rain and later by the flood, the plaintiff could recover only that portion of the damage which occurred after the flood began. The plaintiff contends that the instruction was erroneous in that it required the jury to apportion damages caused concurrently by an act of God and an act of negligence.

The evidence is that a rain occurred on the night of June 21, 1947. The floodwater began to enter the feed yard at about 7 a.m. on June 22, 1947. Any damage that was caused by the rain occurred before the flood began and would have occurred without regard to any negligence on the part of the defendant. A proximate cause is a cause without which the injury would not have occurred. Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531. Under the circumstances of this case, the instruction given was proper.

The plaintiff further contends that it was error for the trial court to submit the issue of proximate cause to the jury because the law of the case is that the defendant is liable for all damages which the plaintiff sustained. The contention is incorrect.

The first appeal determined only that the defendant was negligent as a matter of law. This court did not determine as a matter of law that the damages claimed by the plaintiff were caused by the defendant's negligence. This court stated specifically that the trial court should have told the jury that the burden was upon the plaintiff to prove by a preponderance of the evidence that his damages were proximately caused by the negligence of defendant, and the amount of his damages. Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661.

The second appeal determined only that the evidence was insufficient to sustain a verdict for the defendant on the basis that the sole proximate cause of plaintiff's damage was an act of God. Cover v. Platte Valley Public Power & Irr. Dist., 167 Neb. 788, 95 N. W. 2d 117. The judgment was reversed and the cause remanded for a new trial limited to the issue of plaintiff's alleged damages. But, contrary to the plaintiff's present contention, the plaintiff was not relieved from the burden of proving that his damages were proximately caused by the negligence of the defendant, and the amount of the damages.

The remaining question is whether the verdict is so inadequate that it must be set aside. A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. The verdict was itemized and each item of property that was damaged will be considered separately.

The plaintiff claimed damages to sheep in the amount

of $22,880. The jury awarded the plaintiff $11,440 for this item. There was evidence from which the jury could have found that the floodwater started to enter the feed yard from the east on the morning of June 22, 1947, and flooded about one-half of the area for a period of 3 or 4 days; that the pens in the feed yard have a capacity of around 100,000 sheep and that there were approximately 80,000 sheep in the feed yard at the time of the flood; that commencing at 9 a.m., on June 22, 1947, the plaintiff moved seven or eight thousand sheep from pens that were flooded to pens that were dry; that on June 23, 1947, eight or nine thousand sheep were moved to other pens; that on June 24, 1947, between nine and eleven thousand sheep were moved to other pens; that very little feed was placed in the bunks on June 23, 1947; that the plaintiff started feeding at about the middle of the afternoon on June 24, 1947, and by the next day "got them pretty well caught up"; and that the sheep had been on feed from 80 to 120 days and between 75 percent and 90 percent of them were ready for market.

There was also evidence that when sheep which are on feed are taken off feed for several days they will lose weight; that a part of the weight which is lost is their natural fill; that in addition to the loss of their natural fill there can be a tissue shrinkage or loss of meat; that sheep can recover their natural fill in 24 hours; that loss in weight comes first from dehydration; that if sufficient water is available, sheep can go for several days without feed and have very little tissue shrinkage; and that sheep which are well along on a feeding ration can be off feed for several days and then go back on the ration without difficulty and recover rapidly.

The plaintiff computed his loss upon the basis that 26,000 lambs lost 4 pounds each which amounted to 88 cents per head. The evidence as to this item of damage consisted entirely of estimates and opinions. There

was no direct evidence that the plaintiff suffered any actual loss when the sheep were marketed. We conclude that the record fails to show that the verdict as to this item of damage should be set aside as inadequate.

The plaintiff claimed $3,600 for the loss of feed. The jury awarded the plaintiff $600 for this item. The feed consisted of a mixture of alfalfa meal, corn, soybean meal, and molasses. The plaintiff's foreman testified that when the water receded the feed in the bunks was cleaned out and discarded and he estimated that 60 tons of feed were lost. The plaintiff testified that the value of the feed was $60 a ton. There was evidence that on the morning of June 22, 1947, the feed was wet from rain; that wet feed can be salvaged by mixing dry feed with it; that some of the feed bunks were one-third full and others were two-thirds full; that sheep will eat wet feed; and that by noon on June 22, 1947, the pens which were not flooded were probably out of feed. The jury could have found that the value of the feed in the bunks had depreciated because it was wet but that, notwithstanding the rain, much of it was consumed by the sheep. The evidence would have supported a higher verdict as to this item but does not show that the verdict as to this item is so inadequate that it must be set aside.

The plaintiff claimed $5,280 for the loss of baled alfalfa. The jury awarded the plaintiff $3,960 for this item. The plaintiff's foreman testified that the bales were piled in a long rick, 8 to 10 bales high; that the water seeped up "two or three" bales high and then some seeped up into "the next bale"; that he counted the bales; and that on the basis of 70 pounds to a bale, 220 tons were destroyed. The plaintiff testified that he had paid $24 per ton for the hay the year before and that it had the same value at the time of the flood. The verdict as to this item is reasonably close to the plaintiff's estimate of the damages and cannot be said to be inadequate.

The jury awarded the plaintiff $180 for damages to electric motors. This was the full amount claimed for this item and it requires no further consideration.

There being no prejudicial error, the judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA EX REL. VENANGO RURAL HIGH SCHOOL DISTRICT, APPELLEE, V. SYLVIA ZIEGLER, AS COUNTY SUPERINTENDENT OF CHASE COUNTY, NEBRASKA, ET AL., APPELLANTS.

STATE OF NEBRASKA EX REL. VENANGO RURAL HIGH SCHOOL DISTRICT, APPELLEE, V. LAVONNE MRASEK, AS COUNTY SUPERINTENDENT OF PERKINS COUNTY, NEBRASKA, ET AL., APPELLANTS.

115 N. W. 2d 142

Filed May 11, 1962. Nos. 35143, 35145.

1. **Schools and School Districts.** Venango Rural High School District became a validly created high school district under sections 79-402 and 79-1102, R. S. Supp., 1953, and the action taken by the respondents on January 6, 1956, pursuant to the order of the district court rendered on December 5, 1955.
2. ———. The taking of territorial area of a Class VI school district and causing it to become a part of the area of a rural high school district is not inhibited.
3. **Statutes.** A legislative act will operate only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.

APPEALS from the district courts for Chase and Perkins Counties: VICTOR WESTERMARK, JUDGE. *Affirmed.*

Roy E. Blixt, Maupin, Dent, Kay & Satterfield, Thomas O. David, James J. Duggan, W. C. Conover, Charles Evans Hughes, and *Clinton J. Gatz,* for appellants.

Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo and *James E. Schneider,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

Here are two actions. The relator in the first is also relator in the second action. In the first the relator prayed for an alternative writ of mandamus. In the second relator prayed for the same kind of relief. The basic subject matter of the two actions is the same. In each action the matter under inquiry flows from an alleged failure to perform a several and coincidental duty. In the light of this it is clear, and as to this the parties are in accord, that the final determination in the two cases must be the same. It was agreed that they should be briefed and tried together as one case and on one set of briefs. This being true the disposition here will be made in one opinion.

The first of the two cases is entitled State of Nebraska ex rel. Venango Rural High School District, relator and appellee, v. Sylvia Ziegler, as County Superintendent of Chase County, Nebraska, and LaVonne Mrasek, as County Superintendent of Perkins County, Nebraska, respondents and appellants.

A petition was filed by the relator, the pertinent part of which as summarized here is the following: The respondents in multilateral judicial action pursuant to the provisions of sections 79-402 and 79-1102, R. S. Supp., 1953, and in compliance with a judgment of the district court for Perkins County, Nebraska, rendered by said court on December 5, 1955, entered the following order: "Pursuant to the decree of the District Court of Perkins County, Nebraska, entered on December 5, 1955, Ruth Rees McQuiston, County Superintendent of Perkins County, Nebraska, and Sylvia Ziegler, County Superintendent of Chase County, Nebraska, do hereby jointly find and order that the organization of Venango Rural High School District by School Districts 8, 31, 61 and 65 of Perkins County, Nebraska, and School Districts 29 and

49 of Chase County, Nebraska, has been completed, authorized and perfected."

An appeal was taken from the judgment of the district court rendered on December 5, 1955, to the Supreme Court of the State of Nebraska, and the judgment was affirmed on November 16, 1956. A motion for rehearing was filed which was denied.

It is interpolated here that the judgment of the district court of which mention has been made and the joint order of the two county superintendents are in their terms still in full force and effect.

It is further interpolated here that the statutes which were the basis of the organization of the Venango Rural High School District, which was confirmed by the judgment or decree of the district court and the joint order of the two county superintendents, imposed upon the superintendents certain duties of implementation of the new organization. These duties have never been performed.

Returning to the summary of the petition, it is pleaded that the county superintendents of the counties had a statutory duty to deliver to a taxable inhabitant of the Venango Rural High School District a notice in writing describing the boundaries of the Venango Rural High School District and specifying the time and place of the first meeting of the district. An exaction of the notice to be given to the inhabitant was that he notify every qualified voter of the district of the time and place of the first meeting for the completion of the organization of the district.

The county superintendents failed and refused to call a first meeting until on or about March 9, 1959, at which time the organization and election of officers of the Venango Rural High School District was completed, and this district has been carrying on and performing the functions of a Class VI school district in Perkins County, Nebraska.

It is pleaded that at the time of the formation of the

Venango Rural High School District, or as soon thereafter as possible, it became the absolute and unqualified statutory duty of the superintendents to ascertain and determine the amount, pursuant to section 79-414, R. R. S. 1943, justly due to Venango Rural High School District from Chase County High School District out of a part of which the Venango Rural High School District was formed. This duty the superintendents have wholly failed, neglected, and refused to perform.

The petition contains much more than has been set out here, but it appears that this is sufficient to direct attention to the true issues involved in this case.

The action is by the relator wherein a writ of mandamus is sought to require the respondents to comply with the duties which, as the relator says, are imposed upon them by section 79-414, R. R. S. 1943, and in particular to determine the amount justly due the Venango Rural High School District from Chase County High School District.

In effect, by the answers of the respondents, to the extent necessary to set out here, it is stated that they did not effectuate the organization of the Venango Rural High School District until March 9, 1959, for the reason that the propriety of the district was in litigation which prevented action at an earlier date. It is not denied that they have failed to comply with the declared requirement that they determine the amount due the Venango Rural High School District.

In the second of the two cases the relator is the same as the relator in the first. The respondents are the same. A summary of the pertinent parts of the pleadings in this case, with one exception, would be substantially the same as the summary in the first, hence there will be no repetition.

The exception is that the property of school districts 8, 31, and 61, which became a part of the Venango Rural High School District, was taken from Perkins County High School District which was a Class VI dis-

trict. This will be referred to later herein.

The two cases were tried together and on June 29, 1961, the relief prayed by the relator in each of the cases was granted by the judgment of the court. Motions for new trial were duly filed. They were overruled. From these judgments and orders the respondents appealed.

The cases were tried on a stipulation of facts in which stipulation a large number of exhibits were identified, admitted in evidence, and made a part of the bill of exceptions. This bill of exceptions contains for the most part a historical background of the cases before the court at this time. In view of a history contained in earlier decisions relating to the subject matter involved here but little reference to it will be required.

The errors assigned as grounds for reversal will not be specifically mentioned herein, but it is concluded that the opinion will sufficiently respond to the substance thereof requiring consideration.

In School Dist. No. 65 v. McQuiston, 163 Neb. 246, 79 N. W. 2d 413, it is pointed out that pursuant to authority contained in section 79-1102, R. S. Supp., 1953, the regularly constituted authorities of School District No. 65 of Perkins County, the regularly constituted authorities of the school districts involved herein in that county, and the regularly constituted authorities of the school districts of Chase County involved herein had filed proper petitions requesting the creation of a single high school district for high school purposes.

The county superintendents gave notice of the petitions and after hearing on July 11, 1955, multilaterally declined to form the new district. The total area involved is what has been and will be referred to herein as the Venango Rural High School District.

The petitioners in proceedings in error sought review of the action of the superintendents by the district court. In the district court the action of the superintendents was reversed, and on December 5, 1955, they were ordered

to jointly enter an order finding that the organization of the Venango Rural High School District had been completed, authorized, and perfected. This is the order which has been previously quoted herein as having been rendered on January 6, 1956. Attempt was made to appeal from that adjudication. The attempt, by the judgment of this court, was denied. The judgment of the district court therefore became final.

The effect of this judgment is to say that the Venango Rural High School District was duly created under the provisions of sections 79-402 and 79-1102, R. S. Supp., 1953, and the action of the two county superintendents on January 6, 1956.

Section 79-402, R. S. Supp., 1953, was amended by action of the Legislature in 1955, 1957, and 1959, but in no particular which has any significance in this case.

One of the contentions of the respondents is that by the amendments the method of division and distribution of assets and property has been changed from what was previously provided, which change is controlling, hence the district court was in error in the rendition of the judgments in these two cases.

The answer to this contention, at least in part, has been given in no uncertain terms in School Dist. No. 65 v. McQuiston, *supra*. Without reference in terms to section 79-414, R. R. S. 1943, but with certainty nevertheless, it was confirmed by that adjudication that there involved was a proper creation under section 79-1102, R. S. Supp., 1953, and accordingly it was ordered and directed that action be taken to effect a compliance with the provisions thereof. This answer finds support in Perkins County High School Dist. v. McQuiston, 167 Neb. 330, 93 N. W. 2d 32, modified on motion for rehearing, 167 Neb. 777, 94 N. W. 2d 663.

Another contention is substantially that the purported creation of the Venango Rural High School District was invalid for the reason that authority therefor did not exist in or flow from these statutory provisions. A

suggested basis for this is that other provisions of statute prevent the taking of Class VI districts or parts thereof and making and incorporating them in rural high school districts. No such inhibitory provisions have been found. The most that may be said is that where there has been a creation of a rural high school district in which is included an area from a Class VI district, the Class VI district may retain its identity as such.

With regard to a situation under earlier statutory provisions having a substance in all respects like the one involved here, this court, in State ex rel. Hill v. Smith, 111 Neb. 757, 197 N. W. 418, said: "Relator contends that, if rural high school districts are permitted to be organized in counties where there is a county high school, each of such rural high schools would take away from the county high school a part of its territory and means of support, and that, by reason of the organization or such rural high schools the county high school would be left without sufficient territory and sufficient income to maintain the county high school.

"We are unable to accept relator's view. We cheerfully concede that it was the legislative design that there should be at least one high school in every county, but we do not think that it was the legislative intent to thereby prevent the subsequent organization of rural high schools."

The theory of the respondents that the Venango Rural High School District was not organized and completed on January 6, 1956, but rather was completed on March 9, 1959, is without merit.

The substantial significance of this contention is that the proceedings in 1956 were under section 79-402, R. S. Supp., 1953, and since the district did not commence functioning until the fall of 1959, the order of January 6, 1956, had no force and effect. No citations appear in the brief the effect of which are to lend support to the contention.

On the other hand, this court has said: "It is well established in this jurisdiction that a legislative act will

operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." School Dist. of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550. There is nothing in the area of concern here to indicate that the Legislature intended that there should be retrospective operation.

Section 79-402, R. S. Supp., 1953, provided for the creation of new school districts or change of district boundaries and the conditions precedent to such creation. The record here together with the opinions of this court relating to this situation disclose, to the extent that the section is applicable, that there was compliance with these conditions.

Section 79-1102, R. S. Supp., 1953, caused the conditions for creation under section 79-402, R. S. Supp., 1953, to become applicable in the case of the creation of a rural high school district from other districts as here. With these conditions there was compliance.

Section 79-414, R. R. S. 1943, required that after creation of a new district the county superintendent or county superintendents, if two or more counties were involved, should ascertain and determine the amount justly due the newly created district from the old districts on account of the severance therefrom.

It is the performance of this duty by the respondents that the relator seeks to compel. They have failed to so perform, and in the light of the record the inescapable conclusion and inference is that they have refused to so perform.

The district court found that the respondents were required to perform the duty imposed by section 79-414, R. R. S. 1943, and by judgments ordered performance as of January 6, 1956.

The judgments are correct and accordingly they are affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MCCOOK LIVESTOCK EXCHANGE COMPANY, A CORPORATION, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

115 N. W. 2d 147

Filed May 11, 1962. No. 35158.

1. **Appeal and Error.** A party who, after appealing from a judgment in his favor, voluntarily accepts the benefits or receives the advantage of the judgment is thereby precluded from afterward prosecuting his appeal.
2. **Corporations.** The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it.
3. **Eminent Domain: Appeal and Error.** Where in a condemnation suit a condemnee receives the full amount of an award made to it in county court by reason of a mistake in the payment, both on the part of the county judge and the condemnee's agent, and fails to pay or tender back the portion of the payment which exceeds that to which it was entitled with reasonable promptness after the discovery of the mistake, its appeal to the district court should be dismissed.

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

Charles M. Bosley and *Robert C. Bosley,* for appellant.

Clarence A. H. Meyer, Attorney General, *Harold S. Salter,* and *James F. Petersen,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an action of eminent domain brought by the State of Nebraska, Department of Roads, as condemner, in the county court of Frontier County, Nebraska, to condemn certain real estate belonging to the appellant and condemnee in that county for a highway.

The condemner filed its petition in the county court of said county on February 18, 1961. Thereafter appraisers, on March 10, 1961, regularly made return of their appraisal of the damages to the condemnee for the taking of its property in the sum of $1,730. On April 5, 1961, the condemnee herein filed notice of appeal to the district court of said county, together with the necessary bond for that purpose.

The transcript of the proceedings in the county court was filed in the district court on April 10, 1961, and the petition on appeal on April 5, 1961. The condemner filed answer on July 14, 1961. After issues were joined on August 8, 1961, the condemner filed a motion to dismiss the appeal because the condemnee had ratified the award of the appraisers by acceptance of the full amount of the award from which it had appealed.

Thereafter, on September 7, 1961, the district court sustained the motion and dismissed the appeal. The condemnee thereupon made a motion to vacate the judgment and order of dismissal or in the alternative to grant a new trial. From an order overruling this motion the plaintiff and condemnee has brought the matter to this court on appeal.

The facts, so far as are essential for our review of this matter, show that while the appeal was pending in district court the parties through their respective counsel, under date of July 8, 1961, entered into a written stipulation to release to the condemnee $1,350, being somewhat less than the 80 percent authorized to be released under section 76-719.01, R. S. Supp., 1959. The stipulation with an order prepared for the county judge to sign authorizing the release of that sum was forwarded to the county judge of Frontier County, Nebraska, to be filed in the county court. Meanwhile, on or about April 10, 1961, an envelope, unaccompanied by a letter, was received by the accountant of the condemnee whose duties included receiving and depositing funds of the company. It contained the check of the county judge of

Frontier County, dated March 31, 1961, for $1,730, the full amount of the award and was marked "For Condemnation." It was deposited by the accountant to the credit of the condemnee in the McCook National Bank on April 10, 1961, in the usual manner. He was accustomed to receive advance payments on condemnation suits of companies whom he represented as accountant. In this case he testified he thought the payment was for 80 percent of the condemnation money. The auditor had no communication with the county judge concerning this condemnation proceeding and he deposited the money without saying anything to the other representative of the condemnee at the time he received it. The condemnee's vice president knew of the condemnation proceeding and of the award of the appraisers, and was handling the matter for it. He testified he discovered the payment at a court session at Stockville in August but later said he knew of the payment having been made within 2 or 3 weeks of its receipt. Shortly after the receipt of the stipulation for the withdrawal of the $1,350, the county judge, on July 11, 1961, notified the condemnee's attorneys by letter that the condemnee had accepted the check for $1,730, and that perhaps he should have waited until after the appeal had been decided but he was unfamiliar with the procedure. Apparently this was the first information its attorneys had that the condemnee had accepted the full amount of the award. The record fails to show that the condemnee has at any time returned or tendered back any part of the money received from the county judge.

The errors assigned by the condemnee are that the court erred in dismissing the appeal and refusing to grant a new trial because the amount received by it from the county judge was sent and accepted under mistake without condemnee's request, demand, or wishes; and that condemnee never intended to abandon its appeal or to agree to the amount of the award of the appraisers.

This court has repeatedly held that a party who, after

appealing from a judgment in his favor, voluntarily accepts the benefits or receives the advantage of the judgment is thereby precluded from afterward prosecuting his appeal. Harte v. Castetter, 38 Neb. 571, 57 N. W. 381; Thurston v. Travelers Insurance Co., 128 Neb. 141, 258 N. W. 66; State ex rel. Heintze v. County of Adams, 162 Neb. 127, 75 N. W. 2d 539.

In the case before us the condemnee gave notice of appeal to the district court on April 5, 1961. Under section 76-719.01, R. S. Supp., 1959, under stipulation of the parties, the county judge may order not to exceed 80 percent of the money deposited by the condemner in county court to be paid to the condemnee. Such a stipulation, in this case providing for the withdrawal of $1,350, was entered into on July 8, 1961. Meantime, however, the condemnee had actually received the full amount of the award on April 10, 1961.

Condemnee contends that the check for $1,730 was received by its auditor and cashed due to a mistake and that the auditor knew nothing of the details of the condemnation proceeding, and cashed the check, believing it was the 80 percent the condemnee was entitled to withdraw. A review of the evidence seems to substantiate this contention. However, the vice president in charge of the litigation knew of the whole situation, at least in August 1961, and apparently knew of a payment having been made within 2 or 3 weeks of its receipt, and long before the signing of the stipulation for withdrawal. The county judge had informed the condemnee's attorneys of the true situation by letter under date of July 11, 1961. Condemner's motion to dismiss the appeal was filed in the district court on August 8, 1961. The hearing on the motion to dismiss in the district court was had September 7, 1961. The motion for new trial was heard and overruled on September 25, 1961. The record fails to show any attempt at any time by the condemnee or its attorneys to pay or tender back the excess of the money received by it over the stipulated

amount of $1,350 authorized to be withdrawn.

" 'The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it.' " Drainage District v. Dawson County Irrigation Co., 140 Neb. 866, 2 N. W. 2d 321.

The condemnee with complete knowledge of the situation has taken and kept the full amount of the award in county court and has persisted in prosecuting its appeal to the district court and thereafter to this court without in any way offering to correct the alleged mistake of payment. Where in a condemnation suit a condemnee receives the full amount of an award made to it in county court by reason of a mistake in the payment, both on the part of the county judge and the condemnee's agent, and fails to pay or tender back the portion of the payment which exceeds that to which it was entitled with reasonable promptness after the discovery of the mistake, its appeal to the district court should be dismissed.

The judgment of the district court in dismissing the condemnee's appeal was right and should be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLANT, V. GARY AMICK, APPELLEE.
114 N. W. 2d 893

Filed May 11, 1962. No. 35164.

1. **Criminal Law: Municipal Corporations.** If an act be an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state

and the municipality, and both may punish it without infringing any constitutional right.

2. **Constitutional Law.** The purpose of Article I, section 6, Constitution of Nebraska, was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted.
3. **Constitutional Law: Municipal Corporations.** It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury, when Article I, section 6, of the Constitution is not violated. This is so even if the ordinance is a reiteration of a statute covering the same offense under which the defendant would be entitled to a jury trial.
4. **Automobiles: Intoxicating Liquors.** The revocation of a driver's license upon a conviction for operating a motor vehicle while under the influence of intoxicating liquor is an incidental consequence and is not to be considered as punishment for the offense.
5. **Criminal Law: Municipal Corporations.** Certain language quoted from our opinion in McLaughlin v. State, 123 Neb. 861, 244 N. W. 799, is disapproved as a rule of law in this state.

APPEAL from the district court for Douglas County: JOHN E. MURPHY, JUDGE. *Reversed and remanded.*

Herbert M. Fitle, Charles A. Fryzek, Walter J. Matejka, John W. Kennedy, Allan L. Morrow, and *Raymond E. Gaines,* for appellant.

Martin A. Cannon, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The only question raised by this appeal is whether or not a defendant charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of a city ordinance is entitled to a trial by jury.

The defendant was charged in the municipal court of Omaha with operating a motor vehicle while under the influence of intoxicating liquor in violation of a city ordinance. He demanded and was refused a jury trial.

He was convicted and sentenced to pay a fine of $100 and costs. In addition thereto, his driver's license was suspended for a period of 6 months. He appealed to the district court. The district court sustained a motion to quash for the reason that the defendant had been denied a jury trial in the municipal court. The State has appealed to this court.

A prosecution for the violation of a city ordinance, while in the form of a criminal prosecution, is in fact a civil proceeding to recover a penalty. If an act be an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state and the municipality, and both may punish it without infringing any constitutional right. State v. Hauser, 137 Neb. 138, 288 N. W. 518.

The Constitution of this state provides that the right of trial by jury shall remain inviolate. Constitution of Nebraska, Art. I, sec. 6. This court has construed this constitutional provision to mean that it preserved the right of trial by jury as it existed at common law and under the statutes in force when the Constitution of Nebraska was adopted. Bell v. State, 104 Neb. 203, 176 N. W. 544; State v. Hauser, *supra*. No contention is here made that the offense now under consideration was recognized as a crime at common law or by any statute in existence when the Constitution was adopted. It seems plain to us that the offense charged in the instant case is outside of the purview of the cited provision of the Constitution.

It is within the province of the Legislature to authorize the addition of petty offenses to certain classes of subjects previously triable without a jury. Bell v. State, *supra;* State v. Kacin, 123 Neb. 64, 241 N. W. 785. The Legislature of this state has made the operation of a motor vehicle while under the influence of intoxicating liquor a punishable offense. § 39-727, R. R. S. 1943. The city of Omaha has made the same act punishable by a city ordinance. It is contended that since a

defendant may properly demand a jury when charged under the statute that a right to a jury arises when he is charged with the same offense under a city ordinance.

The criminal jurisdiction of the municipal court in metropolitan and primary cities extends to all cases in which the punishment does not exceed 6 months' imprisonment or a fine of $500 or both. § 26-118, R. R. S. 1943. By section 26-183, R. R. S. 1943, a jury may be demanded in all cases except criminal cases arising under city or village ordinances. The controlling statutes do not contemplate the right to a jury in criminal cases brought under a city ordinance. State v. Hauser, *supra;* Liberman v. State, 26 Neb. 464, 42 N. W. 419, 18 Am. S. R. 791.

A person tried for the violation of a city ordinance is not entitled to a jury trial, although the ordinance is but a reiteration of the provisions of a statute covering the same offense, and although the person charged would be entitled to a jury trial if prosecuted under the statute. State ex rel. Connolly v. Parks, 199 Minn. 622, 273 N. W. 233; State v. Ketterer, 248 Minn. 173, 79 N. W. 2d 136. This rule does not depend on whether or not the statute was enacted before or after the ordinance was passed.

It is inferred from defendant's brief that it is his contention that the offense charged is not a petty offense placing it outside the constitutional right to a trial by jury. We think that issue is settled in District of Columbia v. Clawans, 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843.

It is contended also that the offense is outside the classification of a petty offense because the ordinance authorized the revocation of the driver's license of defendant. This question was also before the Minnesota court in State v. Harris, 50 Minn. 128, 52 N. W. 387, when it was held that the revocation of a license upon conviction of an offense did not constitute punishment within the meaning of that word in the provision of the

Constitution relating to the jurisdiction of justices of the peace. In State ex rel. Connolly v. Parks, *supra,* it was said: "The revocation of a license in such a case is an incidental consequence and is not to be considered as punishment for the offense." See, also, Robinson Cadillac Motor Car Co. v. Ratekin, 104 Neb. 369, 177 N. W. 337; Smith v. McNulty, 107 Neb. 505, 186 N. W. 543; Sandlovich v. Hawes, 113 Neb. 374, 203 N. W. 541. We concur in the foregoing holdings.

The defendant relies primarily on McLaughlin v. State, 123 Neb. 861, 244 N. W. 799. The opinion in that case states: "A defendant charged with a misdemeanor in a police court for a violation of a city ordinance is not entitled to a jury trial unless the offense charged was a criminal offense under the common law, or is a criminal offense under our statutes, in either of which cases the defendant would be entitled to a trial by jury." The foregoing statement is not supported by authority and was unnecessary to a decision of that case. It is in the realm of obiter dictum and is disapproved as a rule of law in this state.

The constitutional provision that the right of trial by jury should remain inviolate has been construed by this court to mean that it should remain as it was at the time of the adoption of the Constitution. The offense involved in the present case did not exist at that time and, consequently, it being a petty offense, the right to a jury trial is not within the scope of the constitutional guaranty. Under such circumstances, the matter of a jury trial is a legislative matter. The Legislature, by section 26-183, R. R. S. 1943, has specifically provided for jury trial in all cases "except criminal cases arising under city or village ordinances." This is clearly within the province of the Legislature to do and controls the disposition of the present case.

The trial court was in error in sustaining the motion to quash on the ground that defendant was entitled to a jury trial in the municipal court on an offense charged

under a city ordinance. The judgment is reversed and the cause remanded. See § 29-2316, R. S. Supp., 1961.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

IRMA I. BALDWIN, APPELLEE, V. JACK LLOYD COLGLAZIER ET AL., APPELLANTS.
114 N. W. 2d 890

Filed May 11, 1962. No. 35179.

1. **Wills.** When the language used in a will is clear and unambiguous the court will apply thereto its usual and ordinary meaning and then apply to the construction thereof the applicable rules of law.
2. **Wills: Estates.** The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of the testator is obscure in this respect.
3. ———: ———. In the absence of provisions indicating the contrary a will giving a remainder to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Wiltse & Wiltse, for appellants.

Bayard T. Clark and *Frank A. Hebenstreit,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

Plaintiff and appellee Irma I. Baldwin brought this action in the district court for Richardson County for the construction of the will of her grandfather and to quiet title in herself to 40 acres of land affected thereby.

The defendants are Jack Lloyd Colglazier, Lillian Colglazier, and Richard Colglazier, great-grandchildren of the testator who are the children of Lloyd A. Colglazier, deceased, and Florine Colglazier, his widow.

The district court found for the plaintiff Irma I. Baldwin, held she was the sole owner of the land, and quieted her title thereto as against the defendants. The defendants filed a motion for a new trial which was overruled and thereupon they have brought the matter to this court on appeal.

The defendants' assignments of error which, so far as need be considered by this court, are that the judgment is contrary to the law and the evidence; and that the court erred in not finding the defendants were the owners of an undivided one-half of the premises and in refusing to quiet their title thereto accordingly.

We sustain these assignments of error.

The controversy is concerning the construction of the will of Lewis W. Weddle. The paragraph involved reads as follows: "Item IX. I give devise and bequeath to my beloved daughter Lenora Colglazier the North West quarter of the South West Quarter of section Fourteen (14) Township Three (3) Range Fifteen (15) in Richardson County, Nebraska to be hers during her natural life only, and in the event of death of my daughter Lenora Colglazier the said 40 acres of land shall be and is hereby bequeathed to her children and in the event of no issue or children surviving my daughter Lenora Colglazier then the said 40 acres herein mentioned under Item IX shall revert to my legal heirs."

There is no dispute of facts involved herein, since they are all contained in the stipulation of the parties. The testator executed his will on June 17, 1912. He died November 24, 1915, and the will was probated in the county court of Richardson County on December 28, 1915. He provided for all 11 of his children by giving each of them a life estate in specific land with identical provisions as to remainders in each instance. Each son

received 80 acres and each daughter 40 acres. Thereafter he gave the residue of his estate to his 11 children equally and made identical provisions with respect to encumbrances that might be upon any of the lands.

The testator was survived by his daughter Lenora Colglazier, the life tenant of the land involved. At that time she had two children, the plaintiff Irma Baldwin, born January 1, 1895, and Lloyd A. Colglazier, born September 14, 1896, both of whom were well along in their teens when the will was executed. She never had other children. Lloyd A. Colglazier died intestate September 3, 1953, leaving as his sole and only heirs at law Jack Lloyd Colglazier, a son; Lillian Colglazier, a daughter; Richard Colglazier, a son; and Florine Colglazier, his widow, who are the defendants herein. The life tenant Lenora Colglazier died intestate on February 26, 1960, leaving the plaintiff Irma I. Baldwin, her daughter, and the children of Lloyd A. Colglazier as her only heirs at law.

The duty of this court in such case is to ascertain the intention of the testator from the contents of the will. "When the language used in a will is clear and unambiguous the court will apply thereto its usual and ordinary meaning and then apply to the construction thereof the applicable rules of law." Carr v. Carr, *ante* p. 189, 112 N. W. 2d 786.

The paragraph of the will of Lewis M. Weddle affecting the land in this litigation first gives a life estate to his daughter Lenora Colglazier. Its next provision is "and in the event of death of my daughter * * * the said 40 acres of land shall be and is hereby bequeathed to her children." The words "in the event of death" appear synonymous with the phrase "in case of death." In the decisions of this court such phrases do not have the effect of postponing the vesting of an estate in remainder to the time of the death of the life tenant. In re Estate of Willits, 88 Neb. 805, 130 N. W. 757, 33 L. R. A. N. S. 321; Olson v. Lisco, 149 Neb. 314, 30 N. W. 2d

910. In the case before us it appears it refers to the time the children should enter into the enjoyment of their estate.

"The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of the testator is obscure in this respect." Davis v. Davis, 107 Neb. 70, 185 N. W. 442. In the case before us the phrase providing for and granting the gift to the children of Lenora Colglazier contains no suggestion of the remainder given them being subject to defeasance on the death of the children or either of them. Neither is there any indication of an intention to vest the title to the remainder granted them at a later date than that of the testator's death.

The position of the defendants is seemingly based on the last portion of the paragraph which reads, "in the event of no issue or children surviving my daughter Lenora Colglazier then the said 40 acres herein mentioned under Item IX shall revert to my legal heirs." They claim that because the estate in remainder given to the children of the life tenant being subject to defeasance or limitation, if the life tenant should die without issue or children that the estate granted the children was contingent on their surviving their mother; and that the gift was to a class and the membership of the class should be determined as of the date of the death of the life tenant. This situation has come before this court hitherto and has been decided adversely to the defendants' contention.

In Semrad v. Semrad, 155 Neb. 209, 51 N. W. 2d 264, the provision of the deed in question reads: " 'Grantors reserve the right that Mary Semrad (their daughter) can not convey or sell the above described land to any person during her natural life, and in case of Mary Semrad death said above described land should be divided among her hown (sic) children, and in case there should

be no children after Mary Semrad then in that case the above described land should revert back to the Grantors above mentioned.'

"Nine children were born to Mary Semrad. Mary Semrad died October 19, 1949. Two of her children predeceased her. The two left surviving children. These children were living at the time Mary Semrad died."

This court in the cited case affirmed the judgment of the district court finding that the interest of two of the children of the life tenant who had predeceased her leaving children was not extinguished. It cited with approval Strawhacker v. Strawhacker, 132 Neb. 614, 272 N. W. 772, which case held the same way with respect to the remainders of children who had predeceased the life tenant. The case of Semrad v. Semrad, *supra,* is cited in a note concerning remainders to life tenants' children in 57 A. L. R. 2d 103, in that portion thereof designated as section 13(c), beginning at page 153, where the discussion of the general rule in such cases states: "A limitation over in the event that the life tenant shall leave no child at his death ordinarily bears some suggestion that the real intent may have been to benefit only such children of the life tenant as should survive him, and this notwithstanding the basic disposition runs to the children generally and the limitation over can clearly have no application as such if a single child is living at the life tenant's decease. On principle, however, and as a plain construction of the language, it seems clear that the limitation over cannot in itself be deemed to render the remainder contingent; * * *."

Thereafter this note cites numerous cases where in the absence of provisions indicating the contrary a will giving a remainder to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child. Many cases there cited show that the rule in Semrad v. Semrad, *supra,* coincides with that of most jurisdictions.

In the case before us the testator made his will when the two children of Lenora Colglazier were in being and well along in their teens. He made similar provisions giving life estates to his other children and with like remainders to their children. There appears no doubt that the testator intended in each instance to give particular lands to the children born to the respective life tenants. There is no suggestion that he intended their particular interest would be determined as of the date of the death of the life tenants. The clause in the will makes no provision for a defeasance of the vested interest of any child except the limitation in the event no issue or children survive the life tenant, in which event it would go to his legal heirs. Indeed there appears little ambiguity in the clause of the will.

It follows that the children of Lloyd A. Colglazier, together with his widow Florine Colglazier, who constitute his only heirs, have inherited his half interest in the premises involved in this litigation under the statute of descent as provided in Semrad v. Semrad, *supra*.

The judgment is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

GLENN E. WELLS, APPELLANT, V. NORMAN H. MILLER, TRUSTEE, APPELLEE.
115 N. W. 2d 137

Filed May 18, 1962. No. 35046.

1. **Waters: Drains.** An owner of land may, without liability for damages, drain the same in the general course of natural drainage by constructing and maintaining, in a reasonable and proper manner on his own land, open ditches or tile drains which discharge a reasonable quantity of water into a natural drainway or watercourse.

2. **Waters.** Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining landowner where it was not wont to run according to natural drainage.
3. ———. The owner or proprietor of lands bordering upon either the normal or flood channel of a natural watercourse is entitled to have its water, whether within its banks or its flood plane, run as it was wont to run according to natural drainage, and no one has the lawful right by diversion or obstruction to interfere with its accustomed flow to the damage of another.
4. **Waters: Highways.** A landowner, through or adjacent to whose lands is constructed and maintained a public road, has a right to such advantage from it by way of drainage as is incidental to its existence and which does not inconvenience the public or individuals, or injure the public work.
5. ———: ———. Where the evidence shows that a party made a proper use of a public road ditch as it was laid out and constructed by the county, such party may not be enjoined on the theory that he is diverting water from its natural course of drainage onto the lands of another to the latter's damage.

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

Spear, Lamme & Simmons, for appellant.

Sidner, Lee, Gunderson & Svoboda and *Fraser, Wenstrand, Stryker, Marshall & Veach,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

The plaintiff Wells brought this suit on August 29, 1959, praying for a mandatory injunction to compel the defendant Miller to restore a road ditch along the south side of Miller's farm to its former condition. The trial court found for the defendant and the plaintiff has appealed.

The defendant is the legal owner of the south half of the southwest quarter of Section 19, Township 17, Range 10, and other adjoining land, in Dodge County, Nebraska. A public road lies east and west along the south side of the specifically described land. In 1958 the county

cleaned and deepened the north ditch along this road in accordance with plans provided by the county surveyor. After the deepening of the north road ditch, Miller constructed 6 lateral ditches in the west 40 acres, which drained south into the north road ditch. The record shows that this 40 acres was very flat and contained what is described as alkali holes. Miller caused the land to be leveled, and constructed the lateral ditches heretofore described. The purpose of the lateral ditches was to drain surface waters from the 40 acres into the north road ditch.

The county road terminated near the east boundary of Miller's land. At the terminus of the road was a horseshoe-shaped lake which evidently had been created by a change in the course of the Elkhorn River. A part of the lake lies on Miller's land and a part lies on Wells' land. At the east end of the road was a private lane into the Miller improvements to the north which followed around the lake. Prior to 1944 there was a box culvert in the north road ditch under this private lane, through which water ran from the ditch into the lake. In 1944 or thereabouts, the box culvert was replaced with a 24-inch steel culvert. Subsequently a new 48-inch culvert replaced the 24-inch culvert. Water from the north road ditch ordinarily drained through these culverts into the lake.

At the west end of the half mile road was a road intersection. Coming into the intersection from the northwest was a drainage ditch referred to as drainage ditch No. 6. After entering the intersection this drainage ditch crossed under the east-and-west road and proceeded south in or near the west road ditch of the north-and-south road. Some 20 feet north of this intersection was a culvert under the north-and-south road through which water could pass only in times of high water, but not on the occasions of ordinary rainfall. The evidence shows, however, in the case of unusual rains the culverts in the intersection could not handle the drainage

waters from the northwest, resulting in a flooding of the intersection. When the water reached the height of the culvert under the north-and-south road, it would flow through the culvert onto Miller's land. These waters usually drained into the north road ditch, and were emptied into the lake at the east end of the road. In case of flooding by high water leaving the banks of the Elkhorn River to the north, the whole area was usually inundated, the floodwaters going over the road east and west of the intersection and finding their way south and east across lands to the south. On these occasions of flooding, water from the lake would flow back west through the 48-inch culvert into the north road ditch.

The evidence shows the elevation at the west intersection to be approximately 18 inches higher than the elevation at the east end of the half-mile road, using the level of the lake as a common bench mark. The county in deepening and cleaning the north road ditch made use of the 18-inch fall in order to provide drainage to the east. High water, whether the result of flooding from the Elkhorn River or from heavy rain, appears to carry silt into the north road ditch approximately midway of its length, which causes water to stand in the west half of the ditch. This necessitates continuous cleaning after all heavy rains and floods in order to obtain proper drainage to the east. The defendant asserts that he was cleaning the north road ditch for this purpose only when he was enjoined by the plaintiff.

In the latter respect the evidence shows that the area was inundated by two floods in 1960. One occurred in April and the other in June. There appears to be little dispute that the primary source of these floods was the overflowing of the Elkhorn River to the north of the Miller lands, although rainfall was a contributing factor. These floods were of such volume that they passed south over the east-and-west road, both on the east and west of the road intersection at the southwest corner

of Miller's land. This resulted in a silting of the north road ditch and a holding of the water in the west half of the north road ditch and on the Miller land. Miller obtained informal permission from the county and township boards to clean the ditch, provided he left the excavated dirt on the east-and-west road. He cleaned the ditch and piled the dirt on the north half of the road. Continuing rains made the road practically impassable. Wells obtained permission to push the dirt onto the north shoulder of the road, which he did. In so doing, some of the dirt was pushed into the road ditch preventing complete drainage to the east. After the April flood Miller again proceeded to clean the ditch.

The plaintiff Wells is the owner of the northeast quarter of Section 30, Township 17, Range 10, and other adjoining land, in Dodge County, Nebraska. The northeast quarter of Section 30 corners with the Miller land, the Wells quarter section lying to the southeast of the Miller land. The greater portion of the horseshoe lake, including both ends of the lake, lies on plaintiff's land. The outlet from the lake is also on Wells' land. It is the contention of plaintiff that Miller deepened the north road ditch along the south of his land, causing additional waters to flow east and empty into the horseshoe lake. This, the plaintiff asserts, has caused the water in the horseshoe lake to rise and encroach upon his feed lots near one end of the lake, to his damage. It is the position of plaintiff that the waters on the Miller land, prior to the deepening of the road ditch, normally flowed to the southwest in the state of nature and that the deepening of the north road ditch has caused them to flow east, contrary to their natural drainage course. The primary issue is whether or not Miller, in cleaning the north road ditch, changed the natural course of drainage and diverted waters upon the land of the plaintiff contrary to controlling rules of law on the subject.

It is well-established law in this state that water flowing in a natural drainageway may not lawfully be

diverted and cast upon the land of an adjoining landowner to his damage where it was not wont to run in a state of nature. Nor may surface waters be collected and discharged through an artificial channel in unusual quantities upon land of another, except into a natural drain. Andersen v. Town of Maple, 151 Neb. 103, 36 N. W. 2d 620. There is a clear distinction in the law governing surface waters and floodwaters flowing as a part of a natural stream during flood season. No one is permitted to interfere with the natural flood plane of a stream to the injury of other riparian owners. Cooper v. Sanitary Dist. No. 1, 146 Neb. 412, 19 N. W. 2d 619; Courter v. Maloley, 152 Neb. 476, 41 N. W. 2d 732. The rule in this state with reference to the use of road ditches by adjacent landowners is that such a landowner has a right to make use of it for the drainage of his land, as is incidental to its existence and which use does not inconvenience or damage the public or other persons, or damage the public work. Thom v. County of Dodge, 64 Neb. 845, 90 N. W. 763.

The record shows that prior to 1958, when the county deepened the north road ditch, it was rather shallow. The evidence is that it could be crossed in many places with farm machinery. The county, however, dug the ditch out according to a fixed grade. The bottom was sloped from the west to east so that all surface water in the ditch would flow east into the horseshoe lake. There is no satisfactory evidence in the record that defendant did anything more than clean out the ditch in order that the water would flow east in accordance with the grade of the ditch established by the county. See Gray v. Chicago, St. P., M. & O. Ry. Co., 90 Neb. 795, 134 N. W. 961.

There is some evidence in the record that in former times the surface water from the west 40 acres of the Miller land flowed through a culvert under the east-and-west road into a cutoff lake to the south of it. At some time in the past, not shown in the record, this

culvert was removed and surface waters have not flowed south since its removal. In any event, it is not here contended that Miller or his predecessors in title removed this culvert or in any manner interfered with any natural course of drainage that may have formerly existed at that point.

The county surveyor testified, as shown by platted elevations prepared by him, that the grade of the bottom of the north road ditch was lower when the county completed its work in 1958 than it was in August 1959. The grade established by the county with its 18-inch fall from west to east appears to have brought about any change that took place in the course of drainage. The defendant insists that all he did at any time was to clean the ditch to the grade established by the county in order that water in the west end of the ditch would move east in accordance with the drainage plans and elevations prescribed by the county. The trial court apparently took this view of the evidence and concluded that defendant had no part in the diversion of any water from its natural drainage course. Such a finding is sustained by the record.

The issue in this case is between Miller and Wells only. The county and township are not parties. We conclude under the record before us, as did the trial court, that defendant was making proper use of the north road ditch as it was constructed by the county in 1958. The change in the course of the water in the north road ditch, if any, is not shown to have been made by the defendant. While it is true that defendant cleaned the ditch to the grade established by the county for his own benefit, he was within his rights in making such incidental use of the county-constructed ditch.

The Miller land was in the flood plane of the Elkhorn River. The inundation of the area by floodwaters from the Elkhorn River does not appear to be pertinent to the issue before us. The inundation of the area would have occurred irrespective of any construction in the

north road ditch. When the floodwaters receded into the banks of the stream, the standing waters which remained would ordinarily be considered the same as surface water. Such water could then be drained into the north road ditch under the same conditions as other surface water.

Although not made a primary issue in this case, it appears that water from the horseshoe lake spills into a similar cutoff lake when it reaches a certain height, and flows from the latter lake into the Elkhorn River. It would appear that the lakes and natural spillways constitute a natural drainageway in which surface water could be drained by adjoining landowners without liability under the rules announced in Nichol v. Yocum, *ante* p. 298, 113 N. W. 2d 195.

The Miller land slopes from north to south and from west to east. This is in the general direction of the Elkhorn River and the general course of drainage. The trial court heard the witnesses on the stand and made a personal inspection of the area involved. We think the findings of the district court that defendant did not unlawfully collect and discharge surface waters or divert water from a natural drainage course upon the lands of plaintiff through an artifical drainage course constructed by him is sustained by the evidence. We necessarily conclude that the judgment of the district court should be affirmed.

AFFIRMED.

NADENE HAMMON, APPELLANT, V. WILKIE LARUE PEDIGO ET AL., APPELLEES.
115 N. W. 2d 222

Filed May 18, 1962. No. 35138.

1. **Automobiles.** Section 39-745, R. R. S. 1943, does confer the right of a driver of an emergency automobile to exceed the speed limits imposed by statute. This exemption does not protect

the driver of such emergency automobile from the consequences of a reckless disregard for the safety of other drivers using the highway.

2. ———. Section 39-752, R. R. S. 1943, does grant the right-of-way to the driver of an emergency automobile on official business, and the right-of-way over other drivers using the highway; however, such driver of an emergency automobile is not relieved from the responsibility of driving with due regard for the safety of all persons using the highway, nor will it protect him from the consequences of arbitrarily exercising such right-of-way.

3. **Trial.** A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.

4. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.

APPEAL from the district court for Douglas County: FRANK G. NIMTZ, JUDGE. *Reversed and remanded.*

O'Sullivan & O'Sullivan and *Donald S. Bergquist, Jr.*, for appellant.

Cassem, Tierney, Adams & Henatsch and *Lawrence J. Tierney*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The plaintiff, Nadene Hammon, brought this action in the district court for Douglas County against Wilkie LaRue Pedigo and Patrick E. Corrigan, defendants, for damages alleged to have been sustained by the plaintiff and her husband while the plaintiff was riding in an automobile owned and being driven by her husband proceeding west on Dodge Street in Douglas County, when said automobile was struck by a Douglas County

sheriff's automobile being driven by the defendant Pedigo which was proceeding south on Ninetieth Street in Douglas County. At the close of the plaintiff's evidence, the defendants made separate motions for directed verdicts or in the alternative that the plaintiff's petition be dismissed. The defendants' motions for directed verdicts were sustained and the plaintiff's petition dismissed. The trial court rendered judgment in favor of the defendants. The plaintiff filed a motion for new trial, then filed supplemental motions for new trial, one directed to the judgment rendered in favor of the defendant Pedigo and the other directed to the judgment rendered in favor of the defendant Corrigan. All of the motions for new trial were overruled. The plaintiff perfected appeal to this court.

For convenience we will refer to the defendant Wilkie LaRue Pedigo as Pedigo or deputy sheriff; to the car driven by Pedigo as the sheriff's automobile; to the plaintiff's husband as Hammon; and to the plaintiff by her first and last name, Nadene Hammon.

The plaintiff's husband assigned any and all causes of action he might have had as a result of the accident to the plaintiff.

The plaintiff's petition alleged that the defendant Pedigo, a deputy sheriff for Douglas County, was driving an automobile assigned to the sheriff's staff; and that said defendant was guilty of negligent driving which was the proximate cause of the collision. The charges of negligence were as follows: (a) In failing to keep a proper lookout for automobiles which were proceeding westward along and over Dodge Street, and in particular for the automobile driven by plaintiff's husband; (b) in driving his automobile at an unreasonable rate of speed under the circumstances and conditions of the road; (c) in failing to stop at the stop sign; (d) in proceeding into the intersection without ascertaining whether or not said movement could be made with safety; (e) in striking the automobile owned by the plaintiff's hus-

band in which the plaintiff was a passenger at the time of the accident; and (f) in failing to turn his automobile to the right or left in order to avoid striking the automobile in which the plaintiff was a passenger.

The defendants' answer alleged that Pedigo, as deputy sheriff, and Corrigan, as sheriff, were in this instance in the exercise of a governmental function and that the plaintiff had no cause of action against these defendants; that the negligence of the plaintiff was more than slight; that the accident was caused solely through the negligence of the driver of the automobile in which the plaintiff was riding; and that the proximate cause of the accident was the negligence of the driver of the automobile in which plaintiff was riding and the negligence of the plaintiff in the following particulars: (a) In failing to keep a proper lookout for automobiles and especially the emergency automobile which had the siren sounding and the flashing red light in operation; (b) in passing other automobiles that had stopped before continuing into the intersection in order to permit the emergency automobile to pass; (c) in proceeding into the intersection without ascertaining that the movement could be made with safety; (d) in failing to have the automobile under control; (e) in failing to stop or swerve the automobile in order to avoid causing it to collide with the automobile of the defendants; (f) in failing to accord to the defendants' automobile the right-of-way; (g) in violating the statutes of Nebraska in these respects and in failing to use all means at hand to avoid an accident when the plaintiff and the driver of the automobile in which the plaintiff was riding could have and should have avoided said accident; (h) that the plaintiff was negligent in failing to protest against the negligent acts of the driver of the automobile in which she was riding; and (i) that the plaintiff was negligent in failing to warn the driver of the automobile in which she was riding of the hazards in operating the automobile as he did and in failing to warn of the

presence of the emergency automobile in close proximity to the intersection. The defendants denied all allegations of negligence contained in the plaintiff's petition.

The sole assignment of error made by the plaintiff is that the trial court erred in sustaining the motions made by the defendants at the close of the evidence taken in the plaintiff's case-in-chief for directed verdicts or in the alternative for dismissal of the plaintiff's petition, and in rendering judgment in favor of the defendants.

The following sections of the statutes are involved in this case.

Section 39-745, R. R. S. 1943, provides: "The speed limitations set forth in Chapter 39, article 7, shall not apply (1) to vehicles when operated with due regard for the safety of others under the direction of the Nebraska Safety Patrol, any conservation officer, sheriff, member of any police department, or any other police officer, in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violations, (2) to fire department or fire patrol vehicles when traveling in response to a fire alarm, or (3) to public or private ambulances when traveling in emergencies; Provided, the exemption herein shall not apply to bondsmen. This exemption shall not protect the driver of any vehicle exempted herein from the consequences of a reckless disregard of the safety of others."

Section 39-752, R. R. S. 1943, provides: "The driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway. The driver of a vehicle upon a highway shall yield the right-of-way to police and fire department vehicles when the latter are operated upon official business and the drivers thereof sound audible signal by bell, siren or exhaust whistle. This provision shall not operate to relieve the driver of a police or fire department vehicle from the duty to

drive with due regard for the safety of all persons using the highway nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of such right-of-way."

Section 39-753, R. R. S. 1943, provides in part: "Upon the approach of any police or fire department vehicle giving audible signal by bell, siren or exhaust whistle, the driver of every other vehicle shall immediately drive the same to a position as near as possible and parallel to the right-hand edge or curb of the highway, clear of any intersection of highways, and shall stop and remain in such position unless otherwise directed by a police or traffic officer until the police or fire department vehicle shall have passed."

The following is also applicable in this case.

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Buie v. Beamsley, 171 Neb. 181, 105 N. W. 2d 738.

This brings us to a summary of the evidence adduced by the plaintiff, except as to the injuries alleged to have been suffered by the plaintiff.

A sergeant of the Nebraska Safety Patrol assigned to the Omaha area testified that part of his duties was to investigate accidents and enforce traffic laws; that he was acquainted with the intersection of Ninetieth and Dodge Streets as it existed in August 1957; that on the north side of the intersection traffic was controlled by a stop sign; that as you drove south on Ninetieth Street to the intersection there were banks on both sides of the street; that the effect of the bank on the east side of Ninetieth Street was to cut down the visibilty of an automobile driver approaching on Dodge Street pro-

ceeding westward; that automobile drivers proceeding south on Ninetieth Street would have their visibility of traffic proceeding westward on Dodge Street cut down due to the bank; that visibility would be cut down by the bank approximately up to the right-of-way, or a little to the north of the right-of-way line of Dodge Street; and that it would be approximately a blind intersection almost to the point of the actual lines of the intersection. This witness further testified that he investigated an accident that took place on August 4, 1957, about 3 p.m., at Ninetieth and Dodge Streets; that he arrived at the scene approximately 10 minutes after the accident occurred; that he talked to the driver of the sheriff's automobile, the deputy sheriff Pedigo; and that at that time both the sheriff's automobile and the automobile driven by Hammon had been moved. This witness had in his possession notes made by him at the time of the investigation of the accident. He testified that Hammon's automobile left skid marks 15 feet long, approximately 2 feet from the north edge of the brick pavement which is the center or passing lane. These skid marks ended approximately at the edge of the pavement or the east line of Ninetieth Street if you drew an imaginary line. He further testified that the automobile driven by Pedigo left skid marks of 9 feet, beginning 7 feet north of the north line of Dodge Street and ending approximately 2 feet into the intersection from the north line of the pavement. This witness further testified that he had a conversation with Pedigo at the scene of the accident. Pedigo told this officer that his speed was unknown, but that he was slowing down for the intersection; and that he applied his brakes, and the automobiles collided. This witness observed the damage to both automobiles. The damage to the Hammon automobile was on the right side, from the front of the front door on back, and the damage to the sheriff's automobile was to the front end. This witness had a conversation with Hammon who stated that

he was proceeding west on Dodge Street at a rate of speed of approximately 40 miles an hour; and that he did not see the red light nor hear the siren on the sheriff's automobile until he got "pretty close" to the intersection. Hammon also said that he saw a red light before he heard the siren; and that he applied his brakes and swerved to the left to endeavor to avoid striking the sheriff's automobile. This witness further testified that daily records were kept of the relative amount of traffic on Dodge Street, classifying such traffic as normal, medium, and heavy; and that this record was kept personally by him, and showed traffic on Dodge Street at 3 p.m., on August 4, 1957, a Sunday afternoon, to be heavy.

On cross-examination this witness testified that Dodge Street is a four-lane highway; that he believed the center lanes on Dodge Street were 10 feet in width and the other two outside lanes were 11 feet in width; that Ninetieth Street is an ordinary, black-topped street, 22 feet wide and consisting of two lanes; that on the day of the accident the pavement was dry, the weather clear, and the accident happened in broad daylight; and that the speed limit on Dodge Street in that area was 50 miles an hour, and on Ninetieth Street the speed limit was 60 miles an hour.

Glen A. Carlson testified that on August 4, 1957, at about 3 p.m., he was driving eastward on Dodge Street toward the intersection of Ninetieth and Dodge Streets; that as he approached this intersection he stopped in the center lane of Dodge Street and waited for traffic to pass by him; that as the traffic cleared, he made a left turn onto Ninetieth Street; that as he was making the left turn and had almost completed it, he heard a siren; that he looked around and saw the sheriff's automobile coming directly over the hill on Ninetieth Street toward him; that three or four automobiles had already been lined up behind the stop sign on the west side of Ninetieth Street occupying the southbound lane of traf-

fic; that he had intended to enter onto the northbound lane of Ninetieth Street; that instead of doing so he pulled off of the driving surface to the right on the east shoulder of Ninetieth Street and stopped; that at this time he was approximately three car lengths north of a projection of the curbline of Dodge Street; that the sheriff's automobile kept coming, moved over into the northbound lane of Ninetieth Street, and continued on toward the intersection; and that the driver of the sheriff's automobile attempted to stop but was unable to do so and struck the Hammon automobile which was on Dodge Street. This witness further testified that the sheriff's automobile first began to slow down when it had passed his automobile which was about three car lengths north of the intersection; that as the sheriff's automobile approached the intersection its driver applied the brakes heavily, slid the wheels, and struck the Hammon automobile; and that after the loud impact the rear end of the Hammon automobile was pushed to the south, slid to the left, then proceeded out of control into the righthand ditch along Dodge Street. This witness further testified that he did not observe the damage to the Hammon automobile because it was in the ditch. He did observe the damage to the sheriff's automobile, and the front end of this automobile was damaged. This witness further testified that the traffic on Dodge Street was heavy immediately prior to his leaving it to turn onto Ninetieth Street; and that after the collision occurred, he noticed that Pedigo was nervous.

Hammon, the driver of the automobile in which the plaintiff was riding, testified that on August 4, 1957, at about 3 p.m., he was driving west on Dodge Street in the outside lane, proceeding to the Valley Lakes, near Valley; that as he approached Ninetieth Street at a speed of approximately 40 miles an hour, he saw automobiles parked on both sides of the approaches to Dodge Street on Ninetieth Street; and that he then saw the emer-

gency automobile coming. He applied his brakes because he found himself right in the way, and then tried to accelerate his speed but was unable to do so. His automobile was struck and knocked into the inside lane and then proceeded into the ditch. He further testified that traffic proceeding east on Dodge Street was still moving following the collision. He was unable to recall if he swerved his automobile to the left prior to the accident. He remembered skidding when he was trying to accelerate his speed, and being struck broadside toward the center rear portion of the automobile. This witness further testified that there were two holes punched in the right side of his automobile and that it was extensively caved in.

Nadene Hammon testified that she was sitting against the door on the right side of the front seat; that as the automobile approached Ninetieth Street she noticed an automobile coming from her right; and that she did not hear the siren but was aware of a light. She said: "And I saw this light, and just about this time my husband put the brakes on and then I was aware that we —oh, I don't know how to express it, but we did not come to a stop. I started forward and I grabbed with one hand on the dashboard and one hand on the little bar * * * Between the window vent and the window that goes up and down, because I knew we were going to be hit." On cross-examination this witness testified that she saw the sheriff's automobile a few seconds before the impact. She testified that she did not give her husband any warning between the time she saw the sheriff's automobile and the impact.

Referring again to section 39-745, R. R. S. 1943, it will be observed that this section confers upon the driver of an emergency vehicle on official business the right to exceed the speed limitations imposed by statute. However, a duty is imposed upon such driver to operate the emergency vehicle in such a manner that he will not do so in reckless disregard to the safety of others.

Section 39-752, R. R. S. 1943, does provide that a driver of an emergency vehicle shall have the right-of-way, and the drivers of other vehicles shall yield such right-of-way to an emergency vehicle on official business. However, this provision does not operate to relieve the driver of such vehicle from the duty to drive with due regard to the safety of all persons using the highway, nor shall it protect the driver of such vehicle from operating the same in an arbitrary manner in the use of such highway.

Most states have adopted statutes relating to the use of emergency vehicles, the duties and obligations imposed upon the drivers of such vehicles, and the obligations and duties of other drivers relating to emergency vehicles. It is true that not all of the statutory provisions of the different states are alike, but some of the same are similar to those enacted by the Legislature of this state. The cases on this subject are very numerous, and different rules are laid down with respect to the operation of emergency vehicles. The factual situation in each case is different. The following cases point to the degree of care to be exercised by the driver of an emergency vehicle, and are applicable to the instant case.

In the case of City of Kalamazoo v. Priest, 331 Mich. 43, 49 N. W. 2d 52, the court held that statutes, relieving drivers of emergency vehicles only from those duties imposed on other drivers which relate to observance of speed limits, heeding traffic and stop signs, and yielding right-of-way, contain no exemption for drivers of emergency vehicles from duties inherent in the exercise of due care.

In Mayor and City Council of Baltimore v. Fire Insurance Salvage Corps, 219 Md. 75, 148 A. 2d 444, it is said: "In holding that operators of authorized emergency vehicles are liable for ordinary negligence under the statutes mentioned, we do not, of course, mean to state that their conduct in the operation of such ve-

hicles is measured by exactly the same yardstick as the actions of the operators of conventional vehicles. The urgency of their missions demands that they respond to calls with celerity and as expeditiously as is reasonably possible. When giving audible signals, they are, within limitations, relieved from speed regulations, rules of the road and certain other provisions. It is generally recognized that firemen when going to a fire often drive at a rate of speed that could not be justified by the ordinary motorist. They are not required to stop for red lights or other stop signals, but may slow down and proceed cautiously through them. However, they are bound to exercise reasonable precautions against the extraordinary dangers of the situation that the proper performance of their duties compels them to create. When dealing with the operation of emergency vehicles, it is particularly appropriate to recognize that negligence and reasonable care are *relative* terms and their application depends upon the *situation* of the parties and the degree of care and vigilance which *circumstances* reasonably impose."

In the case of Montalto v. Fond du Lac County, 272 Wis. 552, 76 N. W. 2d 279, the court said: "In our opinion, the giving of visible and audible warnings may or may not afford a reasonable opportunity to others to yield the right of way, depending upon the circumstances present. And the failure to afford that opportunity may be ordinary negligence or reckless disregard, depending on those circumstances. To adopt the view of the appellants would mean that a lack of 'due regard' would have to amount to a 'reckless disregard' before an ambulance driver could be held negligent as to speed. That the legislature had no such intention is clear from the fact that sec. 85.40 (5), Stats., both requires that a driver operate with due regard for the safety of others and prohibits the exercise of his privilege with a reckless disregard for their safety." See, also, Johnson v. Brown, 75 Nev. 437, 345 P. 2d 754.

In Goddard v. Williams, 251 N. C. 128, 110 S. E. 2d 820, it was said, relating to the conduct of a police officer chasing a traffic violator, where the police officer was involved in an accident, that his conduct is to be examined by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. In citing the Michigan case of McKay v. Hargis, 351 Mich. 409, 88 N. W. 2d 456, the court said: " 'We know of no better standard by which to determine a claim of negligence on the part of a police officer than by comparing his conduct * * * to the care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances.' "

In Gasparac v. Castle (Ky.), 330 S. W. 2d 111, the court said: "The appellants' argument that as a matter of law their ambulance had the right of way and was in a place it had the legal right to be at the time of the collision is subject to qualification. The provision exempting an emergency vehicle from ordinary traffic regulations confers no absolute immunity upon the driver, for it is based on the prescribed conditions. Nor does the preferential status relieve the driver from the duty of having due regard for the safety of other people lawfully using a street or highway. The duty is measured by the danger to be apprehended. Notice and warning to persons required to yield the right of way is essential, and a reasonable opportunity to yield or get out of the way is necessary before they become chargeable with the obligation to give preference to the emergency vehicle. There must be strict observance of the conditions which will exempt an emergency vehicle. When a driver has the preferred right of way, he must be especially alert when he intends to run a red traffic light at a busy street intersection and must take care commensurate with the serious consequences that might follow his failure to do so. He should remember that

other drivers have the right to assume that the red light signal will be obeyed by him unless duly and timely warned to the contrary. The evidence of negligence on the part of the ambulance driver was sufficient to take the issue to the jury."

There is evidence from which a jury might find that Pedigo was driving the sheriff's automobile at an unreasonable and improper rate of speed under the circumstances when he was in the northbound lane; that Pedigo might have been unable to see to his left or east on Dodge Street for westbound traffic on such street; that the sheriff's automobile left skid marks as heretofore shown by the evidence; and that Pedigo driving the sheriff's automobile struck the Hammon automobile with sufficient force to push it over to the center lane on Dodge Street from the right lane where it was traveling before it was struck. There is evidence on the part of the highway patrol officer that the intersection would be blind for southbound vehicles on Ninetieth Street. In addition we make reference to the evidence as heretofore set out.

There is another rule of law that is applicable to the instant case: "When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury." Buie v. Beamsley, *supra*.

In the light of the evidence adduced and the above-cited authorities, we conclude that the evidence was sufficient to submit the case to the jury for its determination as to whether or not the driver of the sheriff's automobile was negligent, or whether or not the plaintiff was guilty of contributory negligence. These are questions for a jury to determine.

We reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

KENNETH M. JOHNSON ET AL., APPELLEES, V. AIRPORT AUTHORITY OF THE CITY OF OMAHA, APPELLANT.

115 N. W. 2d 426

Filed May 25, 1962. No. 35069.

1. **Aviation: Easements.** Generally speaking an avigation easement is an easement of right to the navigation of airspace over designated land and to the use of land as an incident to air navigation.
2. ———: ———. Damage to land caused by navigation of airspace above established avigation easement limits furnishes no cause of action on account of such navigation.
3. **Aviation: Eminent Domain.** Damage to land caused by navigation within an established avigation easement taken by condemnation is properly chargeable as damages to the taker of the easement.
4. **Aviation: Easements.** The minimum topmost height of an avigation easement is the minimum safe altitude which is fixed in the Civil Air Regulations under authority of the Civil Aeronautics Board.
5. ———: ———. The minimum safe altitude under the prescribed regulations, for the purposes of this case, is 500 feet.
6. ———: ———. Under the regulations and the taking proposed, the airspace between a distance of 26 feet above the land and 500 feet above the ground constituted the avigation easement.
7. ———: ———. Navigable airspace means airspace above minimum altitudes of flight prescribed by the regulations, including airspace needed to insure safety in takeoff and landing of aircraft.
8. **Eminent Domain.** A condemner may not be held in damages beyond the limits of the taking proposed.
9. **Aviation: Eminent Domain.** The taking of real property in the establishment of an avigation easement which reduces the value of that to which the easement attaches entitles the owner to damages in the amount of the difference in value before and after the taking.
10. ———: ———. The damage contemplated by the taking of an avigation easement is that which flows from activity in the easement area up to the navigable airspace.
11. ———: ———. Damage caused by condemnation of an incorporeal as well as a corporeal avigation easement is a taking within the meaning of the Fifth Amendment to the United States Constitution.
12. ———: ———. Under the Constitution of Nebraska, if an

avigation easement is taken by condemnation the taker is required to compensate for the taking and the damaging.

13. **Eminent Domain.** The fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger, and which tends to lessen the market value of the land.
14. **Trial: Appeal and Error.** Ordinarily error is waived if after a party has adduced objectionable evidence the opposing party adduces on direct or cross-examination evidence on the same subject.
15. **Damages: Appeal and Error.** Where the question of the amount of damages is one for the jury the determination thereon will not be disturbed on appeal if it is supported by the evidence and it bears a reasonable relationship to the elements of injury and damage.

APPEAL from the district court for Douglas County: FRANK G. NIMTZ, JUDGE. *Affirmed.*

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and Steven J. Lustgarten, for appellant.

Marchetti & Samson, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This action was originally instituted in the county court of Douglas County, Nebraska, by the Airport Authority of the City of Omaha, a municipal corporation, which will be referred to herein as appellant, to condemn airspaces over lands in the vicinity of an airport operated by the appellant and to condemn obstructions within the designated airspaces. This was done pursuant to power regularly granted to it by section 3-204, R. R. S. 1943, and in accordance with the provisions of statute and of the Nebraska Constitution relating to the taking and damaging of private property for public use,

the character of which was in accordance with a grant or grants flowing from rights contained in legislation of the United States enacted pursuant to the United States Constitution, and particularly the Fifth Amendment. Numerous bodies of land, each with its accompanying airspace, were designated in the proceeding; however only one is involved in the proceeding in this court. The one involved is numbered 15 and it is described as the west 50 feet of Lot 18, East Omaha Acres, lying within the southwest quarter of the southeast quarter of Section 36, Township 16 North, Range 13 East, in Douglas County, Nebraska. The area is owned by Kenneth M. Johnson and Ruth Marie Johnson, husband and wife, as joint tenants. In the proceeding here these parties are appellees.

In due course, in the county court an award was made for damages in favor of the appellees and against the appellant. From that award the appellees perfected an appeal to the district court in which they contended that the award was insufficient to compensate for the damage sustained. After issue was joined a trial was had to a jury and a verdict was returned in favor of appellees for $6,950. Judgment was rendered in this amount together with interest at the rate of 6 percent from August 4, 1959. A motion was filed by the appellant for a new trial, which was overruled. From the judgment and the order overruling the motion for new trial an appeal was perfected.

It appears proper to point out that on the appeal here the regularity of no formal procedural step from the inception of the action in the county court to the present time is attacked. For the purposes of this case specifically it must be accepted that the appellant had the right to condemn; that the proceeding throughout conformed to Nebraska constitutional and statutory rights and procedures; and also that it conformed to the United States constitutional and statutory rights and procedures. These are inevitable inferences which flow from the

assignments of error, which are four in number, as follows:

"I Error of the Court in giving to the jury Instruction No. 2.

"II Error of the Court in giving to the jury Instruction No. 10.

"III Errors of law occurring during the trial with reference to the rulings of the Court, having to do with the admission or rejection of evidence.

"IV The Court erred in overruling the motion of defendant for a new trial where the verdict was manifestly excessive and clearly wrong."

Facts of concern here about which there is no dispute are that at the eastern edge of the city of Omaha the appellant maintains and operates an airport, under authority of the statutes of the State of Nebraska and of the United States and established regulations, which is capable of handling aircraft of all modern sizes and kinds. On it are established runways for takeoffs and landings of the various kinds of aircraft. In particular it has two runways designed to handle generally northbound and southbound traffic. One is referred to as the northwest-southeast runway and the other as the north-south runway. The former is the longer and is described as an instrument runway. The latter is not an instrument runway. In practice the former has the greater use, but each may be used for the same character and quality of traffic. From a strictly determinative standpoint, in the light of the issues presented by the parties, the former is of little concern herein.

Between the south end of the north-south runway and Adams Street, which is to the south, is a distance of about 1,350 feet. The appellees are the owners of a lot immediately south of Adams Street, 50 feet east and west and 200 feet north and south, on which is located a dwelling house and a garage which is used as a workshop. From the south end of this runway southward the appellant was required to and did obtain an avigation ease-

ment. This easement extended upward and outward and over the property of the appellees. The lowest level of the easement was 26 feet. As pointed out there were two phases of taking. Under one phase was a corporeal taking of two trees which extended above the 26-foot limit, and under the other phase was an incorporeal taking above that height of the right of use and occupancy in the landing and taking off of aircraft.

As has been indicated this total right to condemn and take is not questioned in this case. It may also be said that the appellant does not contend that it is not required to respond in damages for the entire corporeal taking.

The true effect of the presentation of the appellant is that although damages may be recovered on account of the taking under an avigation easement, damage sustained by the incorporeal taking is not compensable. This is the gist of the attack made by the first assignment of error and the argument in support of it. A theory appears to be that since such an easement as this is authorized, empowered, and even commanded under the federal authority, and authorized by Nebraska statutes, damage without physical taking is not compensable.

It is true, as has been indicated, that the avigation easement was commanded properly under federal authority, but it is not true that under either the Constitution and laws of the United States or of the State of Nebraska this frees the taker of the avigation easement from liability for damage caused to the land over which the easement extends.

It is true that damage caused by navigation above or outside the established avigation easement limits is not chargeable to such navigation, but this is not true with regard to that which is within the easement. The reported cases all appear to support this as shown by the cases cited later herein.

Briefly and without attempt or effort to explore its full significance, it is stated that the term avigation applies to the navigation of airspace. In the case here

the concern is with the lawful boundaries of the easement over the lands of appellees and the rights and obligations of the parties in relation thereto.

It is clear of course that land is the physical base of the easement, and the base of the right within which navigation may be carried on is a plane not less than 26 feet above the land. In order to arrive at which is the topmost altitude of the easement it becomes necessary to refer to the Civil Air Regulations adopted under proper authority by the Civil Aeronautics Board. Section 60.17 of the regulations, in the description of minimum safe altitudes, provides that, except for takeoff or landing, the minimum safe altitude in noncongested areas shall be, for a situation such as is involved here, 500 feet above the surface. Obviously this situation was treated for the purpose of the trial as a noncongested area. This was the minimum safe distance. The area above this was free for use. It is described as navigable airspace. Navigable airspace is defined in 49 U. S. C. A. (1962 Supp.), § 1301, p. 143, as follows: " 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft."

It may well be said therefore that the space between the lower limit of 26 feet above the land of appellees and the minimum safe altitude of 500 feet was the area of the avigation easement involved here.

The appellant argues in effect that this is not a true definition of the easement condemned. It argues that only a flight angle was described and taken and that it cannot be held for damages beyond the limits of the proposed taking described in its proceedings to take.

There is authority for the contention that a condemner may not be held in damages for anything beyond what is described in the proceedings to take. See United States v. Brondum, 272 F. 2d 642. That however is not the situation here. The petition filed in the county court,

which is basic herein, fairly includes all of the area which is pointed out herein as the avigation easement taken by the appellant. This is made clear by the petition which contains the following: "That the members of said Airport Authority have determined the necessity of acquiring easements in air spaces above land and the right to prevent height obstructions in the clear-zone areas * * * in order to provide unobstructed air space for the landing and taking-off of aircraft * * *; that it is necessary * * * to obtain for the benefit of the public in its use of the Airport, the right to prevent the owners or other parties in interest from hereafter erecting, or permitting the erection or growth, of any structure, tree or other object in the air space over any portion of the property hereinafter described higher than the number of feet hereinafter stated above the present ground level or elevation; * * * together with the right of ingress to, egress from, and passage over the tracts of property hereinafter described; * * *."

The legal authorities are in substantial accord in the view that a taking of real property in the establishment of an avigation easement which reduces the value of that to which the easement attaches entitles the owner to damages in the amount of the difference in value before and after the taking. See, United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206; Griggs v. County of Allegheny, 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585; Wright v. United States, 279 F. 2d 517; Herring v. United States, 162 F. Supp. 769; Dick v. United States, 169 F. Supp. 491; Matson v. United States, 171 F. Supp. 283. The damage contemplated is that which flows from activity in the easement area up to the navigable airspace, which in the instance here appears to be 500 feet. Clearly it could not be less than that altitude above the ground.

It may well be said that the opinions in United States v. Causby, *supra,* and Griggs v. County of Allegheny, *supra,* are not in exact accord in all particulars, but

they are in accord on the proposition that for damage for a taking by the establishment of an avigation easement, as avigation easement has been described and defined herein for the purposes of this case, the owner of the land is entitled to recover.

These observations are a negation of the argument of the appellant in support of its first assignment of error which is an attack upon instruction No. 2 given by the court, which attack is in substance that the jury was improperly told that the appellant had taken an easement for airflight purposes.

For the purposes of clarity, it is pointed out, although it is not presented as an issuable subject in this case, that if there was either a corporeal or incorporeal taking or damaging, the appellees are entitled to recover damages from the appellant as a taking within the meaning of the Fifth Amendment to the United States Constitution. There could be no question as to the corporeal taking, and all of the decisions previously cited herein from the United States courts clearly declare that damage to the value of land caused by navigation within an avigation easement amounts to a taking within the meaning of the Fifth Amendment.

Also, it is pointed out that Article I, section 21, Constitution of Nebraska, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." If it may be said that the state Constitution controls it would be necessary to conclude, even if it should be said that this type of damaging was not a taking, that there would be liability for the damage, it being effectually conceded that the damage flowed from a public use.

As has been pointed out the second assignment of error is an attack upon instruction No. 10. There are two phases to the attack. The first is that it injects the element of operation of aircraft within the easement. As already made clear herein this element is basic in the consideration of the issues and there is nothing in

the instruction which improperly directs consideration of it.

The other phase is a complaint the effect of which is to say that the instruction is improper in its reference to fear as an element of damage. When considered along with the other instructions and controlling legal principles it appears that no prejudicial error is contained. Fear, depending upon its quality and consequences, may be a proper element of damage and the jury was properly instructed thereon.

This court, in defining the quality of fear which may be the basis of recovery of damages in condemnation cases, said the following in Wahlgren v. Loup River Public Power Dist., 139 Neb. 489, 297 N. W. 833: "The only fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger, and which tends to lessen the market value of the land." This is supported by cases cited in the opinion and quoted with approval in Lane v. Burt County Public Power Dist., 163 Neb. 1, 77 N. W. 2d 773.

From this and the instructions as to fear it is made clear that the second phase of the attack of the second assignment of error is without merit.

The remaining two assignments of error will be considered together. They refer collectively to the amount of damages which the appellees are entitled to receive and certain evidence which the appellant urges was erroneously received in support of their claim.

The paramount question presented by these two assignments of error is that of whether or not the verdict was excessive. It is not contended that a verdict and judgment in favor of the appellees was improper. There is tacit agreement that they are entitled to damages. There is much difference of opinion as to the amount.

There is no great dispute as to what has been denominated as the corporeal taking. The great dispute relates to the incorporeal taking. Several witnesses were called who gave testimony bearing on the question of damages. The first called on behalf of the appellant qualified as an expert. In brief detail he gave it as his opinion that the land had a value of $600; that the cost of constructed improvements was $10,764; that the depreciation since construction was $2,906, leaving a fair market value at the time of taking of a rounded-off amount of $7,850 for improvements, or $8,450 which included the value of the land; and that after the taking the property was of the value of $7,500. In his opinion the witness attributed $100 to the loss of the trees or corporeal damage, and $850 to incorporeal damage. Thus his opinion was that the property was damaged by the easement in the amount of $950. The former of these valuations was regarded by the witness as the fair market value before the taking and the latter after taking. This "fair market" standard was treated as controlling on the trial and in the instructions to the jury. That standard was stated quite sufficiently for the purposes of this case by the witness, as follows: "Fair market value, * * * is what a willing buyer who did not have to buy would pay to a willing seller who did not have to sell, * * *." Of course the measure of damage is the difference between the value of the property before and after the easement was taken.

This witness gave no consideration whatever in his testimony to the use by the appellant of the area of incorporeal taking prior to and without condemnation or agreement. Under the evidence it is made clear that at least a part of the space in the area of incorporeal taking was used by the appellant prior to condemnation, but there is no evidence that the use was by any lawful authority. He indicated clearly by his testimony that he assumed the use theretofore was of right and therefore based his opinion only on the difference in the

value which was accomplished at the time of taking by condemnation.

No case has been cited the effect of which is to say that wrongful or unauthorized use or taking before the exercise of eminent domain may be asserted in eminent domain proceedings to destroy or defeat the right of a condemnee to recover all of his damages which are incident to the taking. This is of course subject to the possibility that rights may be lost by the operation of statutes of limitation.

Another witness, an expert, was called by the appellant and the approach to the appraisal was substantially the same as that of the first one on the matter of value. He however arrived at a somewhat different result. His opinion was that before the taking the improvements were of the value of $6,984 and that the land had a value of $600, making a total of $7,584. He valued the trees at $400 which was included in the total.

In arriving at these amounts and for the purpose of indicating the value at the time of the taking the witness indicated that there had been a physical depreciation of $2,118 and an economic depreciation of $1,500. It does not appear that he specifically attributed anything in favor of appellees on account of the incorporeal taking.

A third witness, also an expert, was called by the appellant. It is not deemed necessary to do more than to point out that the testimony of this witness in all material and pertinent respects follows closely that of the first witness and arrives at the same results.

The appellant's witnesses attributed no damage to appellees' property except the small amount which is inferable from the testimony of these three witnesses.

As to damage and its character and extent, the appellees called on Richard E. Mooney, who was airport director for the appellant. He described in general the facilities of the airport and its operations particularly with reference to that portion involved herein, the property of the appellees, the north-south runway, the north-

west-southeast runway, the annual number of takeoffs and landings at the airport for the years 1950 to 1960, inclusive, and the kind of craft using the runways and the easement involved here.

He testified in substance that the northwest-southeast runway was the primary runway and that it normally carried the heaviest traffic. Jets and heavier planes usually use this runway. These heavier planes however are not restricted to this runway but are permitted to and do use the one involved here. One is 6,000 feet in length and the other 7,000 feet. The use of the north-south runway depends largely on the direction and velocity of the wind. This runway has since 1950 been sufficient in length to accommodate the largest nonjet aircraft and it would accommodate jets if necessity arose on account of prevailing winds.

Jerome L. Wozny gave testimony as to the use of the avigation area. He said he had seen a heavy plane flown not more than 100 feet above the ground. He had seen one jet plane in the area. He gave it as his opinion that the value of the property of the appellees was $10,000 to $10,500 before the taking and about $2,000 thereafter.

As has been pointed out, there is being considered here collectively two assignments of error. One of these is that the witness Wozny was erroneously allowed to testify, as basis for his opinion as to values, to the sale price of other lands. He was permitted to testify as one of the incidents of his knowledge of values that he knew the sale price of an adjacent similar property.

Assuming that error was involved, it was waived by the appellant. After the testimony was given the appellant adduced evidence on the subject. This evidence of the appellant, it is true, was elicited by cross-examination, but the rule is the same whether it was elicited either on direct or cross-examination. The rule is: "Ordinarily a party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced." Sump v. Omaha Public

Power Dist., 168 Neb. 120, 95 N. W. 2d 209. See, also, George A. Hoagland & Co. v. Scottish Union & National Ins. Co., 131 Neb. 112, 267 N. W. 242; Allen v. Massachusetts Mutual Life Ins. Co., 149 Neb. 233, 30 N. W. 2d 885; 5 C. J. S., Appeal & Error, § 1506 (c), p. 894; 5A C. J. S., Appeal & Error, § 1735 (b), p. 1032. The third assignment of error is therefore without merit.

The next witness called was Kenneth M. Johnson, one of the appellees. He described the premises and its uses. The house is modern, is 1½ stories in height, has 5 rooms, and its dimensions are 24 by 32 feet. It has automatic oil heat and electric power. He also described a garage which he uses as a workshop. There is no dispute as to the physical description of the land and the buildings or as to the use to which they are put. He testified in substance that after the easement was taken flights were at times as low as 25 or 30 feet above the house; that the frequency of low flights appeared to depend upon weather conditions; that within the month prior to the trial he personally observed two jet planes, one at a height of less than 100 feet and the other around 150 to 200 feet; and that as results of operation of aircraft doors are slammed, there are noises as the planes pass over, there is very pronounced vibration, that use of the premises is interfered with, that peaceful enjoyment is destroyed, and that fear attends the use of the premises.

In testimony, the details of which will not be repeated here, he gave it as his opinion that the value of this property before the taking was about $9,500, and after the taking it was about of the value of $2,000.

Ruth Marie Johnson, the other appellee, was called as a witness. Her testimony as to the effects of the landings and takeoffs through the easement is corroborative of that of her husband in all respects mentioned by him. She makes it clear that the results do not flow alone from jet planes but other types as well. She gave it as her opinion that the property was worth

$10,000 to $10,500 before the taking and around $2,500 thereafter.

R. Wayne Wilson, a mortgage broker, gave it as his opinion that on property such as this covered by such an easement as the one involved here it would be impossible to obtain a loan.

Ann Godden, a former neighbor, gave it as her opinion that the Johnson property had a value of probably $10,000 before this taking. She testified that she regarded it as of no value after the taking.

The appellant has not by evidence disputed the results which the appellees contend flow from the use of the easement taken. It is pointed out and the matter was dwelt upon at considerable length that another runway was submitted to much greater use, but no valid reason or inference was advanced why this should have the effect of mitigating damage under the circumstances disclosed, if any. The pertinent subject was freedom to use with frequency of use, and not of how frequently on count or by comparison. In other words, the appellant has not disputed the factual consequence of the taking, but only the amount of the damage.

The question of the amount of damages was one for the jury, and the rule is that the determination thereon will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of injury and damage. See, Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643; Johnson v. Nathan, 161 Neb. 399, 73 N. W. 2d 398; Smith v. Damato, 172 Neb. 811, 112 N. W. 2d 21.

The verdict in this case bore a reasonable relationship to the injury and damage sustained. In amount it was supported by competent evidence of probative value. There was nothing in the evidence to justify on appeal a conclusion that the verdict was the result of passion and prejudice. The credibility of witnesses was a question determinable by the jury. It cannot be said that the verdict was on its face excessive.

In the light of the record presented the conclusion reached is that the judgment of the district court should be and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

CARTER, J., dissenting.

This is a condemnation proceeding commenced by the Airport Authority of the City of Omaha. The condemner may properly limit the extent of the taking, and the damages to the condemnee are limited to the property or interest in property taken by condemner's petition of taking. The condemner cannot be compelled to take and compensate for anything in excess of the property described in his petition of taking.

The majority opinion holds that the condemner's petition of taking was for two easements described as avigation and flight obstruction easements. Briefly stated, an avigation easement grants the right to fly over an owner's land. A flight obstruction easement is one which increases the margin of safety for flying by assuring that a pilot's vision will not be obscured by natural growth or man-made obstructions above a designated altitude. They are definite and distinct easements. United States v. Brondum, 272 F. 2d 642.

The majority opinion holds that the Airport Authority took both an avigation and a flight obstruction easement. I contend that a flight obstruction easement only was described in the condemner's petition of taking and that condemnee's damages should have been limited by the trial court to the taking of the flight obstruction easement. If my position be the correct one, the trial court was clearly in error in submitting to the jury the question of damages for the taking of an avigation easement.

The applicable portion of the petition of taking states: "That the members of said Airport Authority have determined the necessity of acquiring easements in air spaces above land and the right to prevent height obstructions in the clear-zone areas as established for the

Omaha Municipal Airport in order to provide unobstructed air space for the landing and taking-off of aircraft pursuant to Section 3-204, Revised Statutes of Nebraska, 1943, Reissue of 1954; that it is necessary for petitioner to obtain for the benefit of the public in its use of the Airport, the right to prevent the owners or other parties in interest from hereafter erecting, or permitting the erection or growth, of any structure, tree or other object in the air space over any portion of the property hereinafter described higher than the number of feet hereinafter stated above the present ground level or elevation; said present ground level or elevation being as shown on Exhibit 'A' attached hereto and made a part thereof; that it is further necessary for petitioner to obtain for the benefit of the public in its use of the Airport, the continuing right and easement, from and after the deposit of the condemnation award with the County Judge, to take any action necessary to prevent the erection or growth of any structure, tree or other object into the air space higher than the number of feet hereinafter stated above the present ground level as heretofore defined, and to remove from such air space, or mark or light as obstructions to air navigation, any and all structures, trees or other objects that may at any time project or extend into the air space as heretofore defined, together with the right of ingress to, egress from, and passage over the tracts of property hereinafter described; said tracts being located in Douglas County, Nebraska, to-wit: * * *." The number of feet above present ground level to be included in the easement over condemnee's property is then specifically fixed at 26 feet by the petition for taking.

I point out that the only language that could possibly refer to the taking of an avigation easement are the words "acquiring easements in air spaces above land" appearing in the first sentence of the foregoing paragraph of the petition of taking. The use of the plural refers to the fact that 12 easements in 12 different prop-

erties are sought in this proceeding. There is no mention of the right to fly over land. The quoted portion of the petition of taking recites that the taking is pursuant to section 3-204, R. R. S. 1943, the statute dealing with the taking of flight obstruction easements. The foregoing statute uses very similar language to that contained in the petition of taking, to-wit: "Where necessary, in order to provide unobstructed air space for the landing and taking-off of aircraft utilizing airports or restricted landing areas * * * every municipality is authorized to acquire * * * easements through or other interests in air spaces over land or water, interests in airport hazards outside the boundaries of the airports or restricted landing areas and such other airport protection privileges as are necessary to insure safe approaches to the landing areas of said airports or restricted landing areas and the safe and efficient operation thereof." The language construed by the majority as including an avigation easement is almost identical with the language of section 3-204, R. R. S. 1943, the flight obstruction easement statute. It should be construed in context with the flight obstruction statute and not be given an effect that is not within the meaning used in that statute. Both the avigation and flight obstruction easements are above the surface of the ground and consequently the use of the term "interests in air spaces" is as applicable to one as to the other.

The petition of taking does not even purport to define the limits of a proposed avigation easement. No longitudinal, lateral, or vertical distances are recited. The plat attached describes only a flight obstruction easement and makes no reference whatever to an avigation easement. The allegations of fact pertain only to a flight obstruction easement. The answer filed by condemner in the district court makes this plainer than the original petition of taking. The number of feet above ground level as it relates to the easement taken is definitely fixed at 26 feet. I submit that the description of

the easement taken is insufficient to support the taking and compensating for any easement other than a flight obstruction easement. An avigation easement is not described by words or plat with the certainty required in a condemnation proceeding.

The case is identical with United States v. Brondum, *supra,* wherein the court said: "This appeal turns on the distinction between a clearance or obstruction easement and an avigation or flight easement. These terms are not jargon leading to fruitless semantics; not in condemnation proceedings, anyway. In condemnation proceedings they are useful tags to identify distinctive estates in property. Here, the district judge erred in interpreting a clearance easement as an avigation easement. The district judge's direction of the trial and his charges to the jury were based on the error, and as a consequence the easement granted was not the easement described in the declaration of taking. The cause must be remanded for a new trial. * * * There is no mention (in the declaration of taking) of the right to fly over land. In plain words, the Government seeks to acquire the right to cut trees and natural growth to a prescribed height and to remove man-made obstructions above a prescribed height. The estate therefore is sometimes referred to as 'flight obstruction easement.' * * * The United States Government has complete discretion in determining whether to take a clearance easement or to take an avigation easement, and upon the filing of the declaration of taking and the depositing of the estimated compensation for the taking, here $2,000, the title described in the declaration passed to the Government. The district court lacked jurisdiction to compel the United States to take an avigation easement. * * * But in a condemnation proceeding courts cannot compel the United States to take and pay for an estate not described in the declaration of taking." See, also, United States v. 64.88 Acres of Land, 244 F. 2d

534; United States v. 4.43 Acres of Land, 137 F. Supp. 567.

I submit that the petition for taking is one for the condemnation of a flight obstruction easement only. There is no description of an avigation easement in the petition for taking. There is not one word in the petition for taking referring to the flight of aircraft over condemnee's land. I submit that the opinion of the majority compels the Airport Authority to take and pay for an avigation easement that it did not want, that it did not ask for, and one it made no attempt to describe in its petition of taking. To impose liability for an avigation easement upon a public authority under the circumstances shown is, in my opinion, violative of the fundamental rules governing the taking of private property for a public purpose.

I do not imply that the condemnee does not have a cause of action if his property has been damaged by continuous, low-flying airplanes. See, United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206; Griggs v. County of Allegheny, 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585. I submit, however, that the damages for which recovery may be had in the instant case are those resulting from the specific property taken in this condemnation proceeding. A condemnee cannot properly inject a claim for damages for some other taking or damaging into a condemnation proceeding for the taking of a separate and distinct property or property interest.

In my opinion the trial court erred in interpreting the taking of a flight obstruction easement as including an avigation easement. The majority opinion arrives at the same incorrect conclusion. I would reverse the judgment of the district court, with instructions to submit to the jury the question of damages for the taking of a flight obstruction easement only.

I am authorized to state that Spencer and Boslaugh, JJ., concur in this dissent.

FRED V. GENTSCH, INC., A CORPORATION, APPELLEE, V. EARLE M. BURNETT, JR., ET AL., APPELLEES, IMPLEADED WITH EARLE M. BURNETT, SR., APPELLANT.

115 N. W. 2d 446

Filed May 25, 1962. No. 35095.

1. Receivers. The power of appointment of a receiver is controlled by statute, which power may not properly be exercised in the absence of the actual commencement of an action and until after at least 5 days' notice to all parties to be affected thereby.
2. ———. The filing of a petition in and of itself does not, within the meaning of statute, constitute an actual controversy between contending suitors in court, and accordingly furnishes no foundation for the exercise of the jurisdiction of the court to appoint a receiver.
3. ———. In case of failure to comply with the essential requirements for the valid appointment of a receiver everything done is a nullity.
4. ———. To the extent that the opinion in Murphy v. Fidelity Mutual Fire Ins. Co., 69 Neb. 489, 95 N. W. 1022, conflicts with the conclusion and decision arrived at herein, it is overruled.

APPEAL from the district court for Lancaster County: HERBERT A. RONIN, JUDGE. *Reversed and remanded.*

John R. Doyle, for appellant.

Richard A. Vestecka, W. M. Elmen, and *G. A. Youngs*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, BOSLAUGH, and BROWER, JJ.

YEAGER, J.

This is an action at law by Fred V. Gentsch, Inc., a corporation, plaintiff and appellee, against Earle M. Burnett, Jr.; Earle M. Burnett, Sr.; Earle M. Burnett, Sr., and Earle M. Burnett, Jr., doing business as Tad's Home Trailer Sales, Tad's Trailer Sales, and Burnett's Home Trailer Sales; Tad's Enterprises, Inc., a corporation; and Drive-In Realty Company, a corporation, defendants. Earle M. Burnett, Sr., is the only appellant.

By the petition on which this case was presented,

filed September 3, 1959, the plaintiff declared its corporate status and the status of the defendants, and declared that it had sold to the defendants on open account described furniture of the value of $5,587 and that it had received in part payment $1,675 which left due and unpaid $3,912. The prayer was for judgment in this amount of $3,912. The transcript fails to show that any of the defendants ever filed any kind or character of responsive pleading.

On or about January 15, 1960, the plaintiff filed an application which stated in substance that it sought to preserve property owned by Tad's Enterprises, Inc., for the payment of plaintiff's claim and those of other unnamed claimants; that the defendants were all insolvent; that Earle M. Burnett, Jr., and Earle M. Burnett, Sr., were doing business as Tad's Home Trailer Sales, Tad's Trailer Sales, and Burnett's Home Trailer Sales; that these parties had in their possession property belonging to Tad's Enterprises, Inc.; that Drive-In Realty Company had in its possession property belonging to Tad's Enterprises, Inc.; that Earle M. Burnett, Jr., and Earle M. Burnett, Sr., are the sole and only owners and stockholders of Drive-In Realty Company and of Tad's Enterprises, Inc.; that Richard A. Vestecka was serving as trustee in possession of certain assets belonging to Tad's Enterprises, Inc., and Lewis Pierce was cotrustee; that the assets of Tad's Enterprises, Inc., consisted of certain real estate, balance due on contracts, notes and accounts receivable, and interest in personal property; and that on account of time delays for payment of the various obligations a receiver should be appointed to make collections and to apply the money and cash received under orders of the court.

There was a prayer for the appointment of a receiver to protect the assets of Tad's Enterprises, Inc., and Drive-In Realty Company and to collect "the debts and property due and belonging to said corporation," with power to prosecute and defend in the name of the cor-

porations. Richard A. Vestecka was nominated for receiver.

On February 2, 1960, after notice to the defendants and persons named in the application, Vestecka was appointed receiver of the assets of Tad's Enterprises, Inc., and Drive-In Realty Company.

On or about June 17, 1960, a claim was filed on behalf of Earle M. Burnett, Sr., against the receiver in which he asserted entire right, title, and interest to each and every promissory note in the possession of the receiver under the names of Burnett's Home Trailer Sales, Tad's Home Trailer Sales, Tad's Trailer Sales, Earle M. Burnett, Sr., Earle M. Burnett, Jr., and Drive-In Realty Company that were executed by various individuals, companies, partnerships, and other entities, and turned over to Tad's Enterprises, Inc., under an alleged agreement of April 24, 1959, by and between Earle M. Burnett, Sr., Earle M. Burnett, Jr., Drive-In Realty Company, parties of the first part; Tad's Enterprises, Inc., party of the second part; and Michigan National Bank, a corporation, party of the third part. No formal response to this claim appears in the transcript. The transcript contains no record of the filing of other claims.

On October 19, 1960, L. R. Ricketts was appointed "Special Master for trial of the various issues in this cause in this proceedings * * *." He was designated special master but he was within the meaning of the statute a referee. See §§ 25-1129 to 25-1137, R. R. S. 1943.

It is pointed out here that the question of the validity of appellant's claim is the only issue which is presented by this appeal. The special master was by the terms of his appointment purportedly granted the power to and did perform other functions not pertinent to any pleadings appearing in the transcript, on which matters he made findings and recommended adjudications.

It shall be understood however that the disposition herein shall not be regarded as an adjudication of or determination upon any rights of or interests in prop-

erty except those which flow from the claim of the appellant.

The matter submitted came on for hearing before the special master on December 19, 1960. Hearing was had and evidence was taken, and on February 24, 1961, he made his report in which he prayed that judgment be rendered on his findings.

To the extent necessary to state here, it was found that on or about April 24, 1959, Earle M. Burnett, Sr., Earle M. Burnett, Jr., and Drive-In Realty Company were doing business under various names of Burnett's Home Trailer Sales, Tad's Home Trailer Sales, and Tad's Trailer Sales, and on that date Earle M. Burnett, Sr., Earle M. Burnett, Jr., and Drive-In Realty Company, for a valuable consideration, assigned, transferred, and set over unto Tad's Enterprises, Inc., all property, both real and personal, of every kind and description used in connection with the mobile home business, including all property rights, tangible and intangible, accrued in connection therewith, the purpose of which was to permit Tad's Enterprises, Inc., to collect all of the assets of the Burnetts and Drive-In Realty Company; that on the basis of this the Michigan National Bank, a creditor of the Burnetts and Drive-In Realty Company, agreed to hold harmless the Burnetts and Drive-In Realty Company from any and all obligations due it which had been incurred by them; that about September 1959, Earle M. Burnett, Jr., as president of Tad's Enterprises, Inc., assigned the assets of Tad's Enterprises, Inc., to trustees for the purposes of collection; and that on or about February 1, 1960, on the application of the plaintiff herein, the court appointed a receiver to take charge of the assets of Tad's Enterprises, Inc.

The report finds that "all parties including creditors are before the court and the court has jurisdiction to determine all issues raised by the pleadings and the reports filed herein."

The findings of the report show also that the special

master proceeded to try and to determine matters and rights, both personal and real, which if the transcript is to be regarded as complete, of parties who are in no sense parties to this action.

Objections were filed to the report by Earle M. Burnett, Sr., and Earle M. Burnett, Jr., on March 17, 1961.

The objections of Burnett, Sr., were overruled and judgment was rendered on March 27, 1961, in all things approving and adopting the report of the special master. Thereafter a motion for new trial was filed by Earle M. Burnett, Sr., and Earle M. Burnett, Jr., which motion was overruled.

The foregoing is a résumé of what is of pertinence which is authentically in the transcript which has come to this court. From this it appears that the petition is the only pleading in the record relating to the cause of action. Issue has never been joined and no trial has been had on the issue tendered by the petition.

The evidence taken by the special master contains the agreement mentioned as having been entered into on April 24, 1959. This was by Earle M. Burnett, Sr., Earle M. Burnett, Jr., and Drive-In Realty Company, parties of the first part; Tad's Enterprises, Inc., party of the second part; and Michigan National Bank, a corporation, party of the third part. Michigan National Bank is not and never has been a party to this action.

It was after this agreement was entered into that the receiver was appointed, and it is obvious from the transcript that the primary purpose of the agreement was to provide a means of satisfying obligations owing by the defendants to the Michigan National Bank and other unnamed parties.

The order of appointment however empowered the receiver only to hold all money received until the further order of the court.

The evidence appears to disclose that the assets to which the agreement had reference came into the hands of the receiver. The gist of the claim of Earle M. Bur-

nett, Sr., was that a large portion of these assets were not transferred by the agreement, but belonged personally to him. A record of these assets is contained in what appears as exhibit No. 6, which is a part of the bill of exceptions.

There was no objection to the appointment of the referee, who is designated as special master, and none to any other procedural step which was taken at the hearing or thereafter with regard to the reference. It becomes clear however from the record that the only controverted question actually submitted to the special master was that of whether the assets described in exhibit No. 6 were the personal property of Earle M. Burnett, Sr., free from any right to possession or control of the receiver, or were assets properly within the receivership.

The parties have not raised the question, but nevertheless a determination of whether or not jurisdiction existed to make the appointment of a receiver is basic and fundamental.

It must be ascertained whether or not the pretended appointment of a receiver was jurisdictionally valid.

The power of appointment of receivers is found in section 25-1081, R. R. S. 1943. Section 25-1082, R. R. S. 1943, contains conditions precedent to a valid appointment. Conditions of consequence here are that a suit must be actually commenced and appointment shall not be made until after at least 5 days' notice to all parties to be affected thereby.

The record makes it obvious there was no compliance with this provision as to notice. Only the parties to the action and the trustees were notified, whereas numerous other parties were not. A specific one was Michigan National Bank.

Of primary significance within the meaning of the statute, there was no action pending which would extend to the court jurisdiction to appoint a receiver.

In Vila v. Grand Island E. L., I. & C. S. Co., 68 Neb.

222, 94 N. W. 136, 110 Am. S. R. 400, 63 L. R. A. 791, a case in certain respects comparable to this one, this court said that the filing of a petition in and of itself furnished no grounds for the appointment of a receiver. By quotation therein from State ex rel. Merriam v. Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, this court said: " 'The filing of that petition no more instituted an actual controversy between contending suitors in court, than would the filing of a copy of the Lord's Prayer. It laid no foundation whatever for the exercise of the jurisdiction of the court to appoint a receiver, unless some ground for the exercise of that jurisdiction can be found other than an actual, pending controversy in the court which undertook its exercise.' "

This proposition was sustained in Furrer v. Nebraska Building & Investment Co., 108 Neb. 698, 189 N. W. 359, 43 A. L. R. 225. In the opinion in the case with reference to the notice required by statute, it was said: "This being the requirement of the statute, the question is, has the court complied with its provisions. If it has not complied with the same, then all he has done in this matter is a nullity. It is incumbent upon the trial judge to comply with the statutes absolutely in the appointment of a receiver."

In Murphy v. Fidelity Mutual Fire Ins. Co., 69 Neb. 489, 95 N. W. 1022, language appears which indicates that the appointment of a receiver in a law action on the application of a simple contract creditor who has not reduced his claim to judgment is voidable and not void. We do not deem this a correct statement of the law. The rule is: A receiver may not be appointed in an action at law for the recovery of money only, such as an action at law on a simple contract. 75 C. J. S., Receivers, § 7, p. 666. The general rule is more specifically stated in 75 C. J. S., Receivers, § 11 b, p. 672, as follows: "Unless the case is within a statute providing for the appointment of a receiver on his application, a general or simple contract creditor who has not reduced his

claim to judgment, who has no right or interest in, or lien on, the property of the debtor, and whose interest or position does not differ from that of any other ordinary creditor, has no standing to obtain the appointment of a receiver of such property; but a receiver may be appointed at the instance of a creditor where he has a lien, or he has a claim of an equitable nature against, and a right to ask payment out of, a fund in the hands of defendant." See, also, Fleet v. Hooker, 178 Okl. 640, 63 P. 2d 988, 109 A. L. R. 272, and the annotations to the A. L. R. citation.

We conclude that the appointment of a receiver in a law action at the instance of a general or simple contract creditor who has not reduced his claim to judgment is void and not voidable, and that the opinion in Murphy v. Fidelity Mutual Fire Ins. Co., *supra,* should be overruled to the extent it conflicts herewith.

It must be said that on the record before this court the appointment of the receiver was without jurisdiction and accordingly a nullity.

The judgment of the district court is reversed; all of the proceedings of the case, except the plaintiff's petition, are rendered for naught; and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

BOSLAUGH, J., dissenting.

I do not concur in the majority opinion in this case which holds that all of the proceedings in the district court that occurred after the filing of the petition are void.

The court does not decide the sole issue presented by the appeal, the ownership of certain promissory notes, but, instead, decides the case upon the basis of an error not assigned. In so doing, the court ignores the fact that the appeal is a direct attack and it is unnecessary to the decision of the case to overrule Murphy v. Fidelity Mutual Fire Ins. Co., 69 Neb. 489, 95 N. W. 1022, or

to do more than hold that the appointment of the receiver was erroneous.

The parties who were directly interested in the determination of the ownership of the promissory notes were before the court, had notice of the hearing on the application for the appointment of the receiver, and have never made any objection to the appointment of the receiver. Since the appointment of a receiver is an ancillary remedy available only where an action is pending in which some other relief is sought, it is difficult to understand how the appointment of a receiver, even if void, would destroy the jurisdiction of the court over the subject matter and the parties as to relief granted independent of the acts of the receiver. In other words, if the district court in this case held that the receiver was entitled to the possession of the promissory notes because one of the corporate defendants instead of Earle M. Burnett, Sr., was the owner of the notes, then the determination of ownership as between the corporate defendant and Burnett should not be affected by the validity of the appointment of the receiver.

The majority opinion refers to section 25-1081, R. R. S. 1943, but does not discuss the language of the statute. I would hold that subdivision (1) of the statute authorizes the appointment of a receiver on the application of any party to the suit when property or a fund is in danger of being lost, removed, or materially injured and the action is by a vendor to vacate a fraudulent purchase of property, or *by a creditor to subject any property or fund to his claim*, or between partners or others jointly owning or interested in the property or fund. I would hold that the appointment of a receiver in this case was authorized by the statute and that no objection to the appointment of the receiver could be raised by any of the parties to the action in this court at this time.

IN RE APPLICATION OF J. M. SHANKS.

J. M. SHANKS, DOING BUSINESS AS CONSTRUCTION SPECIALITIES, FREMONT, NEBRASKA, APPELLEE, V. WATSON BROS. VAN LINES AND HEAVY HAULING CO., OMAHA, NEBRASKA, ET AL., APPELLANTS.

115 N. W. 2d 441

Filed May 25, 1962. No. 35115.

1. **Public Service Commissions.** The Nebraska State Railway Commission has original jurisdiction and sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity.
2. ———. The grant or denial of a certificate of public convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers.
3. **Public Service Commissions: Appeal and Error.** On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
4. ———: ———. Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as necessary to keep it within its jurisdiction and protect legal and constitutional rights.
5. **Public Service Commissions.** The burden is on the applicant for a certificate of public convenience and necessity to show that the proposed service is required by the present or future public convenience or necessity.
6. **Public Service Commissions: Motor Carriers.** The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall.
7. ———: ———. In determining public convenience and necessity, the controlling questions are whether the operation will serve some useful purpose responsive to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served as well by

applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.

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

Jack Devoe, James E. Ryan, and *Fred J. Hurlbut,* for appellants.

Sidner, Lee, Gunderson & Svoboda, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J.

This case involves an application filed October 3, 1960, by appellee, J. M. Shanks, doing business as Construction Specialities, with the Nebraska State Railway Commission, for a certificate of public convenience and necessity, authorizing operations as a common carrier by motor vehicle in Nebraska intrastate commerce. The application is in two parts. Part A covers the transportation of sand, gravel, and road and dam construction material requiring the use of dump trucks between all points in Nebraska over irregular routes, and will be hereinafter referred to as dump truck authority. Part B as amended covers heavy machinery, contractors' equipment, and articles of unusual size and weight on lowboy trailers between points in Nebraska over irregular routes excluding, however, equipment, materials, and supplies used in connection with exploration, discovery, and development in oil and gas, and will hereinafter be referred to as heavy hauling authority.

The application is protested by Watson Bros. Van Lines & Heavy Hauling Co., LeRoy L. Wade & Sons, Inc., and W. F. Gettel, Inc., who are appellants herein. They will hereafter be referred to as appellants, or individually as Watson Bros., Wade, or Gettel. Watson Bros. and Wade are common carriers holding statewide

hauling authority. Gettel holds the same authority in four western counties.

The examiner who conducted the hearing filed a report on March 15, 1961, recommending the granting of the application. The commission, on March 22, 1961, entered an order finding the appellee to be fit, willing, and able properly to perform the services proposed, and that such service was required by present or future public convenience and necessity. Motions for rehearing were overruled June 9, 1961, and appellants perfected this appeal.

The appeal, however, involves only part B, or the heavy hauling authority. Appellants do not protest the granting of the dump truck authority, or part A. Appellants list six assignments of error, but essentially the issue involved is whether the commission acted within the scope of its authority, and whether the order of the commission is unreasonable, arbitrary, and contrary to law.

The assignments of error are reviewed under the rules that: The Nebraska State Railway Commission has original jurisdiction and sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity, and such proceedings are administrative and legislative in character. Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310.

The grant or denial of a certificate of public convenience and necessity by the Nebraska State Railway Commission requires the exercise of administrative and legislative functions and not of judicial powers. In re Application of Petersen & Petersen, Inc., 153 Neb. 517, 45 N. W. 2d 465.

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

Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

Courts are without authority to interfere with the findings and orders of the railway commission except where it exceeds its jurisdiction or acts arbitrarily. In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296.

Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as necessary to keep it within its jurisdiction and protect legal and constitutional rights. Houk v. Peake, *supra*.

With these rules in mind, we come to the sufficiency of the evidence adduced by the appellee to authorize the commission to grant him the authority which it did. Section 75-230, R. R. S. 1943, provides that a certificate may be issued if it is found that applicant is fit, willing, and able properly to perform the service performed and to conform to the provisions of the Motor Carrier Act and the commission's rules and regulations thereunder, and that the proposed service is or will be required by the present or future public convenience and necessity. The burden is on the applicant for a certificate of public convenience and necessity to show that the proposed service is required by the present or future public convenience or necessity. Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265.

Has appellee met this burden? He has been in the construction business all of his life, and has had his own business 2 years. When he experienced difficulty getting services of heavy hauling equipment, he purchased five lowboy trailers and three tractors. These were purchased for his own convenience but other contractors soon began leasing or renting his equipment. Over a 9-month period, his heavy hauling operations from the leasing of his equipment amounted to $30,000. During the same period, one of the objectors, Watson Bros., was adding additional equipment. Within the 4-month

period preceding the hearing before the examiner, it had added five new units.

It is evident that there was ample evidence from which the commission could conclude that present public convenience and necessity required this additional service. We believe appellants have an erroneous idea of the function of the railway commission. It is apparent they feel that so long as they are not solicited by the public for service, or are willing to put on additional equipment, the commission cannot grant new authority.

As was so well said in the dissent in Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496: "The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall."

In determining public convenience and necessity, the controlling questions are whether the operation will serve some useful purpose responsive to public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served as well by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest. Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

It is the duty of the commission to protect the public interest as well as to protect, within reasonable limits, the investment of certificate holders. It is the prerogative of the commission to determine whether or not a new carrier in the field is required by public convenience and necessity. If the granting of an application will en-

danger or impair the operation of an existing carrier, certainly that would be contrary to the public interest. It is apparent that this is not the present situation, and clearly the court has no right to interfere with the finding of the commission as to the present or future need.

Is the appellee fit, willing, and able to perform the services proposed? The commission so found. His net worth at the time of the hearing before the examiner was in excess of $150,000. He appears to have ample equipment. He has demonstrated his ability to satisfactorily serve those who would use his services. There is ample evidence to justify the commission in finding the appellee to be fit, willing, and able.

Appellants concentrate most of their attack on appellee's fitness, on the assumption that some of his operations which indicate the need for the service may have been illegal. Appellants go so far as to suggest that appellee has the burden of proving his operation was not illegal. We do not understand this to be true. Appellee made a full disclosure. His record was before the commission. It was within the scope of the commission's authority to decide what operations it would consider on public convenience and necessity. The most that can be deduced from the record is merely an inference of possible illegal operations, depending on interpretations not a part of this record. In one instance an inspector for the commission checked an operation under a dump trucking contract between the appellee and the State of Nebraska and questioned its legality. Appellee immediately stopped that operation. On the only occasion one of his leases of heavy hauling equipment was checked by an officer of the commission it was approved, or at the very least was not questioned.

There is no evidence in the record that the commission ever questioned appellee's operations otherwise. Certainly it never issued any kind of formal or informal order which appellee ignored. The record of his operation was before the examiner. He was cross-examined

at length by the appellants. The commission was in possession of the facts, and made no finding of illegal operation which it considered sufficient to impair appellee's fitness. It specifically found otherwise when it found the appellee to be fit, willing, and able to perform the services proposed. Contrary to appellants' contentions, this finding was within the jurisdiction of the commission and was not arbitrary. Actually, to have found otherwise might have raised a question as to the reasonableness of the finding.

In the light of the evidence and the authorities cited above, we affirm the order of the commission.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

YEAGER, J., not participating.

GERTRUDE SANFORD, APPELLEE, V. CARL CLIFFORD SANFORD, APPELLANT.
115 N. W. 2d 451

Filed May 25, 1962. No. 35189.

1. **Divorce.** While the court has the power to adjust all the respective property interests of the parties to a divorce from bed and board, it will not be done to a greater extent than necessary to effect a proper separation under the facts of the particular case.
2. ———. A divorce from bed and board leaves the legal status unchanged in many respects while relieving the parties of the right of cohabitation. The primary purpose is to assure support to the wife during the continuance of the marital relation.
3. ———. It is not intended that the parties in a suit for a divorce from bed and board have all the benefits of an absolute divorce except the legal dissolution of the marriage contract.

APPEAL from the district court for Hall county: WILLIAM F. MANASIL, JUDGE. *Reversed and remanded with directions.*

Harry Grimminger, for appellant.

Wellensiek & DeBacker, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

CARTER, J.

This is a suit commenced by Gertrude Sanford to obtain a divorce from bed and board from her husband Carl Clifford Sanford. The defendant cross-petitioned for an absolute divorce. The trial court dismissed defendant's cross-petition and granted plaintiff a divorce from bed and board. A division of property and an allowance of support money to the wife was decreed. The defendant has appealed. The defendant assigns as error the alleged excessiveness of the allowances made to the plaintiff.

The parties were married on October 18, 1931. They have no children other than an adopted son now 25 years of age. The parties separated on October 17, 1959, because of defendant's relationship with another woman. The details need not be recited here. The evidence sustains the granting of a divorce from bed and board to the plaintiff and the dismissal of defendant's cross-petition for an absolute divorce. No complaint is made of these findings by the trial court.

The parties owned a home valued at $14,000, of which approximately $860 remains unpaid. They have a savings account of $5,900. Defendant owns life insurance policies having a cash surrender value of $3,091. Plaintiff owns life insurance policies having a cash surrender value of $872. The furniture contained in the home was not valued. The total value of the property owned by the parties, exclusive of an automobile and household furniture, amounts to approximately $23,003.

The trial court awarded the automobile to defendant and the household furniture to the plaintiff. Other property of the value of $17,712 was awarded to plaintiff. Property of the value of $5,291, in addition to the auto-

mobile, was awarded to defendant. Plaintiff was awarded support money in the amount of $130 per month for 16 months and $80 per month until the defendant attains the age of 65 years.

Plaintiff was 49 years of age at the time of trial. She was employed in the millinery department of a retail store at a gross salary of $50 per week and take-home pay of $39.40. She estimated her living expenses at $181 per month in addition to the payments of $75 per month on the home property. She has sustained two surgical operations for cancer of the breast and suffers from an asthmatic condition.

Defendant is employed by the Sperry-Hutchinson Green Stamp Company at a gross salary of $325 per month plus a commission, which returned a gross income of $7,400 in 1960.

It is upon the foregoing state of facts that defendant contends that the division of property and allowance of support money is inequitable.

The present case is one to obtain a divorce from bed and board, the effect of which is to obtain separate maintenance for the wife. While the courts have the power, when justice and equity require, to make a division of property and grant support money to the wife, a division of property is not ordinarily necessary to accomplish the purpose of such a suit. In Scholz v. Scholz, 172 Neb. 184, 109 N. W. 2d 156, we said: "A divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects but relieving both parties from all obligations and rights to cohabitation while making the necessary adjustments of their property to assure support during the continuance of the relationship. It was not intended that the parties in a limited divorce would have all the benefits of an absolute divorce except the legal dissolution of the marriage." See, also, Shomaker v. Shomaker, 166 Neb. 164, 88 N. W. 2d 221; Yost v. Yost, 143 Neb. 80, 8 N. W. 2d 686. A spouse who has no

grounds for a divorce will not be permitted to obtain all the benefits of a final decree of divorce by the expedient of a suit for a divorce from bed and board. Nor will the defendant in such an action, who has violated the marriage contract, be thus permitted to gain all the advantages of an absolute divorce, except the severance of the marriage tie.

The evidence in the present case will not sustain a finding that all the benefits of an absolute divorce should be decreed, other than the severance of the contract of marriage. After the awarding of divorce from bed and board, the parties remain husband and wife. The primary purpose of the decree is to permit the parties to live apart and to provide for the maintenance of the wife while the marriage relation exists. While the court has the power to adjust all property rights between the parties in a suit for divorce from bed and board, it will do so only to the extent necessary to provide for the separate maintenance of a party entitled thereto.

We think the trial court exceeded the necessities of the case in granting a complete division of property. The proper decree should be as follows: The home described in the record should remain the property of the parties. Plaintiff should be granted the use of the home and the furnishings contained therein. The defendant should be required to pay the taxes, maintenance, and payments on the home as they become due or as needed, as the case may be. The defendant will have the use of the family automobile. The savings account should remain the joint property of the parties and be withdrawn by mutual agreement. The defendant shall be required to pay $125 per month as support money for the plaintiff during the continuance of the marriage relation. The decree of the district court is reversed and the cause remanded with instructions to enter a decree in accordance with this opinion, together with adequate provisions to protect the rights of the

parties. The costs of this appeal are taxed to the defendant, including an attorneys' fee of $200 for plaintiff's counsel in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD J. WENGLER, APPELLANT, V. GROSSHANS LUMBER COMPANY, A CORPORATION, ET AL., APPELLEES.
115 N. W. 2d 415

Filed May 25, 1962. No. 35244.

1. **Workmen's Compensation: Appeal and Error.** On appeal to this court in a workmen's compensation case the cause is considered de novo upon the record before us.
2. **Workmen's Compensation.** The applicable rule for construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation.
3. ———. In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking.
4. ———. The Workmen's Compensation Act should be liberally construed to carry out its beneficent purposes, but under the guise of a liberal construction it should not be extended to cases which by plain language are excluded from its scope.
5. ———. Under the Workmen's Compensation Act the rights of the plaintiff and the liabilities of the defendant are fixed by the terms of the statute.
6. ———. The term "disability" as used in the Workmen's Compensation Act is to be measured by the capacity or incapacity of the employee to earn wages he was receiving at the time of injury, and is confined to the loss of ability to earn in the same or any other employment.
7. ———. 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.
8. **Workmen's Compensation: Appeal and Error.** Where the evidence is conflicting and cannot be reconciled, this court, upon

a trial de novo in a workmen's compensation case, will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.

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

Edgerton & Andrews, for appellant.

Walter P. Lauritsen, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

MESSMORE, J.

This is a proceeding under the Nebraska Workmen's Compensation Act. The plaintiff was an employee of Grosshans Lumber Company, a corporation, hereinafter referred to as the defendant or lumber company. The other defendant was the insurance carrier for Grosshans Lumber Company. Following a hearing before a single judge of the workmen's compensation court, the action was dismissed. The plaintiff then appealed directly to the district court for Hamilton County which, after trial, entered an order of dismissal. The plaintiff's motion for new trial was overruled and the plaintiff perfected appeal to this court.

The plaintiff's petition on appeal alleged in substance that while the plaintiff was in the employ of the lumber company at Aurora, on June 9, 1960, he received personal injuries in an accident arising out of and in the course of his employment as a yardman; that as a part of his duties he was unloading some heavy pipe from a truck, under the supervision of his employer; that he was holding one end of the pipe and another person was holding the other end, and that the end held by such other person accidently hit the ground, causing the end held by the plaintiff to fly up and strike him on the chin, causing him to have a severe scar on the chin, a

severe cut on his tongue and lower lip, and the loss of all of his teeth, which injuries are permanent; that the cut on the plaintiff's tongue caused a defect which caused the plaintiff to suffer a speech impediment; that all medical and hospital bills have been paid; that nothing has been paid to the plaintiff by the defendants under the provisions of section 48-121, R. R. S. 1943; that the plaintiff went to such doctors and dentists as were approved by the defendants, to be treated for his injuries; that at the time of the accident the plaintiff was earning approximately $65 a week; that the plaintiff had suffered no industrial disability, but had suffered permanent injuries which should be compensated for under subsection (3) of section 48-121, R. R. S. 1943; that under such subsection the showing of an industrial disability is unnecessary; and that the plaintiff had made claim for workmen's compensation under subsection (3) which the defendants refused to pay. The plaintiff prayed that the court determine the nature and extent of plaintiff's permanent injuries in accordance with the Nebraska Workmen's Compensation Act, and make an award of compensation to the plaintiff for such relief as he might be entitled to; and that the order of dismissal of the plaintiff's action by the workmen's compensation court be vacated and set aside.

The defendants' answer admitted that the plaintiff sustained an injury on June 9, 1960, which amounted to an accident within the definition of the Nebraska Workmen's Compensation Act; and that the accident arose out of and in the course of the plaintiff's employment with the lumber company. The defendants' answer affirmatively alleged that the plaintiff continued in his employment and received his regular wages, and did not lose sufficient time from his employment to cover the waiting period provided in the Nebraska Workmen's Compensation Act; that the plaintiff suffered no temporary total disability within the provisions of the act; that defendants were not liable to the

plaintiff for compensation for temporary disability; that all medical, hospital, and dental care and cost of dentures had been paid by the insurance carrier for the lumber company under the provisions of the compensation act; that the cuts sustained by the plaintiff to his chin, lip, and tongue had healed without industrial disability or loss of employability or earning power; that the plaintiff had suffered no permanent partial disability within the definitions of the Workmen's Compensation Act; and that the defendants had fully complied with their duties and liabilities to the plaintiff under the Workmen's Compensation Act. The defendants prayed that the plaintiff's petition be dismissed.

The plaintiff's reply denied all allegations of the defendants' answer not specifically admitted.

The plaintiff sets forth several assignments of error which may be summarized as follows: The trial court erred in holding that the injuries suffered by the plaintiff did not entitle him to compensation under the Workmen's Compensation Act.

The plaintiff testified that he was employed by the lumber company in Aurora; that he was a yardman, and his duties were to take care of the yard, run deliveries, take care of customers, and do other work incident to his employment; that the assistant manager of the lumber company called him to go after some pipe which was 28 or 30 feet in length; that they went to Baasch's blacksmith shop, and Baasch took hold of the front end of the pipe and they started to take the pipe off the truck; that the pipe slipped out of Baasch's hand, became unbalanced, "flew" up and hit the plaintiff under the chin and threw him into the air, causing him to bleed from the chin; that Eddie Daniel loaded the plaintiff into a truck and took him to the hospital; that the pipe which struck the plaintiff under the chin knocked his teeth through his tongue, cut his lip open, and made a horseshoe-shaped cut on his chin; that after he arrived at the hospital a doctor sutured his cuts; that the

cut on his tongue bothers him every once in a while so that his tongue stings; that he gets some of his letters mixed up; that as a result of the injuries he has become nervous; and that the teeth he now has do not fit his mouth, are loose, and bother him to the extent that he is unable to chew his food the same as he did prior to the accident.

On cross-examination the plaintiff testified that the great bulk of his work was outside; that he missed a day and a half of work as a result of the accident; that for a period of more than a year after the accident the plaintiff performed the same duties as he did prior to the accident; that he terminated his employment with the lumber company voluntarily; and that he was paid in full for the time lost from his employment. The plaintiff further testified on cross-examination that he had an eighth-grade education; that he did farm work for his father and drove a truck for himself for a year or so before he went to work for the lumber company; and that his working life had been devoted to farm work, trucking, and as a yardman for the lumber company.

On redirect examination the plaintiff testified that while he was working as a yardman he was paid $260 to $270 a month.

Dr. J. E. Shafer testified that he was a dentist; that he was acquainted with the plaintiff and had known him over a period of 10 or 12 years; that the plaintiff had been a patient of his; that he saw the plaintiff in his office and took a full-mouth X-ray; that upon examination of the X-ray he found that the condition of the plaintiff's teeth could have been caused by an outward injury; that the hygienic condition of the plaintiff's mouth was not first-rate; that there were three back teeth which were injured; and that he recommended that all of plaintiff's teeth be removed and replaced with full dentures rather than resupplying the teeth that were lost with partial dentures which would have been adjacent to the teeth that were not healthy enough to

support the partial dentures properly. This witness further testified that on July 18, 1960, a full X-ray was taken of the plaintiff's mouth; that on October 31, 1960, the upper and lower impressions were made for immediate dentures; and that on November 4, 1960, he extracted 30 of the plaintiff's teeth at the Aurora hospital and the dentures were inserted, and were refitted at a later date. The doctor further testified that the accident suffered by the plaintiff was not the entire cause of having all of his teeth removed; and that it was his professional judgment when he looked at the condition of the plaintiff's mouth that he could not do the plaintiff a service that would in any way be permanent or satisfactory to him or good for his physical condition otherwise than by removing all of his teeth, and this he recommended. Professionally, the doctor felt that this would constitute a better service to the plaintiff than he could give him otherwise. The doctor further testified that using false teeth is not a permanent injury to any person.

Dr. E. A. Steenburg, a physician in Aurora, testified that he was acquainted with the plaintiff and had known him for approximately 10 years; that the plaintiff had been his patient on occasions; that he examined the plaintiff 2 or 3 days after the accident; that his examination revealed a 5-centimeter laceration of the plaintiff's chin, a 3-centimeter laceration of his tongue, and a 5-square centimeter abrasion laceration on the inside of his lower lip; that the cut on the plaintiff's chin had been sutured the day of the accident by Dr. Don Steenburg; that the cut on the plaintiff's tongue was due to contact with a tooth at the time of the accident; that the cut on the plaintiff's tongue had healed; and that there was a 3-millimeter scar about one-eighth of an inch deep on the end of the plaintiff's tongue which would be there permanently. The doctor further testified that he noticed the plaintiff had difficulty in pronouncing his "f's" and "s's"; that the lisp could be due to the cut or scar on

the plaintiff's tongue; that the scar on the plaintiff's chin could be removed, to be replaced by another scar; that the scar that the plaintiff now has on his chin is permanent; and that the cut on the plaintiff's lower lip is no longer present.

On cross-examination this doctor testified that the scar on the plaintiff's chin, over a period of time, would become less, and that it had become less in the intervening year and a half; that the cut on the plaintiff's tongue medically had produced a good result; that he had no recollection as to whether the plaintiff might have had a difficulty in pronouncing the two letters mentioned prior to the time of the accident; and that he had no opinion in that regard.

On redirect-examination the doctor testified that the scar on the plaintiff's tongue might possibly be the cause of the plaintiff's speech impediment or his lisping, and on recross-examination he said he would place that in the realm of possibility.

The plaintiff's wife testified that she saw the plaintiff after the accident about 2:30 p.m., when he came home; that the plaintiff had a bandage on his chin, his tongue was cut, his lip cut inside, and his teeth were loosened; and that the plaintiff kept the bandage on his chin for from 3 or 4 days to a week. As to the scar on the plaintiff's chin, it has lessened, but can still be seen plainly, and is not as big as it was. She further testified that as to the injury to the plaintiff's tongue, he did not talk for 3 or 4 days after the accident until the swelling of his tongue went down; that the tongue still bothers him but is a little better; that she has to ask the plaintiff to repeat on occasions; that the plaintiff is more nervous than he was before the accident; that the children make him nervous which was not true prior to the accident; that before the accident the plaintiff's teeth were real good and he never complained of a toothache; and that since the accident he complains about his teeth, and eats only soft foods.

Edward G. Daniel testified that he was the manager of the lumber company and had known the plaintiff nearly 10 years while he was employed by the lumber company; that he and the plaintiff saw each other many times daily while they were both working; that the plaintiff was primarily a truck driver and yardman; that the plaintiff was responsible for loading and unloading cars of materials, and taking deliveries from the yard to different jobs and different customers; that as part of his job the plaintiff was required to wait on customers in the yard with respect to filling orders; that direct selling of materials on the part of the plaintiff would be a minimum part of his job; that the plaintiff continued to perform the same duties after the accident as he did before; that there was no variation in the plaintiff's effectiveness or efficiency in carrying out the duties assigned to him; that he noticed no nervousness on the part of the plaintiff after the accident which interfered with his work; and that he could detect no difference in the plaintiff's speech after the accident and prior to the accident, nor any change in such respect.

"On appeal to this court in a workmen's compensation case the cause is considered de novo upon the record before us." Knaggs v. City of Lexington, 171 Neb. 135, 105 N. W. 2d 727.

The plaintiff cites section 48-109, R. R. S. 1943, which provides in part: "If both employer and employee become subject to sections 48-109 to 48-147, both shall be bound by the schedule of compensation provided in section 48-121, which compensation shall be paid in every case of injury or death caused by an accident * * * arising out of and in the course of employment, * * *."

The plaintiff contends that under the above-cited statute there are four prerequisities to a compensable claim: (1) An injury; (2) an accident; (3) such accident must arise out of and in the course of employment; and (4) no willful negligence on the part of the em-

ployee. The plaintiff further contends that if and when such prerequisities are proved, every case shall be compensated for under section 48-121, R. R. S. 1943.

In the instant case there was no willful negligence on the part of the employee.

Section 48-121, R. R. S. 1943, provides for compensation for total disability and for disability partial in character, except particular cases mentioned in subsection (3) of this section which covers the loss of definite members of the body resulting from permanent injury. This section further provides: "Should the employer and the employee be unable to agree upon the amount of compensation to be paid in cases not covered by the schedule, the amount of compensation shall be settled according to the provisions of sections 48-173 to 48-185."

The plaintiff cites Wilson v. Brown-McDonald Co., 134 Neb. 211, 278 N. W. 254, 116 A. L. R. 702, stating that in the cited case the phrase contained in section 48-121, R. R. S. 1943, "in cases not covered by the schedule," meant all other cases not specifically set forth in subsection (3) of such statute which fell within the intent and purpose of the Nebraska Workmen's Compensation Act.

As before stated, the plaintiff having contended that he has met the four prerequisities as contained in section 48-109, R. R. S. 1943, to a compensable claim, his injuries fall within the intent and purpose of the compensation act, and though his injuries are not specifically mentioned in the schedule of injuries in subsection (3) of section 48-121, R. R. S. 1943, still they come within the phrase "in cases not covered by the schedule" contained in said subsection (3), therefore, the court must fix the award or amount of compensation as contemplated by section 48-121, R. R. S. 1943.

The plaintiff asserts that the applicable rule for construction of the Workmen's Compensation Act is that it be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of

interpretation. See Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152.

"In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation act, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking." Knaggs v. City of Lexington, *supra.*

"The workmen's compensation law should be liberally construed to carry out its beneficent purposes, but under the guise of a liberal construction it should not be extended to cases which by plain language are excluded from its scope." Bekelski v. O. F. Neal Co., 141 Neb. 657, 4 N. W. 2d 741.

In Berry v. School District, 154 Neb. 787, 49 N. W. 2d 617, this court said: "Under the Nebraska Workmen's Compensation Act the rights of the plaintiff and the liabilities of the defendant are fixed by the terms of the statute."

The plaintiff asserts that Nebraska has recognized "disfigurement" as being a type of injury which is compensable under the Workmen's Compensation Act. In this connection, the plaintiff makes reference to Wilson v. Brown-McDonald Co., *supra.* In the cited case this court said: "Disfigurement resulting from severe third-degree burns to the face is to be considered in the light of the general statutory purpose to provide compensation for personal injuries, and is within the meaning of the language contained in section 48-121, * * *." In the cited case the claimant was a high school graduate, had 1½ years of college training, was 20 years old, had done retail sales work in a grocery store and a clothing store, and had worked for a laundry. He received third-degree burns over his entire face while working in the course of his employment. Witnesses who were mer-

chants testified to the effect that they would not employ the claimant in their place of business on account of his facial disfigurement. The court went on to say: "The workmen's compensation act of the state of Nebraska does not contain specific language having to do with facial disfigurement of a severe nature." The plaintiff's facial disfigurement was shocking and severe to the extent that he was unable to procure employment of any kind or nature. The court held that the claimant in the cited case was permanently and totally disabled under subsection (1) of section 48-121, Comp. St. 1929 (now section 48-121, R. R. S. 1943).

It is obvious that in the cited case this court recognized that the schedule as stated in subsection (3) of section 48-121, contained no provision for severe disfigurement of the face, but as heretofore mentioned, determined the case under subsection (1) of section 48-121, Comp. St. 1929.

The evidence in the instant case shows no such facial disfigurement as appeared in the case of Wilson v. Brown-McDonald Co., *supra,* nor does it show total permanent disability as appeared by the evidence in that case. The cited case is no authority supporting the plaintiff's claim for compensation.

It will be noted that under the provisions of section 48-121, R. R. S. 1943, the statute refers to "disability." There are many definitions of the term "disability" as it relates to workmen's compensation.

"To qualify the employee to receive compensation indemnity, the impairment of bodily function must be such as to adversely affect his earning capacity. Disability, for purposes of compensation indemnity, means impairment of earning capacity, * * *. It connotes an inability to perform physical functions required in working to a degree normal to the human being." 1 Campbell, Workmen's Compensation, § 803, p. 711.

The term "disability" as used in the Workmen's Compensation Act is to be measured by the capacity or in-

capacity of the employee to earn wages he was receiving at the time of injury, and is confined to the loss of ability to earn in the same or any other employment. See Branham v. Denny Roll & Panel Co., 223 N. C. 233, 25 S. E. 2d 865. In the above case it was held that under the Workmen's Compensation Act defining disability, there is no "disability" if the employee is receiving the same wages in the same or any other employment.

There are cases too numerous to cite adopting the above rule, and this apparently is the general rule throughout the United States relating to workmen's compensation acts.

In the instant case there is no evidence that the plaintiff was in any manner disabled from performing the work that he had been doing prior to the accident. In fact, he worked for the lumber company for some considerable time after the accident, performing the same duties that he did before the accident. He lost no time from his work except as heretofore shown by the evidence, and for which he was paid. The record further shows that his medical, hospital, and dental bills were paid in full.

This court has 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 Workmen's Compensation Act." Gourley v. City of Grand Island, 168 Neb. 538, 96 N. W. 2d 309. See, also, Baade v. Omaha Flour Mills Co., 118 Neb. 445, 225 N. W. 117.

The record discloses certain evidence that is in conflict, therefore the following rule is applicable to this case.

"Where the evidence is conflicting and cannot be reconciled, this court, upon a trial de novo in a workmen's compensation case, will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others." Cole v. Cushman

Motor Works, 159 Neb. 97, 65 N. W. 2d 330.

In considering the evidence and the authorities above cited, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN P. JENSEN, RESPONDENT.
115 N. W. 2d 464

Filed June 1, 1962. No. 34487.

Original action. On application of respondent for order of reinstatement to practice law. See 171 Neb. 1, 105 N. W. 2d 459, for original opinion suspending respondent. *Application of respondent for reinstatement sustained.* No opinion.

Clarence A. H. Meyer, Attorney General, and *Gerald S. Vitamvas,* for relator.

Joseph T. Votava, Paine & Paine, and *John P. Jensen,* for respondent.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SPENCER, J., dissenting.

This court has entered an order reinstating respondent as a member of the bar of this state. I cannot join in the reinstatement of the respondent on the present state of the record. To do so would be to ignore what I consider to be my duty as a member of the court. I say this because the respondent is being reinstated by default, when it is the duty of this court to see that the application is thoroughly investigated, particularly when the district committee refuses to recommend his reinstatement and suggests subsequent misconduct.

Respondent was suspended for a period of 1 year with

the proviso that he make an affirmative showing sufficient to satisfy this court that he had fully complied with the order of suspension, and that he would not in the future engage in any practices offensive to the legal profession.

We are in an unfortunate position in suspension and reinstatement proceedings in that our rules do not specifically fix the responsibility for investigation and where necessary a counter-showing on the application. The rules do provide for the service of copies of the application on the Attorney General, the chairman of the district committee on inquiry, and the chairman of the advisory committee of the Nebraska State Bar Association. The rules also provide that any of said parties may appear and resist such application within 20 days, but do not require affirmative action. The service of a copy of the application in this case proved to be an idle gesture.

In this instance, when the Attorney General was served with a copy of the application, he called two minor matters which had been sent to his office to the attention of the court, and made no recommendation either way. In this case, the Attorney General has done no more than present what someone else was moved to send him. When the district committee was requested to make a recommendation as to reinstatement, it refused to do so, stating: "The committee has received several reports of violations of the respondent of the order of the Court heretofore made in said case; that the committee does not know and has not ascertained whether or not these reports can be substantiated by competent evidence.

"The committee, therefore, recommends that an investigator be appointed to determine whether or not these reports of violations can be substantiated, and if so, that the Court appoint a referee to take evidence concerning the same. Dated March 3, 1962." The majority of the court has seen fit not to accept the

recommendation of the district committee.

Because no one has felt obligated to investigate and report on the conduct of the applicant, the majority has voted for reinstatement. I do not feel that I can so easily brush the matter aside when in the last analysis the responsibility is mine. This court adopted the rules covering disciplinary procedures. It is our responsibility to admit and when necessary to discipline attorneys. In re Integration of Nebraska State Bar Assn., 133 Neb. 283, 275 N. W. 265, 114 A. L. R. 151. Certainly when an attorney has been suspended for several serious violations of professional ethics this court has a responsibility to the public to be certain that he has fully reformed and thoroughly understands the ethics of the legal profession. The public has a right to assume that one so reinstated by this court will thereafter comply with the recognized standards of ethical professional conduct.

If the record in this case is not complete, the fault is ours. In view of the statement of the district committee, the respondent is being reinstated under a cloud. He is entitled to have any reports of violations investigated and if untrue to have a determination to that effect. On the other hand, the public is entitled to the same consideration, and if the reports are true, respondent's suspension should be made permanent; if untrue, he should be reinstated.

For these reasons I dissent from the order of reinstatement.

Justices Carter and Boslaugh authorize me to state that they concur in this dissent.

SIMMONS, C. J., participating.

BENJAMIN ALLEN REED, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT ET AL., APPELLEES.
115 N. W. 2d 453

Filed June 1, 1962. No. 35129.

1. **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; the want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances.
2. **Gas: Negligence.** When a gas company engages in the distribution of natural gas and the installation and inspection of its equipment, it is incumbent on such company to exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor.

APPEAL from the district court for Douglas County: FRANK G. NIMTZ, JUDGE. *Affirmed.*

Wear, Boland, Mullin & Walsh and *Leonard A. Hammes,* for appellant.

George C. Pardee, G. H. Seig, and *Harry H. Foulks, Jr.,* for appellee Metropolitan Utilities Dist.

Kennedy, Holland, DeLacy & Svoboda and *Joe P. Cashen,* for appellee American Province of Servants of Mary Real Estate Corp.

Heard before SIMMONS, C. J., CARTER, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

SIMMONS, C. J.

This is an action to recover damages for serious personal injuries resulting from an explosion of combustible gas.

Plaintiff was an employee of the defendant, the American Province of the Servants of Mary Real Estate Corporation. The corporation will hereinafter be called St. Mary's. It is made a defendant because of subrogation rights under the Workmen's Compensation Act.

The Metropolitan Utilities District was the supplier of natural gas to St. Mary's. It is the principal and substantially the only defendant involved in the appeal. It will be called the defendant.

Plaintiff alleged several specific acts of negligence of the defendant. They will be set out herein, after a recital of the facts as they appear in the evidence.

At the close of plaintiff's case-in-chief, the trial court directed a verdict for the defendant. Plaintiff appeals from that order. We affirm the judgment of the trial court.

We discussed direct and circumstantial evidence in Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537. What we said there is applicable here.

St. Mary's operates a day high school for girls, a training school for sisters of its order, and has a considerable physical establishment.

In 1955 it built an addition to its existing building. The southeast rooms of the addition consisted, going from the south to the north, of three rooms. The first was a meter room. It was a small room variously described as to size but approximately 4 feet wide by 6 feet long and 10 feet high. It had a door and a louver window leading to the outside on the east. Its ceiling was a slab of concrete. In fact, it was a room in the corner of a larger room described as the water softener room. This room was 11 feet by 20 feet with a 16 foot ceiling. There were two water softeners in this room, which were not in operation at the time of the accident. It had a window on the south. It had a door leading to a hallway, stairs, and chapel on the west and a door leading to the boiler room on the north.

The boiler room was 25 feet by 33½ feet with a 16 foot ceiling. It had a double door and two windows (one a louver), to the outside on the east, and an inside door on the north leading to the auditorium and other parts of the building. There were two boilers and a hot water heater in the boiler room, all of which

were in operation on the morning of the accident on March 18, 1960. The gas to supply these boilers came from the meter room, across the water softener room, and into the boiler room near the ceiling. There were no gas outlets in the water softener room.

In constructing the heating and hot water systems, the plumber brought pipes through the top cement slab of the meter room ceiling and extended them downward a distance of 2 or 3 feet into the meter room. An open space of possibly one-half inch was left around these openings outside these pipes. The defendant brought its gas lines, installed its meters and made connection with St. Mary's heating system all within the meter room, and delivered its gas there.

The last time the defendant inspected its installations was during the first days of February 1960. Parenthetically, there is evidence of two trucks of defendant being on St. Mary's grounds the day before the accident. Their purpose in being there is not shown. We do not consider this evidence of any significance.

The plaintiff was in the water softener room 6 days before the accident. It does not appear that he found anything wrong at that time. He had a key to the meter room door and read the meter about 6 days before the accident.

The morning of March 18, 1960, was quite cold and stormy. Plaintiff came to the boiler room about 7 a.m., examined the boilers and water heater, determined that they were functioning properly, and left the room going out the north door that led to other parts of the building. Mass was being conducted in the chapel. Plaintiff was told that one of the sisters had detected the odor of gas. Whether that odor was in the chapel or elsewhere is not clear. The defendant was not notified.

Plaintiff turned, retraced his steps to the boiler room, entered it, and found nothing wrong. He then went to and entered the water softener room. He had taken two

steps when a terrific explosion occurred. The doors and windows were blown outward. The walls of the meter room were blown inward and rested upon the meters. The door into the water softener room was blown against the water heater with a considerable force. There was a "flash" fire in which plaintiff was seriously burned.

Plaintiff offered an expert witness who testified that to create such an explosion, there would have to be between 166 and 500 cubic feet of gas mixed with the air in the water softener room. He also testified that such a mixture would diffuse both horizontally and vertically and could have been ignited by the open flame of the hot water heater. There is no evidence that indicates the source of the gas or the length of time that it had been accumulating in the water softener room or of a diffusion time.

The day of and after the explosion, the defendant and the plumbing company tested all the installations of the plumbing company and no defects were found.

The same day, in order to restore service, the meters and connections of defendant were removed by the defendant and new ones installed. There is no evidence that the plaintiff or anyone inspected the physical equipment that the defendant removed, or sought to inspect it to discover whether or not it contained evidence that leakage in it occurred. The source of the gas that caused the explosion is a mystery, subject to whatever surmise and conjecure one may wish to make from the testimony herein above-recited.

Negligence is defined in this state: "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; the want of that degree of care that an ordinarily prudent person would have exercised under

the same circumstances." Turnell v. Mahlin, 171 Neb. 513, 106 N. W. 2d 693.

Plaintiff argues here that: "When a gas company engages in the distribution of natural gas and the installation and inspection of its equipment, it is incumbent on such company to exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor." Fonda v. Northwestern Public Service Co., 134 Neb. 430, 278 N. W. 836.

Assuming, but not deciding that the gas involved in this explosion came from a leakage of some sort in the meter room, the inevitable question comes, where was the leakage, what and who caused it, and, of course, the further inevitable question is, was the defendant negligent in the premises. This record furnishes no answer or suggested answer to any of these questions.

Plaintiff makes a series of allegations of negligence, but in argument blends them in such a way that it is a bit difficult to follow just which charge or charges of negligence he relies upon. Generally, they fall into the classification that defendant was negligent in its installations, in the maintenance and inspection of its installations, and that its work was done by inefficient employees.

Whether taken separately, or as a whole, the unavoidable question is what did the defendant do that it should not have done or what did it fail to do that it should have done that was the negligent proximate cause of this explosion. The plaintiff's evidence has no answer except those which rest upon the insufficient foundation of surmise, speculation, and conjecture.

To hold the defendant liable here, would be to hold that it was an insurer. Plaintiff's evidence does not sustain plaintiff's right of recovery. Disrobed of the garb in which plaintiff dresses his case, the naked unescapable fact is that he has failed to produce proof requisite to sustain his essential charges of negligence

of the defendant as the proximate cause of the accident.

The judgment of the trial court is affirmed.

AFFIRMED.

DONALD B. TYRRELL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
115 N. W. 2d 459

Filed June 1, 1962. No. 35153.

1. **Criminal Law: Evidence.** To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged.
2. **Evidence.** A party is ordinarily estopped from asserting error on account of the erroneous admission of evidence where he subsequently elicits similar evidence on the same subject.
3. **Automobiles.** The right to operate a motor vehicle after the suspension of a license is not restored by mere lapse of time, but it depends upon the receipt of a new license.

ERROR to the district court for Lancaster County: ELMER M. SCHEELE, JUDGE. *Affirmed.*

John R. Doyle, for plaintiff in error.

Ralph D. Nelson and *Jerry L. Snyder,* for defendant in error.

Heard before SIMMONS, C. J., CARTER, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

YEAGER, J.

This is an action originally instituted in the municipal court of the city of Lincoln, Nebraska, in the name of the State of Nebraska against Donald B. Tyrrell, charging that Donald B. Tyrrell did on January 1, 1961, within the corporate limits of the city of Lincoln, unlawfully operate a motor vehicle while his driver's license was under suspension and prior to its reinstatement.

Tyrrell was designated as defendant and although here he is designated as plaintiff in error he will be referred to herein as the defendant. The State is defendant in error but herein it will be referred to as the State.

The defendant was tried on the charge, convicted, sentenced to be imprisoned in the city jail for 30 days, and ordered to refrain from the operation of a motor vehicle for the period of 1 year from the date of final discharge from jail.

From the judgment of the municipal court the defendant appealed to the district court where a trial was had to a jury on the charge. In the district court the conviction was affirmed.

From the judgment of the district court the defendant has brought the case to this court for review by proceedings in error. A reversal is sought here based on four assignments of error. Their substance is as follows: The court erred in separately overruling six motions for mistrial; the court erred in overruling the defendant's motion for new trial; the court erred in receiving evidence offered of a conviction of the defendant of a separate offense not related to the offense for which the defendant was on trial; and the court erred in receiving evidence of the suspension of the driver's license of defendant without proper identification.

The first and third of the assignments of error pertain in general to one subject, and therefore will not receive separate consideration. They both relate to the question of whether or not the defendant was entitled to have a mistrial declared on account of, as the defendant insists, improper references made to and evidence adduced concerning another offense not related to the offense for which the defendant was being tried.

First, it is asserted that in the opening statement such an improper reference was made. No record of the literal statement or of sufficient of its substance was presented to reasonably inform as to its content, hence

there is nothing to justify a conclusion that error was involved.

Second, as has been noted, the defendant was being tried for driving an automobile while his license was under suspension. The State, of course, as a part of its case, was under the burden of showing license suspension. The particular complaints are that the proof which demonstrated the suspension which was the basis of the charge on which the defendant was being tried was inadmissible, and because of its admission a mistrial should have been declared. The contention is without merit.

The controlling rule is stated in Clark v. State, 102 Neb. 728, 169 N. W. 271, as follows: "To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged." See, also, Smith v. Smith, 169 Neb. 199, 99 N. W. 2d 8.

In truth after this evidence was adduced and the motions made and ruled upon, the defendant took the stand and gave testimony, which fully verified the evidence in this area to which the motions for mistrial had been directed. Furthermore, it may be said without reservation that the testimony of the defendant without equivocation sustained every element of the charge upon which he was tried. The evidence in this respect was elicited in part on his direct examination and in part on cross-examination, and it went in without objection or exception.

This situation falls within the rule that a party is ordinarily estopped from asserting error on account of the erroneous admission of evidence where he subsequently elicits similar evidence on the same subject. See Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209.

By the fourth assignment of error an attack is made

upon the propriety of the admission in evidence of a purported order of the Director of the Department of Motor Vehicles showing the suspension of the driver's license of defendant. The assignment attacks in particular the order of suspension, but the presentation actually attacks only the foundation for the evidence of the suspension.

Without recitation of detail and without necessity for such recitation, it is stated that here involved was the identity of two exhibits. There was no evidence by which they were sufficiently identified for admission in proof of the charge against the defendant and on objection, which was made, they should not have been received.

This however may not now be regarded as of consequence. The very thing which the State sought to prove by this evidence was proved by the evidence freely and voluntarily adduced by the defendant. Here was error, but it must be regarded as being without prejudice.

The second assignment of error, which challenges the propriety of the ruling on the motion for new trial, calls attention to nothing which has not been considered in disposition of the other three. It will therefore receive no further comment.

In case it shall be urged that the 6-month suspension of the license of the defendant had expired by its terms and for that reason the conviction was invalid, it is pointed out that the right to operate a motor vehicle after suspension is not restored by mere lapse of time. The right to operate thereafter depends upon the receipt of a new license. See § 60-418, R. R. S. 1943.

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

AFFIRMED.

GEORGE BREWER, APPELLEE AND CROSS-APPELLANT, V. ARTHUR L. HILBERG, APPELLANT AND CROSS-APPELLEE.
115 N. W. 2d 437

Filed June 1, 1962. No. 35187.

1. **Workmen's Compensation.** A proceeding under the Workmen's Compensation Act is considered and determined de novo upon the record by the Supreme Court.
2. ———. The compensation provided for the loss of an eye under subdivision (3) of section 48-121, R. R. S. 1943, is exclusive and includes the loss of binocular vision resulting from the loss of an eye.
3. ———. Temporary disability under the Workmen's Compensation Act ends when the condition becomes fixed and the employee is restored so far as the permanent character of his injuries will permit.

APPEAL from the district court for Buffalo County: S. S. SIDNER, JUDGE. *Affirmed as modified.*

Tye, Worlock & Knapp, for appellant.

Andrew J. McMullen, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. George Brewer, the plaintiff, was employed as a plumber's helper by Arthur L. Hilberg, the defendant, at the time the plaintiff was injured.

The plaintiff recovered an award in the compensation court. The defendant waived rehearing before the full compensation court and appealed directly to the district court. After trial de novo in the district court the plaintiff again recovered an award. Both parties filed motions for new trial which were overruled. The defendant then appealed to this court and the plaintiff has cross-appealed.

A proceeding under the Workmen's Compensation

Act is considered and determined de novo upon the record by this court. Graber v. Scheer, *ante* p. 552, 114 N. W. 2d 13.

On Friday, October 14, 1960, the plaintiff was helping Darel Heppner install steam pipes at the gymnasium then under construction at the State Teacher's College in Kearney, Nebraska. The work consisted of welding 9-foot sections of pipe to pipes that had been previously installed and which extended vertically through the floor of the building. The plaintiff's job was to hold the pipe in a vertical position until it was properly lined up and in position to be welded.

The plaintiff testified that while he was holding a section of pipe and turning it so as to bring it into position to be welded, it slipped off the pipe extending through the floor and pulled him over. As the pipe fell to the floor it made a connection with a cable, or a welding rod attached to the cable, from an electric arc welding machine and there was a flash or an arc 3 or 4 inches in front of his face. After the flash the plaintiff fell backwards. The plaintiff told Heppner about his eyes hurting but continued to work.

When Heppner began to weld the pipe which had fallen, the cable burned through just behind the holder. While Heppner repaired the cable, the plaintiff washed his eyes and face with cold water and wet his handkerchief and held it to his eyes. At that time the plaintiff told Heppner that his eyes were burning. Late that afternoon the defendant came to the job and the plaintiff told him that his eyes were burning.

When the plaintiff went home he put Murine in his eyes and applied a cold towel. Later his wife put grated potato on his eyes. The next morning the plaintiff reported his condition to the defendant and the defendant suggested that he consult Dr. Jester. Dr. Jester was not available so the plaintiff consulted Dr. Johnson. Dr. Johnson did not testify but the plaintiff testified that

Dr. Johnson gave him a prescription which relieved the pain.

The plaintiff saw Dr. Jester that evening. Dr. Jester testified that he examined the eyes of the plaintiff on the evening of October 15, 1960, and found that the epithelium or top layer of tissue of the cornea of both eyes had been disrupted; that the injury to the left eye was considerably more serious than the injury to the right eye; that the left eye appeared to be secondarily infected; and that this type of injury is produced by an arc flash.

Darel Heppner testified by deposition that on the afternoon of October 14, 1960, one of the steam pipes slipped off the stationary pipe while the plaintiff was holding it and turning it; that Heppner was about 30 or 40 feet away from the pipe when it fell and he did not see a flash; that later when he started to weld the pipe the cable burned in two; that while he was repairing the cable the plaintiff said that his eyes hurt, that they burned, and that he had "got a flash"; and that the defendant came to the job later and the plaintiff told him that he had "got a flash."

The defendant testified by deposition that the first he knew of the plaintiff's injury was on the morning of October 15, 1960, when the plaintiff came to the defendant's house and said that his eyes had been burned by a welding flash.

The defendant contends that the evidence is not sufficient to prove that the plaintiff was injured as the result of an accident arising out of and in the course of his employment. The defendant argues that the plaintiff was impeached to such an extent that his credibility was completely destroyed and that the other evidence standing alone is insufficient to meet the burden of proof. The record indicates that the plaintiff has a record of psychoneurotic behavior and is not worthy of belief. However, when the plaintiff's testimony is considered together with the testimony of Darel Hepp-

ner and Dr. Jester, the evidence is sufficient to establish that the plaintiff was injured as the result of an accident arising out of and in the course of his employment.

The district court found that the plaintiff was entitled to compensation at the rate of $37 per week from October 15, 1960, to October 1, 1962, for temporary total disability; and from October 1, 1962, for 125 weeks for the loss of his left eye. The district court also allowed the plaintiff $1,893.40 for medical and hospital services less a credit of $38.07 for amounts obtained from the defendant by fraud. The district court further provided that the defendant should continue to pay for medical services as authorized by the plaintiff's treating doctor, and that the plaintiff should have the right to reopen the case at a later date on the basis of a change in condition if he can establish permanent disability to his right eye by objective evidence.

The plaintiff by cross-appeal contends that he is entitled to an award of permanent total disability because he has lost the use of both eyes as a result of the accident. The contention is based upon the testimony of Dr. Jester that the plaintiff has no light perception in his left eye and a visual efficiency of only 10.9 percent in his right eye.

The evidence establishes that the plaintiff has lost the use of his left eye as a result of the accident on October 14, 1960. The surface tissue of the cornea of the left eye has never healed satisfactorily. At this time the eyelids of the left eye are sewn together. At some time in the future it will be necessary to remove the sutures. If the cornea does not heal, the left eye will require continued treatment. There is also a possibility that at some time it may be necessary to remove the left eye.

The evidence does not establish that the plaintiff has lost any part of the use of his right eye as a result of the accident. Dr. Jester did testify that in calculating

visual efficiency it is necessary to consider central visual acuity, visual field, and binocular vision; that the plaintiff has approximately 87½ percent central visual acuity in his right eye, a loss of approximately 71.8 percent in visual field, and 50 percent binocular vision; that when these factors are considered together the visual efficiency of the right eye is 10.9 percent; and that visual efficiency of less than 10 percent is considered to be total disability. But all of the visual acuity tests and visual field tests which were used to measure the visual efficiency of the plaintiff's right eye are subjective tests and depend upon the patient's responses. For that reason there is serious question as to accuracy of the data upon which Dr. Jester's calculations were based. Furthermore, under our statute a workman is not entitled to recover compensation for the loss of binocular or stereoscopic vision resulting from the loss of one eye. The compensation set forth in subdivision (3) of section 48-121, R. R. S. 1943, is exclusive and includes all impairments that naturally follow the loss of one eye. The compensation provided for the loss of an eye includes the loss of stereoscopic vision. Carlson v. Condon-Kiewit Co., 135 Neb. 587, 283 N. W. 220.

On cross-examination Dr. Jester admitted that there is no objective symptom of pathology in the right eye; that, ordinarily, if the plaintiff's vision were restricted to the extent the tests indicate, there would be some objective symptom of pathology; that such symptoms sometimes show up in 2 to 3 months, but that there are reports in the literature in which the symptoms have not shown up for as long as maybe 2 years; that "when I look inside, the retina looks perfectly normal. I can't see anything wrong with the eye at all"; and that he does not know what is wrong with the right eye or why there is a loss of vision. Upon the record in this case there is no basis at this time upon which to award the plaintiff compensation for loss of any use of his right eye. If at some future date the plaintiff has additional

evidence which he wishes to submit to the compensation court, the remedies that are available to him are those that are provided by the statute. The judgment of the district court should be modified by striking any reference to reopening the case upon the basis of a change in condition.

The trial in the district court took place on August 24 and 25, 1961. The district court rendered its decision on September 5, 1961. The district court found that the plaintiff was temporarily totally disabled from October 15, 1960, to the present time and "will remain temporarily totally disabled until October 1, 1962." The statute contemplates that an employee shall receive compensation for temporary disability during the time in which he is convalescing. Temporary disability ends when the condition becomes fixed and the employee is restored so far as the permanent character of his injuries will permit. Allen v. Department of Roads & Irrigation, 149 Neb. 837, 32 N. W. 2d 740. The evidence in this case does not show any hospitalization after April 5, 1961, or treatment after August 22, 1961. There is no evidence to support a finding that temporary total disability continued past August 25, 1961. Accordingly, the judgment of the district court should be modified to provide that the right to compensation for temporary total disability ended August 25, 1961, and that the plaintiff is entitled to compensation at the rate of $37 per week for 125 weeks from August 26, 1961, for the loss of his left eye.

The judgment of the district court included an allowance to the plaintiff of $125 for medical services furnished by Dr. Potter and $20 for medical services furnished by Dr. Watland. The evidence does not show that this expense was reasonably necessary for the treatment of the injury to the plaintiff's eyes. The judgment of the district court should be modified by deleting these two items from the list of medical expenses allowed the plaintiff.

The district court also found that the defendant was liable "for such further medical services as the plaintiff's treating doctor shall authorize." Although the evidence indicates that the plaintiff will have future medical expense as a result of the injury sustained in the accident on October 14, 1960, the defendant is liable only for reasonable medical and hospital services and medicines as and when needed. § 48-120, R. R. S. 1943. In the event the parties are unable to agree as to such expense, then the matter may again be submitted to the compensation court. The judgment of the district court should be modified by striking the reference to the liability of the defendant for future medical expenses.

As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

MARIA K. KRAMER, APPELLANT, V. SARA KRAMER DORSCH ET AL., APPELLEES.
115 N. W. 2d 457

Filed June 1, 1962. No. 35202.

1. **Deeds.** Where an owner of land has conveyed his property by deed, he cannot subsequently divest the title of the grantee by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention.
2. ———. Where a deed is delivered to the grantee by the grantor it immediately becomes operative as a conveyance, if such was the intention of the parties, even though the instrument was not to be recorded until some time in the future.
3. **Deeds: Estoppel.** A grantee who voluntarily redelivers or consents to the destruction of a deed with the intention of thereby reconveying the title may be estopped from claiming title under such deed. Where there is no evidence of any such intention an estoppel may not be asserted.

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

Wright, Simmons & Hancock, for appellant.

Lyman & Winner, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

CARTER, J.

This is an action to set aside a deed to the northeast quarter of Section 2, Township 22 North, Range 55 West of the 6th P.M., in Scotts Bluff County, Nebraska, on the ground that it was procured by fraud and undue influence. The trial court found for the defendants and dismissed plaintiff's petition. Plaintiff has appealed.

The plaintiff is 84 years of age. She can speak some English. She cannot read or write English. She can sign her name. She is the widow of Peter Kramer, who died in 1940. Upon his death she became the owner of one-third of the fee title and a life estate in the land involved in this action. Six children of plaintiff inherited two-thirds of the farm, subject to the life estate of the plaintiff. Henry, an unmarried son, died in 1944 and plaintiff inherited his one-ninth interest in the land. The remaining children were Sara Dorsch, William Kramer, Jacob Kramer, Peter Kramer, and Sophia Simon.

The evidence shows that on September 17, 1958, plaintiff executed a quitclaim deed to Sara Kramer Dorsch conveying all her right, title, and interest in and to the land in question. The following was typed into the quitclaim deed: "This deed is given for the consideration as herein recited and for the additional consideration of confirming and replacing the quit claim deed by the grantor Maria Kramer to the grantee Sara Kramer Dorsch covering the real estate above described made, signed and delivered by the grantor herein to the grantee herein some time during the year 1946 which said quit claim deed was retained by the grantee in her possession

until during the year 1954 at which time the same was destroyed by a brother-in-law of the grantee."

With reference to the quitclaim deed executed and delivered on May 28, 1946, the evidence shows that Sara Dorsch was at that time unmarried and living with her mother, the plaintiff. The testimony of Sara Dorsch and William Kramer is that Sara desired to leave the home and live her own life. Plaintiff urged Sara to remain with her and, according to the evidence of William and Sara, agreed to convey to Sara all her interest in the land here in question if Sara would remain with her. The 1946 deed was executed and delivered to Sara in pursuance of this understanding. Sara did remain with her mother from 1946 to 1958 except for a few vacation trips. The circumstances are consistent with Sara's evidence. The fact is that plaintiff does not dispute them. William Kramer corroborates Sara's testimony. The quitclaim deed was drafted and executed in the office of an attorney who explained the effect of the deed to the plaintiff. Sara did not record the deed. She gave it to William Kramer for safe keeping, who retained possession of it until 1954 when Sara asked for it and took it back into her own possession. Sara states that plaintiff desired to see the deed and that she gave it to her mother with the understanding that it would be returned to her. Instead of returning it to her, plaintiff and a brother-in-law of Sara willfully destroyed it by burning.

It is clear from the evidence that the 1946 quitclaim deed was properly executed and delivered to Sara and had the legal effect of conveying all of plaintiff's interest in the land to Sara. While the 1946 quitclaim deed was not recorded, the execution and delivery of it had the effect of conveying plaintiff's interest in the land irrespective of that fact. The destruction of the 1946 quitclaim deed did not have the effect of reconveying the title to plaintiff. Such a reconveyance of title could be accomplished only in the manner provided by statute. The rule is: Where a grantor has executed a deed and

made a valid delivery, he cannot subsequently, by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention, affect the transaction thus completed. Milligan v. Milligan, 161 Neb. 499, 74 N. W. 2d 74; Brown v. Hartman, 57 Neb. 341, 77 N. W. 776; Bunz v. Cornelius, 19 Neb. 107, 26 N. W. 621.

The quitclaim deed executed and delivered on September 17, 1958, was given to confirm the 1946 quitclaim deed which had been destroyed by the grantor and another. There is no evidence that plaintiff did not intend to convey all her interest in the land absolutely at the time each of the two quitclaim deeds was delivered.

The destruction of the 1946 quitclaim deed seems to have been brought about by the mistaken belief of plaintiff that she had conveyed the remainder interests of the other four children to Sara when she executed and delivered the first deed. When she executed and delivered the quitclaim deed in 1958, the effect of the deed was fully explained to her and she executed and delivered it with full knowledge of its import. The evidence is clear that plaintiff intended to convey all of her right, title, and interest in the land to Sara absolutely at the times the deeds were executed and delivered. Plaintiff does not dispute this. It is quite plain that the destruction of the first deed and the attempt to void the second was the result of a mistake as to the effect of the first and a subsequent change of intention as to the second. We conclude that title to the land passed to Sara absolutely by the 1946 deed. Since Sara already was the owner of plaintiff's interest in the land, the 1958 deed was merely a confirmation of the previous title affording a means of showing that title on the public record.

Plaintiff contends that Sara is estopped to assert title by virtue of the 1946 quitclaim deed. We see no element of an estoppel in this case. While it is true that if a grantee redelivers a deed to the grantor with the intention of reconveying the title he may be estopped from

claiming title under such deed, we have no such situation here. There is no evidence that Sara returned the 1946 deed to plaintiff for the purpose of reconveying the title. The evidence is that she gave it to plaintiff with an agreement that it would be returned to her. The 1958 deed shows on its face that it was given to confirm and replace the 1946 deed, which appears to have been validly executed and delivered. Sara has been the legal owner of plaintiff's interest in the land since 1946. Plaintiff has lost any right she may have had to question the validity and effect of that deed by statutory limitation. While we find no basis for setting aside the 1958 deed, plaintiff could gain nothing in having it set aside in any event, since Sara has been the absolute owner of plaintiff's former interest in the land since 1946.

The trial court came to the same conclusion and its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALONZO JACKSON KIMBROUGH, APPELLANT.
115 N. W. 2d 422

Filed June 1, 1962. No. 35216.

1. **Criminal Law: Trial.** Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
2. **Criminal Law.** In a criminal case this court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
3. **Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence in law actions, to pass on the

credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence.

4. **Criminal Law: Juries.** The question whether there existed in the mind of the defendant an apprehension based upon reasonable grounds of imminent peril and whether the means adopted for his defense were reasonable in view of the circumstances is a question of fact of which the jurors are the sole judges.
5. **Homicide: Evidence.** In a prosecution for homicide it is admissible for the defendant, having first established that he was assailed by the deceased and in apparent danger, to prove that the deceased was a person of ferocity and violent disposition.
6. ———: ———. Such proof must be made by evidence of the general reputation of the deceased. It cannot be made by proving either specific acts on his part or the opinions of witnesses as to his disposition based on their own observations.

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

Thomas P. Lott, for appellant.

Clarence A. H. Meyer, Attorney General, *Dwain L. Jones,* and *Melvin K. Kammerlohr,* for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

SPENCER, J.

Defendant, Alonzo Jackson Kimbrough, was found guilty by a jury of the crime of manslaughter, and was sentenced to a term of 7 years in the Nebraska State Penitentiary. Defendant appeals to this court.

There are two assignments of error. First, that the trial court committed reversible error by submitting a charge of manslaughter to the jury after the defendant had moved for a directed verdict, and second, that the trial court committed prejudicial error by refusing to admit evidence of the violent, desperate, and dangerous character of the deceased.

Defendant, by his own admission, shot Charles Johnson in the City of Omaha, August 19, 1961. Charles Johnson was pronounced dead on arrival at the county

hospital, and will hereinafter be referred to as the deceased. The shooting took place after a dice game behind the People's Hotel at Twenty-sixth and Q Streets. An argument developed between the defendant and the deceased over a quarter bet in the dice game. There is testimony that the deceased, who had a pair of shoes and a small knife on the ground beside him, started for the defendant. The defendant went behind two of the other players. One of these players gave the defendant the 25 cents to settle the argument, and the defendant left the game and went to his room in the hotel.

Defendant testified: "Q. Did you say anything to him? A. I told him I won the bet. Q. What did he say? A. He told me, 'You ain't won this bet.' I said, 'You are taking the quarter?' and he said, 'If that is what you want to call it, you can say that.' Q. What? A. 'If that is what you want to say, you can call it that.' Q. Then what happened? A. I said, 'You don't take nothing from me, Charles; you know I won that bet. You are wrong.' I said, 'You draw your quarter and I draw mine, that is off the bar.' He stuck his hand in his coat pocket and pulled a knife, and then I walked behind Robert Welch. I walked away from him because he had his back against the building, and I walked around behind Pete Roach and Robert Welch. Q. Did Robert Welch give you a quarter? A. Yes, he did. Q. You took the quarter? A. Yes, I did. Q. Then what did you do? A. Well, Johnson and I kept exchanging words and so I went upstairs." Another witness testified the deceased was not armed in any manner at this time.

Some testimony indicates defendant soon returned with a gun in his hand. He pointed the gun at the deceased and said, " 'If you don't get my quarter, I will get you or kill you.' " Deceased asked him, " 'What are you doing, threatening my life?' " Defendant replied, " 'You take it any way you want to.' " Defendant testified he told deceased, " 'You don't take nothing from

me,' " and that when deceased started for him, he pulled the gun out of his pocket, and the deceased stopped. He testified deceased then told him he had better keep the gun on him at all times. Defendant then left and the dice game continued for about 30 minutes.

The testimony indicates that sometime before the end of the game the defendant returned with the gun in his hand and without comment went through an alleyway to the front of the hotel. After the game broke up the deceased went through the hotel and left by the front door. The defendant testifies that he was standing by the side of the door and that as the deceased came out, deceased sprang at him, striking him with the shoes and swinging at him with a knife; that he was knocked against the building and then knocked down; that he managed to knock the deceased off balance; and that as he tried to get up, he drew his gun from his pocket and fired once, but deceased still came forward so he fired again, hitting him in the chest, and deceased fell to the sidewalk.

None of the witnesses saw the knife after the shooting and no mention of it was made by the parties at the scene. No knife was found near the body or in the hands of the deceased. When a knife was mentioned at the police station, an officer returned to the scene but none could be found. However, a knife was given to this officer by one Markus Eldridge who told the officer he picked it up on the walk. There was no testimony as to whether this knife was closed or open at that time. None of the witnesses saw Eldridge at the scene during or immediately after the shooting, and he was not produced as a witness.

Manslaughter is defined in section 28-403, R. R. S. 1943, as: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter; and upon conviction thereof shall be imprisoned in the

penitentiary not more than ten years nor less than one year."

Defendant moved for a directed verdict at the close of the State's evidence. This was overruled. He then presented evidence which did not refute the State's case but sought to excuse the act as being necessary for his own defense. This waived any claim of error in the ruling on his motion at that stage. We said in Henggler v. State, *ante* p. 171, 112 N. W. 2d 762: "Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction." The sufficiency of the evidence was raised by the renewal of the motion at the close of all of the evidence.

Is the evidence sufficient to sustain a conviction for manslaughter? We find that it is. We said in Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516: "In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt."

There are variances in the testimony of the witnesses. Just to mention a few: Defendant claims to have been cut with a knife. No one noticed any knife cuts on him. Defendant claims that he fired the second shot as he was coming off the ground. Another witness testified that there was only one shot and that the defendant was standing when it was fired. The physician who examined the body said the bullet's path in the body was fairly straight.

It is not the province of this court to resolve conflicts in the evidence in law actions, to pass on credibility of witnesses, to determine the plausibility of explanations,

or to weigh the evidence. These matters are for the jury. Haines v. State, 170 Neb. 304, 102 N. W. 2d 609.

As we view the record, there was ample competent evidence to permit the jury to find the defendant guilty of manslaughter. Defendant's defense of justification or self-defense was submitted to the jury by an instruction of which the defendant does not complain. The question whether there existed in the mind of the defendant an apprehension based upon reasonable grounds therefor of imminent peril to life or limb through the assault of the deceased, and also whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances surrounding him at the time of the fatal shot, is essentially a question of fact of which the jurors are the sole judges. See Housh v. State, 43 Neb. 163, 61 N. W. 571.

Defendant urges that the trial court committed prejudicial error by refusing to admit evidence of the deceased's violent disposition and dangerous character. Even if it were properly before the court, there is no merit to defendant's claim. Defendant produced a police officer who was employed in the records bureau of the police department. This officer had with him a folder which bore the name of Charles Johnson. He did not know Charles Johnson. He did not know how many Charles Johnsons lived in Omaha. The record was not connected in any way with the deceased. An objection to further testimony was sustained. The record is not before the court, and no offer of proof was made.

The defendant was permitted to testify as follows: "Q. (By Mr. Lott) Did you know that Charles Johnson had been in jail for fighting? A. Yes, I did. Q. Were you afraid of Charles Johnson? A. Well, in a way I was. I knew he was supposed to be a sort of treacherous type of person. Q. How did you know this? A. By a boy that I knew; he cut down the side of his face with a knife. MR. LOTT: That is all." On cross-examination he testified as follows: "Q. On cross-examina-

tion I asked you if Charles Johnson was all right with you as far as you were concerned; do you remember that? A. Yes. Q. And you said what? A. Yes. Q. Now you say that you were afraid of him; is that it? A. Well, he never did anything to me. Q. So you had no cause to be afraid of him, did you? A. Just that I heard that he was a treacherous type of person. Q. This is from some fellow whose name is what? A. What I have heard about him and the fellow that he cut * * *." Later on cross-examination, he was asked the following question as to the deceased: "Q. Is that this vicious character that you are talking about? A. I didn't say he was a vicious character. I won't state that fact that he is a vicious character."

In Carleton v. State, 43 Neb. 373, 61 N. W. 699, we said: "In a prosecution for homicide it is admissible for the defendant, having first established that he was assailed by the deceased and in apparent danger, to prove that the deceased was a person of ferocity and violent disposition, and this for the purpose of showing either that the defendant was acting in terror and hence incapable of that specific malice necessary to constitute murder in the first degree, or that he was in such apparent extremity as to make out a case of self-defense, or that the deceased's purpose in encountering the defendant was deadly." However, in that same case we also said: "Such proof must be made by evidence of the general reputation of the deceased. It cannot be made by proving either specific acts on his part or the opinions of witnesses as to his disposition based on their own observations."

For the reasons given above, the verdict of the jury and the judgment rendered thereon should be affirmed.

AFFIRMED.

BERNICE ELLEN JONES, APPELLANT, V. DALE RAY JONES, APPELLEE.
115 N. W. 2d 462

Filed June 8, 1962. No. 35167.

1. **Divorce: Appeal and Error.** An appeal lodged in this court from a decree rendered in a divorce action brings the case here for trial de novo on the issue of fact complained of on the record made in the district court.
2. **Divorce.** If the circumstances of the parties change, or it is for the best interests of the children, the court may from time to time on its own motion or on the petition of either parent revise or alter the divorce decree so far as custody, care, and maintenance of the children are concerned.
3. ———. A proceeding in a divorce case, with reference to an adjudication of child support, is a continuation of the divorce suit and one of its incidents, and an attorney's fee for services rendered in this court may be allowed and taxed as costs.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded with directions.*

Harold L. Gwrske, Harold C. Prichard, and *Bayard T. Clark,* for appellant.

No appearance for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

SPENCER, J.

This appeal is from the refusal of the district court to increase the amount of child support allowed in a divorce decree entered in 1956.

Plaintiff and appellant herein, Bernice Ellen Jones, hereinafter referred to as plaintiff, was granted a divorce from appellee, Dale Ray Jones, hereinafter referred to as defendant, on December 11, 1956. She was awarded the custody of the two children, Thomas Ray Jones, then 8 years of age, and Jacqueline Lee Jones, then 6 years of age. The parties had entered into a property settlement

agreement which provided for the payment of $25 per month for each child. The only items of property covered by the agreement were household goods which were given to the plaintiff, except for a refrigerator and an electric range which were given to the defendant.

Plaintiff filed a petition to modify the decree on August 11, 1961, alleging that conditions had materially changed; that the defendant was earning a much more lucrative salary; and that the cost of maintaining the children had materially increased. She requested that the child support be increased from $25 to $50 per month for each child.

An appeal lodged in this court from a decree rendered in a divorce action brings the case here for trial de novo on the issue of fact complained of on the record made in the district court. See, § 25-1925, R. R. S. 1943; McNamee v. McNamee, 154 Neb. 212, 47 N. W. 2d 383.

If the circumstances of the parties change, or it is for the best interests of the children, the court may from time to time on its own motion or on the petition of either parent revise or alter the divorce decree so far as custody, care, and maintenance of the children are concerned. See, § 42-312, R. R. S. 1943; Harris v. Harris, 151 Neb. 191, 36 N. W. 2d 849.

At the time of the divorce, defendant had just received a discharge in bankruptcy and was unemployed. He had been in Greenland and came back when his contract expired, which was shortly before the divorce. He later went to work for the federal government at a salary of $6,000 per year. He now has a career appointment and is earning $7,425 annually. At the time of the hearing in district court, he had a 1961 Chevrolet Impala automobile on which he was paying $90 per month. Defendant put in evidence a statement of living expenses indicating that he was living beyond his means. He seems to overlook the fact that a father is charged with the support of his children and that this is his primary responsibility.

It is the continuing duty of the court to consider the reasonable needs of the children and the ability of the father to supply those needs. It is apparent to us that the defendant's situation has materially changed and that $25 per month for each child is clearly inadequate. There is absolutely no reason why the defendant could not pay $50 per month for the support of each child, or $100 per month, and still live within his income. We determine that he should do so.

A proceeding in a divorce case, with reference to an adjudication of child support, is a continuation of the divorce suit and one of its incidents, and an attorney's fee for services rendered in this court may be allowed and taxed as costs. Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689. We determine that the attorney for the plaintiff should be allowed a fee of $250 for services rendered in this court, to be taxed as costs.

We reverse the judgment of the district court, and remand the cause with directions to modify the decree in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. FLOYD RUSSELL, APPELLANT.
115 N. W. 2d 578

Filed June 8, 1962. No. 35176.

1. **Criminal Law.** It is the general rule that a reasonable time for the preparation of a defendant's case must be allowed in a felony case between the time of the appointment of counsel by the court for an indigent defendant and the date of trial.
2. ———. Whether or not an objection that a sufficient length of time has not been allowed between the appointment of counsel by the court for an indigent defendant and the trial may properly be sustained depends upon the surrounding proved facts and circumstances.
3. **Criminal Law: Continuances.** Affidavits of parties to actions for the continuance of the trial for the production of the testi-

mony of absent and distant witnesses must allege facts and circumstances to be given in evidence from which legal conclusions, constituting a cause of action or defense, may be drawn.

APPEAL from the district court for Holt County: WILLIAM C. SMITH, JR., JUDGE. *Affirmed.*

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

Clarence A. H. Meyer, Attorney General, and *Melvin K. Kammerlohr,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

YEAGER, J.

This is a criminal action prosecuted in the name of the State of Nebraska, plaintiff, appellee herein, against Floyd Russell, defendant, appellant herein. In the action the defendant was charged, by information filed in the district court for Holt County, Nebraska, with the offense of having, on July 30, 1960, willfully, unlawfully, and with the intent to defraud, made, drawn, uttered, issued, and delivered to Galyen Motor Co. a certain unlawful bank check for $575, knowing at the time that he had not sufficient funds in or credit with the bank it was drawn on to make payment thereon upon its presentation for payment.

On March 13, 1961, the defendant was arraigned on the information and pleaded not guilty. There had previously been an incorrect date given to the charge which was corrected thereafter, and an improper arraignment, but this is not presented as ground for reversal on this appeal. At the time of arraignment statutory service of the information had not been made, but this was expressly waived by the defendant, and it is not asserted as ground for reversal.

At the time of arraignment the defendant was advised by the court that he was entitled to have counsel

and if he was unable to provide counsel of his own choice he was entitled to have counsel appointed by the court. He advised the court that he did not desire representation. After arraignment and plea of not guilty bail which had been previously given was continued in force. At that time the defendant was advised to remain subject to the order of the court.

At some point in the interval between the time the original charge was made and the arraignment, one John R. Gallagher was retained as his counsel. At some time prior to October 2, 1961, Gallagher, with the consent of the court, withdrew as counsel.

On October 2, 1961, the case was called for trial. When the defendant was notified of the date for trial does not appear. It does appear that the defendant drove all night the night before in order to respond to the call.

On the morning of October 2, 1961, the court was informed by the defendant that he did not have counsel. He, at that time, in court, requested a postponement and also requested counsel. Postponement was denied and John R. Gallagher was appointed as counsel. This appointment was contrary to the express wish of Gallagher. No formal application for continuance was made and filed by the defendant or on his behalf by Gallagher. The trial started at 11:10 a.m. on that date.

It was not asserted either generally or specifically by either the defendant or counsel that to proceed would deprive the defendant of the testimony of witnesses or other evidence necessary or pertinent to the defense to the charge.

The case was tried to a jury and the State adduced its evidence, as did also the defendant. There was no motion for a directed verdict either at the close of the evidence of the State or of the defendant. The jury was instructed and, after deliberation, it returned a verdict finding the defendant guilty of the crime charged.

A motion for new trial was filed on behalf of the de-

fendant by Gallagher, his then attorney. This motion was overruled and, on October 6, 1961, the defendant was sentenced to serve a term of 3 years in the Nebraska State Penitentiary.

On November 1, 1961, a notice of appeal on behalf of the defendant was filed by his then attorney, Norman Krivosha. An amended and supplemental notice of appeal was filed on November 3, 1961.

The brief of the defendant contains five assignments of error which he contends present grounds for reversal of the conviction in this case. The effect of the first is to say that the rights of the defendant under the Constitutions of the United States and of the State of Nebraska were violated by ordering the case to trial only 1 hour after the assignment of counsel for the defendant.

As interpreted here, the contention is that by what was done due process of law was denied to the defendant, the point being that the action was so precipitate in character that the defendant was prevented from the protection of his rights and his liberty. If this contention is in fact sustained, he was not accorded due process of law. The facts and circumstances however require examination in order to ascertain whether or not the contention is sustained.

It is true that the trial was ordered 1 hour after the attorney was appointed, but that does not present the true picture. The alleged crime was committed July 30, 1960. Soon thereafter the defendant was arrested and had a preliminary examination. Thereafter on March 13, 1961, he was arraigned on an information and became fully advised with reference to counsel. At that time he was ordered to hold himself subject to the order of the court, which obviously meant that he should prepare himself and keep in readiness for trial. More than 6 months after that he was called for trial. It is obvious that the advice given by the court had gone unheeded.

To this it must be added that Gallagher had for a time been his attorney and there is nothing in the record

to indicate that he was not familiar with the defense which the defendant had, if any, or that the witnesses, if any, were not known.

To this it must be further added that no attention at the time was called to any witness who could testify to any fact favorable to the defendant.

To this it must be further added that the motion for new trial asserts error of the same character and quality that is asserted by the assignment of error being considered, but no word of evidence by affidavit or otherwise was adduced to support the assignment.

Affirmatively the defendant himself in testimony at the trial in his direct examination gave evidence, the tenor and effect of which was to admit the charge against him and to refute the contention on appeal that by the requirement that he go to trial on October 2, 1961, his constitutional rights were denied. The following from his evidence appears in the bill of exceptions: "Q. Mr. Russell, you delivered him this check for $575.00 in payment for this car; now did you know that you did not have $585.00 in the bank to cover this check? A. Yes sir, I did. Q. Did you make any arrangements for covering the check? A. No. I attempted to the following day, but the man who purchased the car didn't have the money the day he got it; and that was the reason for the delay, and also I was delayed on other financial matters. Q. Did you have a conversation with the banker in regard to a loan? A. I did; but he wouldn't go for that. Q. The banker would not make you a loan to cover this check? A. No. * * * Q. In other words, your intention was to sell, or resell, the car, and then you would have the money to cover this check? A. That's right."

For support of this assignment of error the defendant relies for the most part on what was said in Dolen v. State, 148 Neb. 317, 27 N. W. 2d 264, and cases cited in the opinion therein. In that case the following statement appears: "It is the general rule that a reason-

able time for the preparation of a defendant's case must be allowed in a felony case between the time of the appointment of counsel by the court for an indigent defendant and the date of trial."

No fault is found with this general rule, but from the rule and the case in which its statement appears, it becomes unavoidably inferable that whether or not sufficient time has been allowed must depend upon the proved surrounding facts and circumstances. See, Hawk v. State, 151 Neb. 717, 39 N. W. 2d 561; Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716; Johnson v. State, 169 Neb. 783, 100 N. W. 2d 844.

A consideration of the surrounding facts and circumstances which have been pointed out leads to the conclusion that this assignment of error is without merit.

This conclusion disposes for all practical purposes of the fifth assignment of error. It is, however, pointed out that from the assignment and argument it is inferable that in the case here, there was a motion for continuance. No such motion however was filed, and no showing of necessity for continuance.

A long-standing and controlling rule applicable in a situation such as this is the following: "Affidavits of parties to actions for the continuance of the trial for the production of the testimony of absent and distant witnesses, must allege facts and circumstances to be given in evidence from which legal conclusions, constituting a cause of action or defense, may be drawn." Farmers & Merchants Bank v. Berchard, Bridge & Co., 32 Neb. 785, 49 N. W. 762. See, also, § 25-1148, R. R. S. 1943.

By the second assignment of error it is urged that the court failed to instruct on all of the essential elements of the crime charged. The contention is contrary to what clearly appears in the instructions. These elements are set forth specifically in the first and the sixth instructions, and attention has been called to them by reference in the eleventh instruction.

By the third assignment of error it is asserted that the court erred in failing to instruct the jury that if the defendant had an understanding with the bank or a reasonable expectation of having funds in the bank when the check was presented for payment, he was not guilty of the crime as charged. There was no basis for such an instruction. There was no evidence to support it. The evidence of the defendant was in clear refutation of the right to such an instruction.

By the fourth assignment of error the defendant contends that the court failed to instruct on the theory of the defense and particularly as to whether or not he reasonably believed that he would have credit with the bank or sufficient funds in the bank when it was presented for payment.

As this assignment of error is interpreted here, the question presented is that of whether or not the court properly and sufficiently instructed as to the intent of the defendant at the time he gave the check. Intent was submitted as an element in the definition of the crime, and the burden of its proof was duly and regularly imposed on the State. Also, in instruction No. 8, the court informed the jury as to the evidentiary effect of the issuance of a check, payment of which was refused because of lack of funds. As to these instructions there was and is no complaint. The remainder of the complaint is too indefinite to require consideration. It must be said therefore that the assignment avails nothing to the defendant.

The conclusion reached in the light of these observations is that the judgment of the district court should be, and it is, affirmed.

AFFIRMED.

LILA MEYERKORTH ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.
115 N. W. 2d 585

Filed June 8, 1962. No. 35210.

Constitutional Law: Schools and School Districts. The statutes set forth in the opinion, complained about by the plaintiffs as being unconstitutional, held not to violate the First Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, or Article I, section 4, of the Constitution of the State of Nebraska.

APPEAL from the district court for Lancaster County: HERBERT A. RONIN, JUDGE. *Affirmed.*

Crosby, Pansing, Guenzel & Binning and *Theodore L. Kessner*, for appellants.

Clarence A. H. Meyer, Attorney General, *Dwain L. Jones*, and *Melvin K. Kammerlohr*, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

MESSMORE, J.

The plaintiffs brought this action for declaratory judgment in the district court for Lancaster County, the purpose of the action being to declare sections 79-201, 79-1201 et seq., and 79-1701 et seq., R. R. S. 1943, and the regulations pursuant thereto which provide for compulsory school attendance, certification of teachers, and for the operation and supervision of parochial schools unconstitutional and a void attempt to exercise the police power of the state. As will hereinafter appear, the sections of the statutes necessary to a determination of this appeal provide for compulsory school attendance, certification of teachers, and for the operation and supervision of parochial schools.

The plaintiffs' contention is that said sections of the statutes are unconstitutional to the extent that they abridge and prohibit the plaintiffs' free exercise of their

religious beliefs, and any attempt on the part of the State to close the school operated by the plaintiffs would be unconstitutional and void.

The defendants demurred to the plaintiffs' amended petition on the grounds that it failed to state a cause of action against the defendants. The demurrer of the defendants to the amended petition was sustained. The plaintiffs elected to stand on their amended petition, whereupon the trial court dismissed the plaintiffs' amended petition. The plaintiffs filed a motion for new trial which was overruled, and the plaintiffs perfected appeal to this court.

The plaintiffs' assignment of error is that the trial court erred in sustaining the demurrer of the defendants to the plaintiffs' amended petition, and in dismissing the plaintiffs' amended petition.

The plaintiffs' amended petition alleged that defendant Freeman Decker was the Commissioner of Education of the State of Nebraska; that the defendant Helen Hanika was the county superintendent of Richardson County; that the plaintiff Lila Meyerkorth was a resident of Richardson County; that the Emmanuel Association was a religious body with headquarters in Colorado Springs, Colorado; that the Emmanuel Association and its members, of which Lila Meyerkorth is one, provide places of worship for members in several states, including the State of Nebraska; and that the churches which follow the doctrine of the Emmanuel Association are owned and operated by the members of each local congregation who have local autonomy over the conduct and affairs of each individual church.

The amended petition further alleged that one of such churches is near Shubert, Richardson County, Nebraska, of which Lila Meyerkorth, plaintiff, is a member; that the plaintiff, as a member of an association of Christian parents, had employed one Eleanor Berry, whom she believed to be a qualified Christian teacher, qualified to educate her children spiritually and intellectually in a

religious atmosphere, and pursuing the religious doctrines and beliefs of the members of the Association; that plaintiff and other parents were fully aware of the physical facilities available at the public schools in the vicinity as well as the teachers and the courses of study offered at such schools; that in like manner, plaintiff and other parents were aware of the professional training and education of the said Eleanor Berry, and with this full awareness, desired to employ said Eleanor Berry to tutor their children spiritually and intellectually so that the education of said children could be conducted in a particular religious atmosphere, and with the belief that said education is of equal or better quality to that provided in the public schools or other schools in the vicinity; that the plaintiff and other parents know the manner in which Eleanor Berry conducts the tutoring of their children, know the facilities available to the children, and are satisfied that the teachings and education are being conducted in their proper religious atmosphere which they desire for their children; that the defendants and each of them are threatening to close said Richardson County school by enforcement of the unconstitutional teacher qualifications and compulsory school attendance statutes and regulations, alleging that the school and the teacher, Eleanor Berry, are not qualified under the said statutes of the State of Nebraska; that the defendants and each of them are threatening to prevent plaintiffs from hiring Eleanor Berry as a private tutor for their children by the enforcement of the unconstitutional compulsory school attendance statutes; that the Commissioner of Education has informed Eleanor Berry that he would not grant unto her a Nebraska teaching certificate, for the reason that she does not meet the qualifications prerequisite to the issuance of such a certificate and that he will not recognize her college credits and degree; that said qualifications, as shown on exhibit A attached and incorporated by reference, are a void and unconstitutional attempt to exercise

the police power of the State of Nebraska; that the Commissioner of Education and the Richardson County superintendent of schools, with the aid and assistance of the Attorney General's office and the Richardson County attorney, have attempted to close said school and deny plaintiff and other parents the right to have their children educated in the religious atmosphere desired by plaintiff; that said defendants have threatened to start criminal and other proceedings against the plaintiff and other parents to compel them to send their children to other available schools, which said schools do not have the proper religious atmosphere as is available to the children of the plaintiff and other parents under the tutoring of Eleanor Berry; that the concerted efforts of the defendants and each of them to compel the plaintiff and other parents to send their children to other schools and to deny them the right to the tutoring of Eleanor Berry and the proper religious atmosphere for their education, is allegedly being done under authority granted to the defendants by section 79-201, section 79-1201 et seq., and section 79-1701 et seq., R. R. S. 1943; that said statutes provide for the compulsory school attendance of children for prescribed number of days, certification of teachers, and for the operation and supervision of parochial schools; that the efforts of the defendants to enforce the statutes as above set forth is in violation of the freedom of religion and the right of free exercise of religion guaranteed to the plaintiff by the Constitution of the United States and the Constitution of the State of Nebraska; that such statutes are an arbitrary, unwarranted, and an invalid attempt to exercise the police power of the State of Nebraska to infringe upon the aforesaid freedom and rights of the plaintiff; and that plaintiff and others similarly situated have paid and will pay all taxes properly levied for the support of the public school but declare and believe that it is their fundamental right, given by God and the Constitutions of the United States and the State of Ne-

braska, to educate their children under their own supervision as parents free from interference by the officials of the State of Nebraska except for such tests by such officials as may be reasonable and proper to determine that satisfactory educational levels are reached by such children under such parental education.

"Declaratory judgment proceedings have frequently been employed to determine questions as to the construction or validity of statutes." Thorin v. Burke, 146 Neb. 94, 18 N. W. 2d 664. See, also, Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection, 162 Neb. 781, 77 N. W. 2d 464.

The Declaratory Judgments Act is applicable to this case.

"A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. * * * In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof." Elliott v City of Auburn, 172 Neb. 1, 108 N. W. 2d 328.

The plaintiffs state that all of the allegations of their amended petition are admitted by the defendants' demurrer. Defendants' demurrer does not admit that the effort to enforce the statutes complained of by the plaintiffs violate freedom of religion and the right of free exercise of religion guaranteed by the Constitution of the United States and the Constitution of the State of Nebraska, nor does the demurrer admit that such statutes are arbitrary, unreasonable, or invalid. Such questions are questions of law to be determined in this appeal.

The defendants contend that the statutes complained of by the plaintiffs are valid and constitutional.

The plaintiffs cite Article I, section 4, of the Constitution of the State of Nebraska which provides in part: "All persons have a natural and indefeasible right to

worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. * * * Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

The plaintiffs also cite the First Amendment to the Constitution of the United States which provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

The plaintiffs cite section 1 of the Fourteenth Amendment to the Constitution of the United States which provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The plaintiffs contend that the statutes and regulations of the State of Nebraska and the Nebraska Department of Education for the regulation of nonpublic schools go beyond protecting the interests of the state, and violate the constitutional rights of parents to educate their children in accordance with the tenets of their religious faith.

In support of their contention the plaintiffs cite the following sections of the statutes: Sections 79-201, 79-1201, 79-1247.02, 79-1701, 79-1705, and 79-1706, R. R. S. 1943, and section 79-1210.01, R. S. Supp., 1961.

Section 79-201, R. S. Supp., 1961, provides: "Every person residing in a school district within the State of

Nebraska who has legal or actual charge or control of any child, not less than seven nor more than sixteen years of age, shall cause such child to attend regularly the public, private, denominational, or parochial day schools each day that such schools are open and in session except when excused by school authorities, unless such child has been graduated from high school. The term shall not be less than nine months in any district; Provided, that districts unable to maintain a nine months school with a twelve mill levy, when supplemented by the state apportionment may, with the approval of the electors of that district, maintain an eight months school. Under no circumstances shall the school term be less than eight months."

Section 79-1201, R. R. S. 1943, provides: "Teachers' certificates issued by the authority of the State of Nebraska and entitling the holders thereof to teach in the public, private, denominational, parochial, and state-operated schools of this state, shall be issued by the Commissioner of Education to all persons of sound mental and physical health and good moral character upon the recommendations of the Board of Regents of the University of Nebraska, the State Board of Education for Normal Schools and Teachers Colleges, and the governing bodies of other Nebraska institutions of higher education."

Section 79-1210.01, R. S. Supp., 1961, provides: "The Nebraska Rural Elementary School Certificate shall, after July 1, 1965, be valid in kindergarten to eighth grade inclusive for a period of five years in schools organized as Class I school districts, and be valid in kindergarten to sixth grade inclusive for a period of five years in schools organized as Class II school districts. The requirements for this certificate shall be a recommendation as an elementary teacher and a minimum of sixty-four semester hours of college credit from a standard institution of higher education in Nebraska or another state. The college preparation shall include at

least forty-five semester hours of college credit in the generally recognized subjects and areas of instruction taught in elementary grades and fifteen semester hours of education including not less than three semester hours of supervised teaching or the equivalent. This certificate may be renewed any number of times for a period of five years upon the presentation of eight additional semester hours of college credit applicable toward a baccalaureate degree from a standard institution of higher education."

Section 79-1247.02, R. R. S. 1943, provides: "(1) The State Department of Education shall establish a procedure for accrediting the elementary and secondary schools of Nebraska, both public and private. The major purposes of such procedure shall be to maintain adequate school programs, and to encourage and assist schools in their purpose of increasing better instructional opportunities for the boys and girls of Nebraska. (2) The Commissioner of Education is authorized to appoint an accreditation committee, which shall be representative of the educational institutions and agencies of the state and shall include as a member the director of admissions of the University of Nebraska. (3) The accreditation committee shall be responsible for: (a) Formulating appropriate standards and policies with respect to the accreditation and classification of schools, and (b) making recommendations annually to the commissioner relative to the accreditation and classification of individual schools. No school is to be considered for accreditation status which has not first fulfilled all requirements for an approved school."

Section 79-1701, R. R. S. 1943, provides: "All private, denominational, and parochial schools in the State of Nebraska, and all teachers employed or giving instruction therein, shall be subject to and governed by the provisions of the general school laws of the state so far as the same apply to grades, qualifications, and certification of teachers and promotion of pupils. All private,

denominational, and parochial schools shall have adequate equipment and supplies, and shall be graded the same and shall have courses of study for each grade conducted therein, substantially the same as those given in the public schools where the children attending would attend in the absence of such private, denominational, or parochial schools."

Section 79-1702, R. R. S. 1943, provides: "No person shall be employed to teach or teach in a private, denominational, or parochial school who has not obtained a teacher's certificate entitling such teacher to teach corresponding courses or classes in public schools where the children attending would attend in the absence of such private, denominational, or parochial school."

Section 79-1705, R. R. S. 1943, provides: "The county superintendent in first class school districts, or the superintendent of schools in all other districts, where any private, denominational, or parochial school is located, shall inspect such schools and report to the proper officers any evidence of the use of any textbooks or of any activities, instruction, or propaganda therein subversive to American institutions and republican form of government or good citizenship or of failure to observe any of the provisions of sections 79-1701 to 79-1707. The State Board of Education shall require the several county superintendents and superintendents of schools to make such inspections at least twice a year, and the school officers of such schools and the teachers giving instruction therein are required to permit such inspection and assist and cooperate in the making of the same."

Section 79-1706, R. R. S. 1943, provides: "In case any private, denominational, or parochial school after a final determination by the proper authorities under sections 79-1701 to 79-1706 fails, refuses, or neglects to conform to and comply therewith, no person shall be granted or allowed a certificate to teach therein, and the pupils attending such school or schools shall be required to attend the public school of the proper district

as provided by law in like manner as though there were no such private, denominational, or parochial school. Full credit for certification under the law shall be given all teachers who have taught in private, denominational, or parochial schools the same as though they had taught in public schools."

The plaintiffs argue that the certification of teachers as provided for in sections 79-1701 and 79-1702, R. R. S. 1943, above set forth, and the minimal school standards provided for by sections 79-1701 and 79-1705, R. R. S. 1943, above set forth, and the regulations promulgated by the Nebraska Department of Education, have no relevance to the interests of the state in children not educated in public, tax-supported schools; that none of these, not one section or phrase, have any materiality to testing children educated in parochial schools to ascertain if they know the language of their country, understand its government, and are able to participate in the democratic process; and that the above-mentioned sections and regulations infringe upon the rights of the parent and the constitutional right guaranteed to the citizens of the State of Nebraska.

The plaintiffs cite Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688, wherein this court held: "Chapter 249, Laws 1919, does not prohibit the teaching of a foreign language if taught in addition to the regular course of study in the elementary schools, so as not to interfere with the elementary education required by law, and outside of regular school hours during the required period of instruction." The court further said: "All private, denominational and parochial schools and all teachers employed or giving instructions therein, shall be subject to and governed by the provisions of the school laws of the state as to grades, qualifications and certification of teachers. They are required to have adequate equipment and supplies, and shall have grades and courses of study substantially the same as the public

schools where the children will attend in the absence of private, denominational or parochial schools. Nothing in the act is to be construed as interfering with the religious instruction in such schools. * * * Instruction is required to be given in American history and in civil government, both state and national, such as will give the pupils a thorough knowledge of the history of our country, its Constitution and our form of government, and such patriotic exercises shall be conducted as may be prescribed by the state superintendent. It is also provided that nothing in the act contained shall be so construed as to interfere with religious instruction in any private, denominational or parochial school. * * * The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual. * * * Neither the Constitution of the state nor the Fourteenth amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. '* * * it surely is not an arbitrary exercise of the functions of the state to insist' that the fundamental basis of the education of its citizens shall be a knowledge of the language, history and nature of the government of the United States, and to prohibit anything which may interfere with such education."

It is apparent that this case includes appropriate language which sustains the defendants' contention that the statutes here involved are not arbitrary, unreasonable, or an invalid attempt to exercise the police power of the state.

The plaintiffs cite Meyer v. State, 107 Neb. 657, 187 N. W. 100, where it was held: "The statute (Laws 1919, ch. 249) prohibiting the teaching of foreign languages in

schools to children before they have passed the eighth grade, held, a reasonable exercise of the police power of the state." In this action the defendant Meyer was charged with the violation of chapter 249, Laws 1919, commonly known as the Siman language law. He was found guilty and fined $25. From such judgment he appealed to this court where the judgment of the trial court was affirmed. Appeal was taken to the Supreme Court of the United States.

In Meyer v. State of Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446, it was held that forbidding the teaching in school of any other than the English language until the pupil has passed the eighth grade violates the guaranty of liberty in the Fourteenth Amendment to the federal Constitution, in the absence of sudden emergency rendering knowledge of the foreign language clearly harmful. The court further said: "The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned." In other words, the Supreme Court of the United States reversed this court's holding in Meyer v. State, *supra*.

The plaintiffs cite Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468. The Oregon Compulsory Education Act required every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years of age to send him to a public school for the period of time a public school should be held during the current year in the district where the child resided, and failure to do so was declared a misdemeanor. The manifest purpose was to compel general attendance at public schools by normal children between the ages of 8 and 16 years who had not completed the eighth grade. The Society of Sisters was an Oregon corporation with the power to care for orphans, educate and instruct the youth, and establish and maintain academies and schools. It had

long devoted its property and efforts to the secular and religious education and care of children, and had acquired valuable good will of many parents and guardians. In its primary schools many children between 8 and 16 years of age were taught the subjects usually pursued in Oregon public schools during the first 8 years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church were also regularly provided. The Society alleged that the enactment of the Compulsory Education Act conflicted with the right of parents to choose schools where their children would receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, and the right of schools and teachers therein to engage in a useful business or profession, and was accordingly repugnant to the Constitution and void. No question was raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils, to require that all children of proper age attend some school, that teachers should be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which was manifestly inimical to the public welfare. The United States Supreme Court ruled on the statute to abolish all schools other than public schools. This is not true in the State of Nebraska, and this case has little bearing on the questions involved in the instant case. It is noted that the language used in the above case relating to the right of the state to inspect and supervise all schools and to provide for the qualifications of teachers indicates clearly that such language corresponds to the statutes set forth above in the instant case.

The plaintiffs cite State ex rel. Chalfin v. Glick, 172 Ohio St. 249, 175 N. E. 2d 68, a decision of the Supreme Court of Ohio which preceded the decision by the Court of Appeals of Ohio which appears in 177 N. E. 2d 293.

We will take up the latter case first. In such case the relators, for their cause of action against the respondents, stated that the respondents, in their respective capacities as school authorities, teachers, and parents, were in charge of and responsible for the operation of private schools for the education of children of compulsory school age whose parents were of the Mennonite or Old Order of Amish faith; and that they failed, neglected, and refused to provide instruction to the youth of their county attending such schools of the kind, amount, for the length of time, both as to school year and age of pupils, of the character of instruction in accordance with the minimum standards of education required by the laws of Ohio and the regulations of the board of education of the State of Ohio pursuant thereto and refused to permit the children to attend the public schools of the district. The court said: "The first and controlling question for determination by the court is whether upon the state of facts revealed by the record a court of equity has jurisdiction to enjoin the respondents from continuing to operate the schools complained of and to send their children of compulsory school age to such schools. The basis for relator's claim for equitable relief by way of injunction, is that the respondents are maintaining a public nuisance for which there is no adequate remedy at law. * * * The legal right of the respondents to operate a nontax supported private school is not and can not be questioned, nor can it be questioned that the Constitution protects the respondents in their right to worship God according to the dictates of their own conscience and to teach in their church and in their schools the tenets of their faith. To constitute a nuisance, either public or private, the thing or act complained of as constituting a nuisance must either cause injury to the property of another, obstruct the reasonable use or enjoyment of his property or cause physical discomfort to him. * * * It is difficult to see how the operation of the nontax supported Amish

school or the attendance of the children of that faith in such school can in any way cause injury to the public nor can it be said the operation of such school injuriously affects the health, safety or morals of the public or works any injury to the public. * * * The violation of law in the instant case, if any, is not the *operation of the schools* under attack, nor in the *subjects taught* therein, nor the attendance of the children of respondents at *such school,* but the failure of the respondent parents to send their children to a school which *meets the standards of education* required by the compulsory education laws of the state. In a proper action this failure by the parents subjects them to the penalties provided for violation of the compulsory education and attendance laws of the state. * * * This decision is limited to the precise question of the jurisdiction of a court of equity to grant relief upon the record presented. This decision should not be construed in any way as upholding the right of the respondent parents to refuse to send their children to a school which meets the compulsory educational laws of the state, or as relieving them from compliance with such laws." The court held: "Injunction will not lie to prohibit an alleged violation of law by parents who fail to send their children to a school which meets the minimum standards of education required by law."

The case simply held that the wrong remedy was pursued. The Supreme Court of Ohio affirmed the decision of the Court of Appeals. The Supreme Court held that a refusal to enjoin the operation of the schools did not amount to an abuse of discretion since no statutory authority for an injunction was found.

What the defendants contend for in the instant action is that they do not deny that the plaintiffs may tutor their children, nor deny the right of the parents of such children to send them to a school for religious training. What the defendants do deny is the right of the parents to tutor their children in lieu of sending them to school,

and also deny the right of parents to send their children to a school operated by an unqualified teacher in lieu of sending them to a proper school. As indicated by the statutes heretofore set out, they are clear concerning the qualifications necessary to teach the children in the State of Nebraska in any school, be it parochial, denominational, private, or public.

The authorities cited by the plaintiffs have to do primarily with the teaching of foreign language in parochial, private, or denominational schools. It is true that the authorities cited by the plaintiffs do hold that such teaching, under certain circumstances, is unconstitutional. However, in the instant case we are primarily concerned with the qualifications of a teacher employed to teach in the alleged school provided for by the plaintiffs. It is obvious that no attempt was made by the plaintiffs to employ a teacher meeting the qualifications prescribed by statute to teach in any school in this state. The amended petition does not allege that the teacher proposed to be hired by the plaintiffs has ever made application for a certificate to teach in this state.

As we view the statutes here involved, there is nothing arbitrary, unreasonable, or unconstitutional relating to the qualifications of teachers to teach in the parochial, denominational, private, or public schools of this state or with the requirements of compulsory education and attendance at such schools. Parochial, denominational, and private schools in this state have met the requirements of the statutes and have abided by them.

This brings us to certain cases cited by the defendants.

In Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A. 2d 134, the public school code of March 10, 1949, required every parent of any child of compulsory school age to send such child to a day school in which the subjects prescribed by the State Council of Education were taught. It was held that such requirements did not violate the provisions of the state and federal Constitu-

tions guaranteeing freedom of religion, as applied to members of the Old Order Amish Church. Defendants were convicted for violating the compulsory attendance provisions of the public school code. The court said: "We analyzed this question in Com. ex rel. v. Bey, 166 Pa. Superior Ct. 136, 140, 70 A. 2d 693, where, after reviewing numerous cases, we held: 'In short, parents have no constitutional right to deprive their children of the blessings of education or prevent the state from assuring children adequate preparation for the independent and intelligent exercise of their privileges and obligations as citizens in a free democracy.' To that conclusion we adhere. Its major premise is that there is no interference with religious liberty where the State reasonably restricts parental control, or compels parents to perform their natural and civic obligations to educate their children. They may be educated in the public schools, in private or denominational schools, or by approved tutors; but educated they must be within the age limits and in the subjects prescribed by law. The life of the Commonwealth—its safety, its integrity, its independence, its progress,—and the preservation and enhancement of the democratic way of life, depend upon the enlightened intelligence of its citizens. Teachers' Tenure Act Cases, 329 Pa. 213, 197 A. 344. These fundamental objectives are paramount, and they do not collide with the principles of religious or civil liberty. Unless democracy lives religious liberty cannot survive."

In the case of Commonwealth ex rel. School District of Pittsburgh v. Bey, 166 Pa. Super. 136, 70 A. 2d 693, the appellants, husband and wife, were convicted in a summary proceeding before an alderman and on appeal in the court below of violating the compulsory attendance provisions of the school code. The statute required every parent of any child or children of compulsory school age, between the ages of 8 and 17 years, to send such child or children to a day school, and that such child or children should attend such school continuously

through the entire term, provided, that the certificate of any principal or teacher of a private school, or of any institution for the education of children setting forth that the work of said school was in compliance with the provisions of the act, should be sufficient and satisfactory evidence thereof. Regular daily instruction by a properly qualified private tutor should be considered as complying with the provisions of the section if such instruction was satisfactory to the proper county or district superintendent of schools. The court said: "It will be observed that the requirement of compulsory attendance can be satisfied in a 'day school' which may be a public school, 'a private school,' or an 'institution for the instruction of children.' The last two classifications include parochial or denominational schools. Daily instruction by an approved private tutor will also satisfy the statute. * * * '* * * Education is to-day regarded as one of the bulwarks of democratic government. Democracy depends for its very existence upon the enlightened intelligence of its citizens and electors.' * * * 'But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. * * * And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, *the state as parens patriae may restrict the parent's control by requiring school attendance*, * * *.'" It was further said: "* * * parents have no constitutional right to deprive their children of the blessings of education or prevent the state from assuring children adequate preparation for the independent and intelligent exercise of their privileges and obligations as citizens in a free democracy." See, also, Prince v. Commonwealth of Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645.

In the case of State v. Hoyt, 84 N. H. 38, 146 A. 170, it was said: "Prohibition of teaching the German language to children under fourteen, unless they have completed eighth-grade work, was declared to be an in-

fringement of the guaranty of liberty found in the fourteenth amendment to the constitution of the United States. Myer v. Nebraska, 262 U. S. 390; Bartels v. Iowa, 262 U. S. 404, * * *. A statute requiring all children to attend the public school was declared invalid for a like reason. Pierce v. Society, 268 U. S. 510." In these cases the state charged some parents for failure to send their children to a public or private school as required by state law. The parents appealed their conviction upon the grounds that they had a private tutor and that that should satisfy the requirements of the state statutes. The Supreme Court affirmed the conviction of the parents, and reviewed the decisions of Pierce v. Society of Sisters, *supra,* which said that private and parochial schools could not be outlawed, and the case of Meyer v. State of Nebraska, *supra,* which said that a ban on foreign language teaching was not reasonable. The court further said: "While these decisions declare the existence of important restrictions upon state power to compel education, there is nothing in them to indicate that the provisions of our statute offend against the federal guaranty of liberty. Under the interpretation of the guaranty, so far as it has been declared, it appears that attendance at some school may still be required, and that the state may supervise the school attended. The power to supervise necessarily involves the power to reject the unfit, and to make it obligatory to submit to supervision. The local statute does not go beyond these requirements. * * * The state being entitled to supervise education, it is not an answer to a charge of failure to furnish supervised instruction to show that equivalent unsupervised instruction is given. Unless the idea of personal liberty in the matter of educating children, recently developed in the federal decisions, is to be carried to the extreme of saying that the sole obligation that can be imposed upon the parent is to educate, a provision that approval of the parent's method must be obtained by him is not invalid."

The case of People v. Turner, 121 Cal. App. 2d 861, 263 P. 2d 685, concerned the conviction of adults for failure to send three children to public school. The California Supreme Court affirmed the conviction and decided that the state's compulsory education law did not unconstitutionally deprive parents of the right to determine how and where their children should be educated. The California statute provides that a tutor may be hired to teach children at least 3 hours a day, between the hours of 8 a.m. and 4 p.m., for 170 days each calendar year. The tutor, however, must hold a valid state teaching credential for the grade actually being taught. The court pointed out that at the time of its decision only 11 of 48 states permitted home instruction by parents or tutors and that except in two states the home instruction was specifically regulated in areas such as qualifications of the tutor and hours instructed.

In the instant case the right to send a child to a private school is not in dispute.

The above-cited statutes set up a standard for a good education. They allow churches and private groups to establish schools on the same basis. They require each child to be exposed to a school a certain number of months. Private and parochial schools are a part of the educational system of this state.

None of the cited cases disclose any statutes similar to those here involved to be arbitrary, unreasonable, or unconstitutional.

The right of religious freedom is not involved in this case. The defendants do not deny these plaintiffs have the right to worship God as their consciences dictate as provided for under the Constitutions of the United States and of this state. What the defendants insist upon is a qualified teacher under reasonable statutes providing for such qualifications to teach school. The statutes complained of by the plaintiffs are not arbitrary or unreasonable nor an invalid attempt to exercise the police power of the State, nor are the regula-

tions governing the approval and accreditation of Nebraska nonpublic schools issued by the Nebraska Department of Education.

From a review of the statutes here involved and the authorities relating to this subject matter, we conclude that the judgment of the trial court sustaining the defendants' demurrer should be, and is hereby, affirmed.

AFFIRMED.

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2. In order to create title by adverse possession, the possession, in addition to other elements, must be exclusive for the period of limitations. Oliver v. Thomas ---------- 36
3. One claiming ownership of real estate by adverse possession must recover upon the strength of his own title and not because of a possible weakness in the title of his adversary. Oliver v. Thomas ------ 36
4. The possession is sufficient if the land is used continuously for the purpose to which it may in its nature be adapted. Oliver v. Thomas ---------- 36
5. Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years. Oliver v. Thomas ---------- 36

Appeal and Error.

1. Proper procedure on appeal outlined where trial court granted motion for new trial and gave no reason for its decision. Biggs v. Gotsch ---------- 15
2. On review in the Supreme Court of an order granting a new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. Biggs v. Gotsch ---------- 15
3. Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury. A verdict based thereon will not be disturbed unless clearly wrong. Biggs v. Gotsch ---------- 15
4. Whether a witness' qualifications to state his opinion are sufficiently established rests largely in the discretion of the trial court. Its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse of discretion. Trailmobile, Inc. v. Hardesty ---------- 46

5. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. To entitle the plaintiff to a recovery he must prove by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. Klentz v. Transamerican Freightlines, Inc. ---------- 53

6. Rule for trial de novo in Supreme Court of workmen's compensation case stated. Klentz v. Transamerican Freightlines, Inc. ---------- 53
Wengler v. Grosshans Lumber Co. ---------- 839

7. Where the evidence is in irreconcilable conflict, the Supreme Court will, upon a trial de novo, consider the fact that the trial court observed the demeanor of the witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. Chism v. Convair Mobile Homes, Inc. --- 86
Thinnes v. Kearney Packing Co. ---------- 123
Hagler v. Jensen ---------- 699

8. It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues raised by the pleadings and supported by the evidence. Nebraska Bottled Gas & App. Co. v. Aetna Cas. & Sur. Co. ---------- 146

9. The trial court has the duty to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not. A failure to do so constitutes prejudicial error. Carlson v. Chambers ---------- 166

10. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby. Carlson v. Chambers ---------- 166

11. Statute governing the perfecting of appeals to the Supreme Court provides, among other things, that the appeal shall be taken by filing in the office of the clerk of the district court the notice of intention to appeal within 1 month of the rendition of the judgment or decree, or within 1 month of the overruling of a motion for new trial in the cause. Bebee v. Kriewald ---------- 179

12. The time for appeal does not begin to run from the overruling of the motion for new trial unless the motion itself is filed in time. Bebee v. Kriewald --- 179

13. In an equity action the Supreme Court will, in determining the weight of evidence which is in irreconcilable conflict on a material issue, consider the

fact that the trial court observed the witnesses and their manner of testifying. Lewis v. Gallemore ---- 211
14. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury, and will not be disturbed on appeal unless clearly wrong. Shreve v. Agricultural Products Co. ------ 219
Schuett v. Hargens ---------- 663
15. When a court reporter is unable to prepare and certify a bill of exceptions, it should be prepared under the direction and supervision of the trial judge and should be certified by the judge and delivered to the clerk of the district court. Peterson v. Skiles -- 223
16. By statute, the district court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any proceeding. Ballantyne Co. v. City of Omaha ---------- 229
17. The term "proceeding" as used in the statutes providing for amendment includes filing of an appeal bond, and the right to amend such bond is within the purview of the statute. Ballantyne Co. v. City of Omaha ---------- 229
18. By statute, the district court in every state of an action must disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Ballantyne Co. v. City of Omaha ---------- 229
19. The right to amend an appeal bond is within the purview of the statute providing for amendments of proceedings. Ballantyne Co. v. City of Omaha ----- 229
20. When instructions are tendered which correctly state the law upon an issue involved, refusing them is error unless the points are fairly covered by the instructions given by the court on its own motion. Pierce v. State ---------- 319
21. On an appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
Petroleum Transp. Co. v. All Class I Rail Carriers -- 564
Shanks v. Watson Bros. Van Lines ---------- 829
22. An objection made to the argument of opposing counsel after the jury has retired is not timely and will not be reviewed on appeal. Lemmon v. State -- 387

23. An assignment of error that the court erred in overruling the motion for a new trial is too indefinite where there are several grounds of error set forth in such motion. Lemmon v. State ---------- 387
24. A party who claims error in a proceeding is required to point out the factual and legal basis that shows the error. Lemmon v. State ---------- 387
25. Where a motion to direct a verdict does not state the reasons therefor in accordance with statutory requirements, prejudicial error cannot be predicated thereon where it is not shown that prejudice resulted therefrom. Swink v. Smith ---------- 423
26. An order confirming a sale by a receiver is a final order from which an appeal can be taken. Lewis v. Gallemore ---------- 441
27. An order which is ministerial in nature and is made solely for the purpose of carrying out a previous order, and does not involve any new matter upon which any party is entitled to be heard, is not a final order from which an appeal can be taken. Lewis v. Gallemore ---------- 441
28. An order overruling a motion to reconsider a previous order, which was not a final order from which an appeal could have been taken, is not appealable. Lewis v. Gallemore ---------- 441
29. Where the evidence on the issue of negligence is in conflict, the question is one for the jury. The Supreme Court, on appeal in such a case, will not resolve conflicts in or weigh evidence. Peterson v. Skiles ---------- 470
30. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion. Peterson v. Skiles ---------- 470
31. An appeal from a finding and adjudication of the district court that a child is neglected or dependent is disposed of in the Supreme Court by trial de novo upon the record. State v. Best ---------- 483
State v. Gross ---------- 536
32. 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. State v. Best ---------- 483
33. An order of the district court requiring a petition to be made more definite and certain will be sustained

on appeal unless it clearly appears that the court abused its discretion. Rhodes v. Crites ---------- 501
34. In an action at law where the evidence is in conflict on a material matter, the verdict of a jury thereon will not be disturbed unless it is clearly wrong. Schuetz v. City Wide Rock & Excavating Co. ---------- 516
35. A party on appeal may not properly assign the admission of evidence as error when no objection was made thereto on the trial. Kehr v. Kehr ---------- 532
36. A trial court may properly direct the inclusion of all matters in a bill of exceptions which it had before it and which it considered, although such matters were not formally received. Kehr v. Kehr -------- 532
37. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. Graber v. Scheer ---------- 552
Hagler v. Jensen ---------- 699
Wengler v. Grosshans Lumber Co. ---------- 839
38. Where an order of the railway commission is reversed by the Supreme Court for lack of findings and at the time of receiving the mandate the commission has before it sufficient evidence on which to base findings that will sustain its decision, it may do so without notice or hearing. Petroleum Transp. Co. v. All Class I Rail Carriers ---------- 564
39. The granting or refusing of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. Rains v. State ---- 586
40. A party against whom a judgment is rendered cannot complain upon appeal of the rendition of a judgment against another party who has failed to appeal. Industrial Loan & Inv. Co. v. Lowe ---------- 624
41. Where an instruction is so framed as to mislead the jury into a duplication of an element of recovery, or into an award of damages twice for the same loss, such instruction is prejudically erroneous. McCarty v. Morrow ---------- 643
42. The overruling of a motion for summary judgment is not an adjudication of the substantive rights of a party and is not a final and appealable order. Pressey v. State ---------- 652
43. Manner of review by Supreme Court of law action stated. Schuett v. Hargens ---------- 663
44. Rule as to sufficiency of evidence to sustain a judg-

ment in a law action where a jury is waived stated. Schuett v. Hargens ---------- 663

45. 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. Ehlers v. Church of God in Christ, Inc. ---------- 670

46. The mode and manner of appeal is statutory. A litigant who complies with the requirements of the applicable statute is entitled to a review of his case to the extent of the scope provided by law. Harms v. County Board of Supervisors ---------- 687

47. The failure of a statute to provide any procedural method for lodging jurisdiction in the district court defeats the right of appeal mentioned therein. Harms v. County Board of Supervisors ---------- 687

48. A petition in error in a district court to test the validity of a final order of an inferior tribunal is an independent proceeding the object of which is to obtain a reversal of the order presented for review. Harms v. County Board of Supervisors ---------- 687

49. An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law. Harms v. County Board of Supervisors ---------- 687

50. If a district court was without jurisdiction of the subject matter of litigation, the Supreme Court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court. Harms v. County Board of Supervisors ---------- 687

51. Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto. The absence of such jurisdiction may be asserted at any time during the pendency of the litigation. Harms v. County Board of Supervisors ---------- 687

52. In proceedings under statute authorizing error proceedings, it is mandatory that a petition in error and the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter. Harms v. County Board of Supervisors ---------- 687

53. During the pendency of a motion for new trial timely filed, no appealable order is rendered until the motion for new trial is disposed of. Morgan v. Weiner ---------- 715

54. The discretion of the district court upon a motion to set aside a default judgment is a legal one, and in the absence of a showing of an abuse of discretion, the Supreme Court will not interfere. Morgan v. Weiner ---------- 715
55. The facts and circumstances in each case, as shown by the record, determine whether there has been an abuse of discretion. Morgan v. Weiner ---------- 715
56. A party who, after appealing from a judgment in his favor, voluntarily accepts the benefits or receives the advantage of the judgment is thereby precluded from afterward prosecuting his appeal. McCook Livestock Exchange Co. v. State ---------- 766
57. Effect of receipt of full amount of condemnation award in eminent domain proceedings stated. McCook Livestock Exchange Co. v. State ---------- 766
58. Ordinarily error is waived if after a party has adduced objectionable evidence the opposing party adduces on direct or cross-examination evidence on the same subject. Johnson v. Airport Authority ------ 801
59. In the exercise of the power of eminent domain, an award of damages will not be disturbed on appeal if it is supported by evidence bearing a reasonable relationship to the elements of injury. Johnson v. Airport Authority ---------- 801
60. Courts should review or interfere with administrative and legislative action of the railway commission only so far as necessary to keep it within its jurisdiction and protect legal and constitutional rights. Shanks v. Watson Bros. Van Lines -------- 829
61. It is not the province of the Supreme Court to resolve conflicts in the evidence in law actions, to pass on the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence. State v. Kimbrough ---------- 873
62. An appeal lodged in the Supreme Court from a decree rendered in a divorce action is tried de novo on the record. Jones v. Jones ---------- 880

Assignments.

An assignment of a contract or a right flowing therefrom does not create a contractual obligation between the assignee and the other party to the contract in the absence of assumption of the liabilities of the assignor by the assignee. Industrial Loan & Inv. Co. v. Lowe ---------- 624

Attorney and Client.

1. It is against sound principles of professional ethics for one who knows he is to be called as a material witness in a case to appear as attorney therein. Muse v. Stewart ---------- 520
2. Even though an attorney is representing himself in a representative capacity, he should not appear both as an attorney and as a witness. Muse v. Stewart -- 520

Automobiles.

1. A motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign protecting the arterial has been broken off and he could not be expected to be aware of its presence. Hammon v. Brazda ---------- 1
2. Ordinarily a guest passenger in an automobile has the right to assume the driver thereof is a reasonably safe and careful driver. A duty to warn the driver does not arise until some fact or situation out of the usual or ordinary is presented. Hammon v. Brazda ---------- 1
3. Where the negligence of the driver of an automobile in which a person is riding as a guest is the sole proximate cause of a collision in which the guest is injured, the guest cannot recover for such injury from a third person. Hammon v. Brazda ---------- 1
4. Where injuries are the result of the negligent acts of the driver of the plaintiff's automobile and the driver of another automobile involved in the collision, either or both tort-feasors may be held for the entire damages. Hammon v. Brazda ---------- 1
5. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so. Biggs v. Gotsch ---- 15
6. Where the driver of a motor vehicle approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of

whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury. Biggs v. Gotsch ---------- 15
7. By statute, the term "trailer" includes every vehicle without motor power carrying persons or property and being pulled by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle. Ashton v. State ---------- 78
8. By statute, the term "truck-tractor" means every motor vehicle designed and used primarily for drawing other vehicles, and not so constructed as to carry a load other than a part of the weight of the vehicle and load being drawn. Ashton v. State -- 78
9. By statute, where a trailer or semitrailer has been duly registered in any jurisdiction, no registration or license fee therefor shall be required in this state when such trailer or semitrailer is operated in combination with any truck or truck-tractor properly licensed or registered in accordance with reciprocity statute or agreements, arrangements, or declarations pursuant to the statute. Ashton v. State ---------- 78
10. Where a combination of a trailer duly licensed in the State of Iowa and a tractor duly licensed in the State of Michigan are involved in interstate commerce passing through the State of Nebraska, no Nebraska license plates are required to be purchased. Ashton v. State ---------- 78
11. The failure of a motor vehicle dealer to keep a promise to do an act in the future does not amount to fraud within the provisions of Motor Vehicle Dealers Act, in the absence of a showing that the dealer's promise was not made in good faith. Sterner v. Lehmanowsky ---------- 401
12. An automobile with a flat tire, being driven on a public road, is a disabled automobile within the purview of applicable statute. Peterson v. Skiles ----- 470
13. It is the duty of a driver of a disabled automobile to take all reasonable precautions to protect the traveling public from injury by removing it from the main traveled portion of the road when it is practicable to do so. Peterson v. Skiles ---------- 470
14. When it is impractical to remove a disabled automobile from a public highway it is the duty of its driver to get it as nearly off the road as circumstances will reasonably permit, and whether or not the driver has done so is ordinarily a question for the jury. Peterson v. Skiles ---------- 470

15. Where the evidence is undisputed that a disabled automobile was stopped as far off the highway as the circumstances would reasonably permit, the trial court may properly find a want of negligence as a matter of law. Peterson v. Skiles ---------- 470
16. It is a violation of statute to stop an automobile beside any vehicle on the roadway, and such violation is evidence of negligence. Peterson v. Skiles -- 470
17. The words "park" or "leave standing" contained in statute relating to motor vehicles mean something more than mere temporary stops on the road which are incident to travel. Peterson v. Skiles --- 470
18. In a negligence action by a guest in one automobile against the driver of a second automobile, the guest may not recover where the negligence of the host driver is the sole proximate cause of the accident. Peterson v. Skiles ---------- 470
19. If the negligence of the defendant and the host driver combine to produce a single injury, they are jointly and severally liable to a passenger for the injury so proximately caused, irrespective of the degree of negligent participation. Peterson v. Skiles -- 470
20. A pedestrian has equal rights with the operator of a vehicle in the use of public highways, and each must use reasonable care for his own safety and the safety of others. McCarty v. Morrow -------- 643
21. Where a pedestrian is walking at night on the left-hand side of a highway and is struck by a vehicle approaching from the rear, it is for the jury to determine if the operator of the vehicle was negligent in not seeing the pedestrian in time to avoid an accident. McCarty v. Morrow ---------- 643
22. A pedestrian has the right to assume that the driver of a vehicle approaching from the rear will exercise ordinary care in keeping a lookout for him and others using the highway. McCarty v. Morrow ---- 643
23. A pedestrian walking along the left side of a highway is not guilty of contributory negligence in failing to look back to observe the approach of vehicles from the rear, or in failing to anticipate the negligence of the driver of a vehicle approaching from that direction. McCarty v. Morrow ------ 643
24. The test of a joint enterprise between the driver of a motor vehicle and another is whether they were jointly operating and controlling the movements of the vehicle in a common purpose or had an aqual right to do so. McCarty v. Morrow ---------- 643

25. Substance of motor vehicle guest statute stated. Robinson v. Hammes ---------- 692
26. In an action under the motor vehicle guest statute, there must be evidence of negligence in a very high degree to justify submission of the case to a jury. Robinson v. Hammes ---------- 692
27. Gross negligence, within the meaning of the motor vehicle guest statute, is negligence in a very high degree, or the absence of even slight care in the performance of a duty. Robinson v. Hammes ---------- 692
28. When one, being in a place of safety, sees or should 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 in failing to keep a proper lookout constitutes contributory negligence more than slight in degree as a matter of law and precludes a recovery. Johns v. Glidden ---------- 732
29. The revocation of a driver's license upon a conviction for operating a motor vehicle while under the influence of intoxicating liquor is an incidental consequence and is not to be considered as punishment for the offense. State v. Amick ---------- 770
30. Special statute confers the right of a driver of an emergency automobile to exceed the speed limits imposed by statute. This exemption does not protect the driver of such emergency automobile from the consequences of a reckless disregard for the safety of other drivers using the highway. Hammon v. Pedigo ---------- 787
31. Special statute grants the right-of-way to the driver of an emergency automobile on official business, and the right-of-way over other drivers using the highway. Such driver of an emergency automobile is not relieved from the responsibility of driving with due regard for the safety of all persons using the highway, nor will it protect him from the consequences of arbitrarily exercising such right-of-way. Hammon v. Pedigo ---------- 787
32. The right to operate a motor vehicle after the suspension of a license is not restored by mere lapse of time, but it depends upon the receipt of a new license. Tyrrell v. State ---------- 859

Aviation.

1. Generally an avigation easement is an easement of right to the navigation of airspace over designated

land and to the use of land as an incident to air navigation. Johnson v. Airport Authority ---------- 801

2. Navigation of aircraft above established avigation easement limits does not furnish the basis for a cause of action. Johnson v. Airport Authority ---- 801

3. Damage to land caused by navigation within an established avigation easement taken by condemnation is properly chargeable as damages to the taker of the easement. Johnson v. Airport Authority ---- 801

4. The minimum topmost height of an avigation easement is the minimum safe altitude which is fixed in the Civil Air Regulations under authority of the Civil Aeronautics Board. Johnson v. Airport Authority ---------- 801

5. The minimum safe altitude under the prescribed regulations, for the purposes of this case, is 500 feet. Johnson v. Airport Authority ---------- 801

6. Under the regulations and the taking proposed, the airspace between a distance of 26 feet above the land and 500 feet above the ground constituted the avigation easement. Johnson v. Airport Authority ---- 801

7. Navigable airspace means airspace above minimum altitudes of flight prescribed by the regulations, including airspace needed to insure safety in takeoff and landing of aircraft. Johnson v. Airport Authority ---------- 801

8. The taking of real property in the establishment of an avigation easement which reduces the value of that to which the easement attaches entitles the owner to damages in the amount of the difference in value before and after the taking. Johnson v. Airport Authority ---------- 801

9. The damage contemplated by the taking of an avigation easement is that which flows from activity in the easement area up to the navigable airspace. Johnson v. Airport Authority ---------- 801

10. Damage caused by condemnation of an incorporeal as well as a corporeal avigation easement is a taking within the meaning of the Fifth Amendment to the United States Constitution. Johnson v. Airport Authority ---------- 801

11. Under the Constitution of Nebraska, if an avigation easement is taken by condemnation the taker is required to compensate for the taking and the damaging. Johnson v. Airport Authority ---------- 801

Banks and Banking.

1. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. Anschutz v. Central Nat. Bank ---------- 60
2. A drawee bank which unwittingly pays a check to a subsequent endorser where the endorsement of the payee was previously forged is not liable in an action by the payee either on contract or for money had and received or for conversion. Anschutz v. Central Nat. Bank ---------- 60

Bills and Notes.

1. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. Anschutz v. Central Nat. Bank ---------- 60
2. The acceptance of a bill of exchange is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. Anschutz v. Central Nat. Bank ---------- 60
3. Under the Uniform Negotiable Instruments Law requiring acceptances to be in writing, an unauthorized payment of a check by the drawee bank on a forged endorsement will not constitute an acceptance. Anschutz v. Central Nat. Bank ---------- 60
4. A drawee bank which unwittingly pays a check to a subsequent endorser where the endorsement of the payee was previously forged is not liable in an action by the payee either on contract or for money had and received or for conversion. Anschutz v. Central Nat. Bank ---------- 60
5. Though the language of a note executed by an authorized agent of a corporation imports a personal obligation, it may be shown by parol evidence on the issue of reformation, except as to a holder in due course, that the intention of both the maker and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their own true purpose. Lincoln Equipment Co. v. Eveland ---------- 174

6. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof the terms of the instrument must stand as evidencing the intention of the parties. Lincoln Equipment Co. v. Eveland -- 174
7. Where a negotiable instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument. Schuett v. Hargens ---------- 663
8. A promissory note in the usual commercial form is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence. Schuett v. Hargens ---------- 663

Brokers.

1. The duties and liabilities of a broker to his employer are essentially those which an agent owes to his principal. Schepers v. Lautenschlager ---------- 107
2. A broker owes to his employer the duty of good faith and loyalty, and is required to use such skill as is necessary to accomplish the object of his employment. Schepers v. Lautenschlager ---------- 107
3. It is a broker's duty to give his client the fullest information concerning his transactions and dealings in relation to the property with reference to which he is employed. Schepers v. Lautenschlager ------ 107
4. A broker is a fiduciary required to exercise fidelity and good faith toward his principal in all matters within the scope of his employment. Schepers v. Lautenschlager ---------- 107
5. The status of a broker as a fiduciary not only forbids conduct on his part which is fraudulent or adverse to his client's interests, but also imposes upon him the positive duty of communicating all information he may possess or acquire which is, or may be, material to his employer's advantage. Schepers v. Lautenschlager ---------- 107
6. Requirements of rule requiring broker to use utmost good faith stated. Schepers v. Lautenschlager 107
7. Duty of broker employed to sell property at a specified price stated. Schepers v. Lautenschlager ---- 107

Burglary.

Evidence that a burglary was committed, together with evidence that some of the property stolen in the burglary was discovered in the possession of the de-

fendant, is not alone sufficient to make a prima facie case of burglary. Henggler v. State 171

Cemeteries.

1. The most advantageous and best use of unoccupied lands which are an integral part of an existing cemetery ordinarily is its use for cemetery purposes. Graceland Park Cemetery Co. v. City of Omaha 608
2. A cemetery is a type of property having no market value. In determining the value of such property the fair market value rule has no application for the reason that cemeteries are not bought and sold on an open market. Graceland Park Cemetery Co. v. City if Omaha 608
3. The number of grave sites taken, multiplied by the sale price of a single grave site, affords no reasonable basis for fixing the value of the land taken by condemnation from a cemetery. Graceland Park Cemetery Co. v. City of Omaha 608
4. The value of cemetery land taken by condemnation may be established by a unit-price method. The unit price in such case is based on the average sale price of grave sites in the used portion of the cemetery, less the reasonable cost of development, sales, maintenance, administration, perpetual care, and any other expense affecting its value. Graceland Park Cemetery Co. v. City of Omaha 608
5. The amount arrived at by applying the net unit price to the number of grave sites actually taken should be reduced to present worth for the projected period in which the grave sites will be sold. Graceland Park Cemetery Co. v. City of Omaha 608

Commerce.

Where a combination of a trailer duly licensed in the State of Iowa and a tractor duly licensed in the State of Michigan are involved in interstate commerce passing through the State of Nebraska, no Nebraska license plates are required to be purchased. Ashton v. State 78

Constitutional Law.

1. The Constitution of this state provides that the general management of all lands and funds set apart for educational purposes, and for the investment of school funds, shall be vested, under the direction of the Legislature, in a board of five members to be

known as the Board of Educational Lands and Funds. State v. Kidder ---------- 130
2. Though the Supreme Court may question the wisdom of a given enactment as a matter of policy, that gives it no right to strike the enactment down if it violates no provision of the fundamental law. State ex rel. Meyer v. County of Lancaster ---------- 195
3. The Constitution does not require that the title of an act be a synopsis of the law. State ex rel. Meyer v. County of Lancaster ---------- 195
4. The provisions of the Constitution relating to title are to be so liberally construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title. State ex rel. Meyer v. County of Lancaster ---------- 195
5. The Constitution is not a grant but rather is a restriction on legislative power. The Legislature may legislate upon any subject not inhibited by the Constitution. State ex rel. Meyer v. County of Lancaster ---------- 195
6. The words "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. Leffelman v. City of Hartington ---------- 259
7. Under the Constitution, taxes must be levied by valuation uniformly and proportionately upon all tangible property. State ex rel. Meyer v. Story ---- 741
8. The rule of uniformity in taxation prescribed by the Constitution inhibits the Legislature from discriminating between taxpayers in any manner whatever. State ex rel. Meyer v. Story ---------- 741
9. The Legislature does not have the power to release or discharge a tax, such action being prohibited by the Constitution. State ex rel. Meyer v. Story ---- 741
10. Amendatory act authorizing imposition of ad valorem tax on motor vehicle dealers was unconstitutional. State ex rel. Meyer v. Story ---------- 741
11. The purpose of Article I, section 6, Constitution of Nebraska, was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted. State v. Amick ---------- 770

12. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury. This is so even if the ordinance is a reiteration of a statute covering the same offense under which the defendant would be entitled to a jury trial. State v. Amick ---------- 770
13. The statutes set forth in the opinion, complained about by the plaintiffs as being unconstitutional, held not to violate the First Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, or Article I, section 4, of the Constitution of the State of Nebraska. Meyerkorth v. State ---------- 889

Continuances.

Affidavits of parties for the continuance of the trial in order to produce the testimony of absent and distant witnesses must allege facts and circumstances to be given in evidence from which legal conclusions, constituting a cause of action or defense, may be drawn. State v. Russell ---------- 882

Contracts.

1. The practical interpretation given contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction. Lewis v. Gallemore ---- 211
2. The burden of proof is upon the claimant seeking compensation for services rendered during the lifetime of a deceased person to prove an agreement express or implied to pay for the services. Hilligas v. Farr ---------- 735
3. Where a family relationship exists between the deceased and the claimant, in order to make a prima facie case claimant is required to rebut by competent evidence the presumption that the services were rendered gratuitously. Hilligas v. Farr ---- 735
4. Evidence to establish a contract must show something more than a mere possibility, guess, or conjecture. Hilligas v. Farr ---------- 735
5. Where one renders personal service to another merely upon the expectation of a legacy, unless there is a contract obligation, the claimant takes his

chance of receiving the legacy, and, if his expectations are disappointed, he can recover nothing. Hilligas v. Farr ---------- 735

Conversion.

All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted. Schepers v. Lautenschlager ---------- 107

Corporations.

Rule as to ratification of unauthorized acts of an officer of a corporation stated. McCook Livestock Exchange Co. v. State ---------- 766

Courts.

1. The courts will not entertain and render decrees which, for want of necessary parties, cannot fully adjudicate the questions presented. Marsh v. Marsh 282
2. The question of want of jurisdiction, in case a purported judgment is under attack, is one which the court may raise on its own motion. Marsh v. Marsh 282
3. It is the duty of courts to protect the neglected rights of parties represented by a guardian ad litem regardless of the conduct of the guardian. Marsh v. Marsh ---------- 282
4. Procedure upon filing of a complaint under the Juvenile Court Act outlined. State v. Best ---------- 483
5. Statutory procedure for retention of custody of neglected or dependent child with parents, subject to visitation of probation officer, outlined. State v. Best ---------- 483
6. By statute, all courts and their offices may be open for business on Saturdays, Sundays, and holidays in the discretion of the judges of such courts. Rhodes v. Star Herald Printing Co. ---------- 496
7. Statute with respect to computation of time removed the specific prohibition against courts being open on certain named days. The matter now is left to the discretion of the court as to whether said court will be open on Saturdays to hear such matters as might come before it. Rhodes v. Crites ---------- 501
8. The right of a court to enforce its lawful orders is inherent in the power of the court. Pressey v. State ---------- 652

9. To warrant dismissal for failure to obey a court order, that order must be within the power of the court to enter. Pressey v. State ---------- 652

Criminal Law.

1. Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. Henggler v. State ---------- 171
2. A common purpose among two or more persons to commit a crime need not be shown by positive evidence but may be inferred from the circumstances surrounding the act and from defendant's conduct subsequent thereto. Miller v. State ---------- 268
3. Participation in criminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed. Miller v. State 268
4. Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining. Miller v. State ---------- 268
   Rains v. State ---------- 586
5. In the absence of a request, the trial court is not required to give a cautionary instruction. Miller v. State ---------- 268
6. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered in the Supreme Court unless such ruling is first challenged in the district court by motion for a new trial. Miller v. State ---------- 268
7. Unexplained silence in the face of an accusation may support an inference of guilt. Where, on being accused of crime, with full liberty to speak, one remains silent, his failure to reply or to deny is admissible in evidence as an admission by silence. Pierce v. State ---------- 319
8. An accused is not required to anticipate the nature of an accusation against him, and his silence when he fails to do so cannot be considered as an admission against him. Pierce v. State ---------- 319
9. Statements by third persons which are not made in

accused's presence, and which are not declarations of a coconspirator nor part of the res gestae, are generally not admissible. Pierce v. State ---------- 319
10. It is the purpose of the Supreme Court to protect and not to encourage the violation of a defendant's rights. The court does not intend to speculate on whether prejudice has resulted where those rights are violated. Pierce v. State ---------- 319
11. A conviction may rest on the uncorroborated testimony of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. Rains v. State ---------- 586
12. By statute, a person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition, if a proper showing is made to the trial court for the taking of such deposition. Rains v. State ---------- 586
13. Objection that the prosecuting attorney is guilty of misconduct at the trial prejudicial to defendant must be taken at the time. It is primarily a question for the trial court. Rains v. State ---------- 586
14. Where the charge to the jury considered as a whole correctly states the law, the verdict and judgment will not be reversed merely because a single instruction, when considered separately, is incomplete. Rains v. State ---------- 586
15. If an act be an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state and the municipality, and both may punish it without infringing any constitutional right. State v. Amick -- 770
16. Certain language quoted from opinion in McLaughlin v. State, 123 Neb. 861, 244 N. W. 799, is disapproved as a rule of law in this state. State v. Amick 770
17. To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged. Tyrrell v. State ---------- 859
18. Effect of introduction of further evidence after denial of motion for directed verdict at close of state's evidence stated. State v. Kimbrough ------ 873

19. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon the evidence unless it is so lacking in probative force that the court can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Kimbrough ---------- 873

20. The question whether there existed in the mind of the defendant an apprehension based upon reasonable grounds of imminent peril and whether the means adopted for his defense were reasonable in view of the circumstances is a question of fact of which the jurors are the sole judges. State v. Kimbrough ---------- 873

21. It is the general rule that a reasonable time for the preparation of a defendant's case must be allowed in a felony case between the time of the appointment of counsel by the court for an indigent defendant and the date of trial. State v. Russell --- 882

22. Whether or not an objection that a sufficient length of time has not been allowed between the appointment of counsel by the court for an indigent defendant and the trial may properly be sustained depends upon the surrounding proved facts and circumstances. State v. Russell ---------- 882

23. Affidavits of parties for the continuance of the trial in order to produce the testimony of absent and distant witnesses must allege facts and circumstances to be given in evidence from which legal conclusions, constituting a cause of action or defense, may be drawn. State v. Russell ---------- 882

Damages.

1. An instruction in a personal injury action that plaintiff should be compensated for the impairment of his capacity to earn money in the future and also for future loss of time permits a double recovery for the period of time lost, and is erroneous. Singles v. Union P. R. R. Co. ---------- 91

2. In an action for damages for personal injuries, a recovery for impairment of future earning power begins when compensation for future loss of time ends. Singles v. Union P. R. R. Co. ---------- 91

3. In an action for damages it is the duty of the trial court to instruct the jury as to the proper measure of recovery. The tendering of a proper instruction is not a condition precedent to the assignment of an

instruction as erroneous on the measure of damages. Singles v. Union P. R. R. Co. ---------- 91
4. It is the duty of the court in the instructions to fully and fairly inform the jury as to the various items of damage which it should take into consideration in arriving at its verdict, and as to the proper basis upon which the separate items thereof shall be assessed. Nebraska Bottled Gas & App. Co. v. Aetna Cas. & Sur. Co. ---------- 146
5. It is the duty of the trial court without request to instruct the jury as to the proper measure of damages in a personal injury action. McCarty v. Morrow 643
6. In the exercise of the power of eminent domain, an award of damages will not be disturbed on appeal if it is supported by evidence bearing a reasonable relationship to the elements of injury. Johnson v. Airport Authority ---------- 801

Death.

The burden of proof is on one asserting death due to other than natural causes to establish such fact by a preponderance of the evidence. Marasco v. Fitzpatrick ---------- 272

Declaratory Judgments.

1. The statute authorizing a declaratory judgment is applicable only where all interested persons are made parties to the proceeding. Marsh v. Marsh --- 282
2. The courts should ordinarily dismiss a declaratory judgments action without prejudice when all parties whose claims gave rise to the controversy and whose rights would be adjudicated by the declaration sought, had they been parties to the action, have not been impleaded. Marsh v. Marsh ---------- 282

Deeds.

1. A conveyance of land subject to a mortgage conveys only an equity of redemption, the interest remaining after the mortgage has been paid. Satterfield v. Peterson ---------- 618
2. Where an owner of land has conveyed his property by deed, he cannot subsequently divest the title of the grantee by withdrawing or destroying the deed, or by other acts indicating a subsequent change of intention. Kramer v. Dorsch ---------- 869
3. Where a deed is delivered to the grantee by the grantor it immediately becomes operative as a con-

veyance, if such was the intention of the parties, even though the instrument was not to be recorded until some time in the future. Kramer v. Dorsch ... 869

4. A grantee who voluntarily redelivers or consents to the destruction of a deed with the intention of thereby reconveying the title may be estopped from claiming title under such deed. Where there is no evidence of any such intention an estoppel may not be asserted. Kramer v. Dorsch ... 869

Divorce.

1. A decree of divorce may not be granted upon the uncorroborated testimony of one of the parties. Rahn v. Rahn ... 249
2. Rule for determination of alimony in divorce case stated. Rahn v. Rahn ... 249
   Safar v. Safar ... 292
   Jablonski v. Jablonski ... 544
3. In making an award of alimony or division of property in an action for divorce, the court may assign both real and personal property as the ends of justice may require. Safar v. Safar ... 292
4. In the computation of values of property for the purposes of making an award of alimony or division of property interests, it is not proper to include money or property not shown to be in existence. Safar v. Safar ... 292
5. In a divorce case where the custody of minor children is involved, the custody of the children is to be determined by the best interests of the children, with due regard for the superior rights of fit, proper, and suitable parents. Goodman v. Goodman 330
6. In awarding the custody of minor children the court looks to the best interests of the children, and those of tender age are usually awarded to the mother if she is a fit and proper person to have their custody. Goodman v. Goodman ... 330
7. Courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Goodman v. Goodman ... 330
8. Child support payments which accrue after the filing of a petition to modify the judgment may be canceled. Goodman v. Goodman ... 330
9. After judgment has been entered in a divorce action, a property and alimony settlement made by the par-

ties before judgment is effective only insofar as it is made a part of the judgment. Coker v. Coker -- 361
10. After divorce, a wife is at liberty to establish an independent domicile. Coker v. Coker ---------- 361
11. In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment in a divorce action which has become final can or should be modified. Coker v. Coker -------- 361
12. In a suit for a divorce from bed and board the court has power to adjust the property rights of the parties when the evidence and circumstances require it. Kehr v. Kehr ---------- 532
13. In a divorce action, regardless of who holds the legal title, where the court has jurisdiction of the parties, it has the power and authority to adjust all of their respective property interests and rights. Jablonski v. Jablonski ---------- 544
14. By statute, a divorce action is triable de novo in Supreme Court upon the issues presented by the appeal. Jablonski v. Jablonski ---------- 544
15. In a divorce from bed and board, the property interests of the parties will not be adjusted to a greater extent than necessary to effect a proper separation. Sanford v. Sanford ---------- 835
16. A divorce from bed and board leaves the legal status unchanged in many respects while relieving the parties of the right of cohabitation. The primary purpose is to assure support to the wife during the continuance of the marital relation. Sanford v. Sanford ---------- 835
17. It is not intended that the parties in a suit for a divorce from bed and board have all the benefits of an absolute divorce except the legal dissolution of the marriage contract. Sanford v. Sanford ------ 835
18. An appeal lodged in the Supreme Court from a decree rendered in a divorce action is tried de novo on the record. Jones v. Jones ---------- 880
19. If the circumstances of the parties change, or it is for the best interests of the children, the district court may from time to time on its own motion or on the petition of either parent revise or alter the divorce decree so far as custody, care, and maintenance of the children are concerned. Jones v. Jones ---------- 880
20. A proceeding in a divorce case, with reference to an adjudication of child support, is a continuation of the divorce case and one of its incidents, and an

attorney's fee for services rendered in this court may be allowed and taxed as costs. Jones v. Jones ---- 880

Drains.

An owner of land may, without liability, drain the same in the general course of natural drainage by constructing and maintaining, in a reasonable and proper manner on his own land, open ditches or tile drains which discharge a reasonable quantity of water into a natural drainway or watercourse. Wells v. Miller ---------- 780

Easements.

1. A way of necessity is just what it purports to be, a way arising by implication of law out of the necessities of the case. Hansen v. Smikahl ------ 309
2. Where a conveyance is made of realty separated from the highway by other realty of the grantor, there arises, by implication, in favor of the grantee, a way of necessity across the said premises of the grantor to the highway. Hansen v. Smikahl ------ 309
3. Where there is no evidence of value of an easement taken by condemnation, it is error to submit such issue to the jury, other than to direct a finding of nominal damages. Graceland Park Cemetery Co. v. City of Omaha ---------- 608
4. Generally an avigation easement in an easement of right to the navigation of airspace over designated land and to the use of land as an incident to air navigation. Johnson v. Airport Authority -------- 801
5. Navigation of aircraft above established avigation easement limits does not furnish the basis for a cause of action. Johnson v. Airport Authority ---- 801
6. The minimum topmost height of an avigation easement is the minimum safe altitude which is fixed in the Civil Air Regulations under authority of the Civil Aeronautics Board. Johnson v. Airport Authority ---------- 801
7. The minimum safe altitude under the prescribed regulations, for the purposes of this case, is 500 feet. Johnson v. Airport Authority ---------- 801
8. Under the regulations and the taking proposed, the airspace between a distance of 26 feet above the land and 500 feet above the ground constituted the avigation easement. Johnson v. Airport Authority 801
9. Navigable airspace means airspace above minimum altitudes of flight prescribed by the regulations,

including airspace needed to insure safety in takeoff and landing of aircraft. Johnson v. Airport Authority ---------- 801

Eminent Domain.

1. The deposit in county court in condemnation proceedings is to be paid to the condemnees on a final judgment entered on appeal in excess of the award in county court. If the condemnees fail to use ordinary diligence to procure the same it should be deemed credited on the judgment as of the date of its becoming final. Blecha v. School Dist. of Hebron ---------- 183
2. In the absence of a statute or agreement to the contrary, the removal expenses of a lessee, including injury to personal property, caused by said removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property. Ballantyne Co. v. City of Omaha ---------- 229
3. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Ballantyne Co. v. City of Omaha ---------- 229
4. If a leasehold interest is taken, or injured, the lessee is entitled to a sum which will restore the money loss consequent to the taking or injury. Ballantyne Co. v. City of Omaha ---------- 229
5. The measure of damages for taking of a leasehold by eminent domain consists generally of the fair market value of the leasehold or unexpired term of the lease, and is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Ballantyne Co. v. City of Omaha ---------- 229
6. Where the rent reserved equals or exceeds the rental value, the lessee has suffered no loss and cannot recover. Ballantyne Co. v. City of Omaha -- 229
7. The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. Leffelman v. City of Hartington ---------- 259

8. The words "or damaged," in Article I, section 21, of the Constitution of Nebraska, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. Leffelman v. City of Hartington 259
9. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Leffelman v. City of Hartington ---------- 259
10. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider only in connection with other competent evidence. Leffelman v. City of Hartington ---------- 259
11. The burden of showing the damages which the landowner will suffer rests upon him while the burden is on condemner to show matters which tend to reduce or mitigate the damages. Leffelman v. City of Hartington ---------- 259
12. The adaptibility for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged. Leffelman v. City of Hartington 259
13. In eminent domain proceedings, requisite foundation for evidence of particular sales of other land stated. Timmons v. School Dist. ---------- 574
14. Evidence of a sale of neighboring land, no matter how similar to the land taken in condemnation, is not admissible unless the sale was so near in point of time as to furnish a test of present value, and the determination of this fact is left to the discretion of the trial court. Timmons v. School Dist. 574
15. While market value is determined by actual sales and not by asking prices, an offer to sell property may be proved against the owner as an admission of its value at or near the time of the offer. Timmons v. School Dist. ---------- 574
16. Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court to determine in the exercise of a sound discretion. Timmons v. School Dist. ---------- 574
17. The question of the adequacy or the inadequacy of an award is not one to which fixed formulae may be

applied. Each case must be viewed in the light of the general principles of valuation applicable to that particular case. Timmons v. School Dist. ---- 574

18. The value of land taken in a condemnation proceeding is properly based on its most advantageous and best use. Graceland Park Cemetery Co. v. City of Omaha ---------- 608

19. The most advantageous and best use of unoccupied lands which are an integral part of an existing cemetery ordinarily is its use for cemetery purposes. Graceland Park Cemetery Co. v. City of Omaha --- 608

20. A cemetery is a type of property having no market value. In determining the value of such property the fair market value rule has no application for the reason that cemeteries are not bought and sold on an open market. Graceland Park Cemetery Co. v. City of Omaha ---------- 608

21. When property is of such nature that it has no market value, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown. Graceland Park Cemetery Co. v. City of Omaha ---------- 608

22. The number of grave sites taken, multiplied by the sale price of a single grave site, affords no reasonable basis for fixing the value of the land taken by condemnation from a cemetery. Graceland Park Cemetery Co. v. City of Omaha ---------- 608

23. The value of cemetery land taken by condemnation may be established by a unit-price method. The unit price in such case is based on the average sale price of grave sites in the used portion of the cemetery, less the reasonable cost of development, sales, maintenance, administration, perpetual care, and any other expense affecting its value. Graceland Park Cemetery Co. v. City of Omaha -------- 608

24. The amount arrived at by applying the net unit price to the number of grave sites actually taken should be reduced to present worth for the projected period in which the grave sites will be sold. Graceland Park Cemetery Co. v. City of Omaha --- 608

25. Where there is no evidence of value of an easement taken by condemnation, it is error to submit such issue to the jury, other than to direct a finding of nominal damages. Graceland Park Cemetery Co. v. City of Omaha ---------- 608

26. Effect of receipt of full amount of condemnation award in eminent domain proceedings stated. McCook Livestock Exchange Co. v. State ---------- 766
27. Damage to land caused by navigation within an established avigation easement taken by condemnation is properly chargeable as damages to the taker of the easement. Johnson v. Airport Authority ---- 801
28. A condemner may not be held in damages beyond the limits of the taking proposed. Johnson v. Airport Authority ---------- 801
29. The taking of real property in the establishment of an avigation easement which reduces the value of that to which the easement attaches entitles the owner to damages in the amount of the difference in value before and after the taking. Johnson v. Airport Authority ---------- 801
30. The damage contemplated by the taking of an avigation easement is that which flows from activity in the easement area up to the navigable airspace. Johnson v. Airport Authority ---------- 801
31. Damage caused by condemnation of an incorporeal as well as a corporeal avigation easement is a taking within the meaning of the Fifth Amendment to the United States Constitution. Johnson v. Airport Authority ---------- 801
32. Under the Constitution of Nebraska, if an avigation easement is taken by condemnation the taker is required to compensate for the taking and the damaging. Johnson v. Airport Authority -------- 801
33. The element of fear in the condemnation of an avigation easement defined. Johnson v. Airport Authority ---------- 801

Equity.

1. Independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief because of laches where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. Fraser v. Temple ---------- 367
2. A court of equity will not enforce a zoning ordinance when its operation and effect will unreasonably and arbitrarily deprive the owner of the substantial use and value of his property and when the purpose of the zoning did not require the hardship to be inflicted. City of Omaha v. Cutchall --- 452

Estates.

1. The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of the testator is obscure in this respect. Carr v. Carr ___ 189
   Baldwin v. Colglazier _____ 775
2. Where the language of the will postpones the vesting of an estate in remainder to the time of the death of the holder of the life estate, and no other intent can be gathered within the four corners of the will, the vesting of the remainder absolutely occurs upon the death of the holder of the life estate. Carr v. Carr _____ 189
3. Under circumstances stated, the remainder interest existing upon the death of the testator was contingent and not absolute. Carr v. Carr _____ 189
4. The creation by will of an interest in real estate defeasible upon the occurrence of an expressed contingency is not legally objectionable and is valid and enforcible. Carr v. Carr _____ 189
5. The words "should either die without lawful issue" refer to the period of time prior to the vesting of the estate involved when the intention of the testator is not otherwise indicated within the four corners of the will. Carr v. Carr _____ 189
6. In the absence of provisions indicating the contrary a will giving a remainder to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child. Baldwin v. Colglazier _____ 775

Estoppel.

1. Where one of two innocent persons must suffer by the acts of a third, he whose conduct, act, or omission enabled such third person to occasion the loss must sustain it if the other party acted in good faith, without knowledge of the facts, and altered his position to his detriment. Rapp v. Rapp _____ 136
2. Where one of two innocent persons must suffer a loss occasioned by the wrongful acts of a third person, the one who made it possible for the third person to commit the act should bear the loss. Plummer v. National Leasing Corp. _____ 557

3. Equitable estoppel is defined and circumstances under which it will be applied stated. Koop v. City of Omaha ---------- 633
4. A grantee who voluntarily redelivers or consents to the destruction of a deed with the intention of thereby reconveying the title may be estopped from claiming title under such deed. Where there is no evidence of any such intention an estoppel may not be asserted. Kramer v. Dorsch ---------- 869

Evidence.

1. Rule as to when physical facts justify refusal to submit case to jury stated. Biggs v. Gotsch ------ 15
2. Persons engaged in performing services of the same character as those to be valued and persons who have knowledge of the business in and from which the services have been rendered, and their value, may give their opinion as to the value of the services. Trailmobile, Inc. v. Hardesty ------ 46
3. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Klentz v. Transamerican Freightlines, Inc. ---------- 53
4. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider only in connection with other competent evidence. Leffelman v. City of Hartington ---------- 259
5. Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony. Marasco v. Fitzpatrick ---------- 272
6. An answer partly responsive cannot be stricken by a motion to strike the entire answer. The motion must be limited to the portion which is not responsive. Pierce v. State ---------- 319
7. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. Pierce v. State ---------- 319
8. Statements by third persons which are not made in accused's presence, and which are not declarations

of a coconspirator nor part of the res gestae, are generally not admissible. Pierce v. State ---------- 319
9. Elements necessary to establish a cause of action by circumstantial evidence stated. Howell v. Robinson Iron & Metal Co. ---------- 445
10. A plaintiff, relying on circumstantial evidence to sustain a cause of action, is not required to exclude the possibility that damages flowed from some cause other than the one on which he relies. Howell v. Robinson Iron & Metal Co. ---------- 445
11. If circumstantial evidence is susceptible of any reasonable inference inconsistent with an inference of negligence on the part of the party charged, it is insufficient to sustain the charge or to require submission of the issue to a jury. Howell v. Robinson Iron & Metal Co. ---------- 445
12. A person having a direct legal interest in the result of a civil action, when the adverse party is the representative of a deceased person, is not competent to testify to any transaction or conversation had between the deceased person and the witness, in the absence of waiver as provided in the statute. Whitten v. Laflin ---------- 464
13. Where evidence that is not properly admissible has been received in evidence but there was nothing in the form of the question to indicate that the evidence would be inadmissible, the aggrieved party cannot complain, unless he moves to strike out the objectionable testimony and withdraw it from the consideration of the jury. Timmons v. School Dist. --- 574
14. Where there is a direct conflict in the evidence relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and admissible for consideration by the jury. Rains v. State ---------- 586
15. It is within the discretion of the trial court to grant additional time to answer requests for admissions although the time originally limited has expired before an application for an extension is made. Schuett v. Hargens ---------- 663
16. The determination as to whether evidence as to weather conditions 1 mile away is relevant and material to the issues in a case is largely within the discretion of the trial court. Cover v. Platte Valley Public Power & Irr. Dist. ---------- 751
17. To make evidence of other acts available in a

criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged. Tyrrell v. State ---------- 859

18. A party is ordinarily estopped from asserting error on account of the erroneous admission of evidence where he subsequently elicits similar evidence on the same subject. Tyrrell v. State ---------- 859

19. In a prosecution for homicide it is admissible for the defendant, having first established that he was assailed by the deceased and in apparent danger, to prove that the deceased was a person of ferocity and violent disposition. State v. Kimbrough ------ 873

20. Proof of violent disposition must be made by evidence of the general reputation of the deceased. It cannot be made by proving either specific acts on his part or the opinions of witnesses as to his disposition based on their own observations. State v. Kimbrough ---------- 873

Executors and Administrators.

1. An action based upon a promise, express or implied, made by an executor after the death of his decedent, lies against the executor personally. Whitten v. Laflin ---------- 464

2. The burden of proof is upon the claimant seeking compensation for services rendered during the lifetime of a deceased person to prove an agreement express or implied to pay for the services. Hilligas v. Farr ---------- 735

3. Where a family relationship exists between the deceased and the claimant, in order to make a prima facie case claimant is required to rebut by competent evidence the presumption that the services were rendered gratuitously. Hilligas v. Farr ---------- 735

4. Where one renders personal service to another merely upon the expectation of a legacy, unless there is a contract obligation, the claimant takes his chance of receiving the legacy, and, if his expectations are disappointed, he can recover nothing. Hilligas v. Farr ---------- 735

Fraud.

1. Fraud is never presumed but must be clearly proved by the party who pleads and relies on it. Sterner v. Lehmanowsky ---------- 401

2. Fraud must relate to a present or preexisting fact and may not generally be predicated on an inference concerning any future acts unless such representations as to future acts are falsely and fraudulently made with an intent to deceive. Sterner v. Lehmanowsky ---------- 401
3. The failure of a motor vehicle dealer to keep a promise to do an act in the future does not amount to fraud within the provisions of Motor Vehicle Dealers Act, in the absence of a showing that the dealer's promise was not made in good faith. Sterner v. Lehmanowsky ---------- 401

Gas.

1. A natural gas company transmitting gas to its customers owes a duty to the public to exercise a degree of care commensurate with the danger involved. Daugherty v. Nebraska Nat. Gas Co. ------ 30
2. The duty to exercise proper care to maintain a gas distributing system is a continuing one. Daugherty v. Nebraska Nat. Gas Co. ---------- 30
3. Constructive notice under circumstances stated was just as effective as actual notice. Daugherty v. Nebraska Nat. Gas Co. ---------- 30
4. A gas company is required to exercise the highest degree of care in the distribution of natural gas and in the installation and inspection of its equipment. Reed v. Metropolitan Utilities Dist. ---------- 854

Habeas Corpus.

1. The writ of habeas corpus may be used in controversies regarding the custody of infants. Osterholt v. Osterholt ---------- 683
2. Habeas corpus proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. Osterholt v. Osterholt ---------- 683
3. Children become wards of the court after filing of petition for habeas corpus seeking their custody, and their welfare lies in the hands of the court. Osterholt v. Osterholt ---------- 683

Highways.

1. A motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign

protecting the arterial has been broken off and he could not be expected to be aware of its presence. Hammon v. Brazda ---------- 1

2. Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so. Biggs v. Gotsch ---- 15

3. Where the driver of a motor vehicle approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury. Biggs v. Gotsch ---------- 15

4. An automobile with a flat tire, being driven on a public road, is a disabled automobile within the purview of applicable statute. Peterson v. Skiles -- 470

5. It is the duty of a driver of a disabled automobile to take all reasonable precautions to protect the traveling public from injury by removing it from the main traveled portion of the road when it is practicable to do so. Peterson v. Skiles ---------- 470

6. When it is impractical to remove a disabled automobile from a public highway it is the duty of its driver to get it as nearly off the road as circumstances will reasonably permit, and whether or not the driver has done so is ordinarily a question for the jury. Peterson v. Skiles ---------- 470

7. Where the evidence is undisputed that a disabled automobile was stopped as far off the highway as the circumstances would reasonably permit, the trial court may properly find a want of negligence as a matter of law. Peterson v. Skiles ---------- 470

8. It is a violation of statute to stop an automobile beside any vehicle on the roadway, and such violation is evidence of negligence. Peterson v. Skiles -- 470

9. The words "park" or "leave standing" contained in statute relating to motor vehicles mean something more than mere temporary stops on the road which are incident to travel. Peterson v. Skiles ---- 470

10. A pedestrian has equal rights with the operator of

a vehicle in the use of public highways, and each must use reasonable care for his own safety and the safety of others. McCarty v. Morrow ---------- 643

11. Where a pedestrian is walking at night on the left-hand side of a highway and is struck by a vehicle approaching from the rear, it is for the jury to determine if the operator of the vehicle was negligent in not seeing the pedestrian in time to avoid an accident. McCarty v. Morrow ---------- 643

12. A pedestrian has the right to assume that the driver of a vehicle approaching from the rear will exercise ordinary care in keeping a lookout for him and others using the highway. McCarty v. Morrow 643

13. A pedestrian walking along the left side of a highway is not guilty of contributory negligence in failing to look back to observe the approach of vehicles from the rear, or in failing to anticipate the negligence of the driver of a vehicle approaching from that direction. McCarty v. Morrow ------ 643

14. Rule as to travel on highway under construction or repair, where limited use is permitted, stated. Ellingson v. Dobson Brothers Constr. Co. ---------- 659

15. A landowner, through or adjacent to whose lands is constructed and maintained a public road, has a right to such advantage from it by way of drainage as is incidental to its existence and which does not inconvenience the public or individuals, or injure the public work. Wells v. Miller ---------- 780

16. Where the evidence shows that a party made a proper use of a public road ditch as it was laid out and constructed by the county, such party may not be enjoined on the theory that he is diverting water from its natural course of drainage onto the lands of another to the latter's damage. Wells v. Miller 780

Homicide.

1. In a prosecution for homicide it is admissible for the defendant, having first established that he was assailed by the deceased and in apparent danger, to prove that the deceased was a person of ferocity and violent disposition. State v. Kimbrough -- 873

2. Proof of violent disposition must be made by evidence of the general reputation of the deceased. It cannot be made by proving either specific acts on his part or the opinions of witnesses as to his disposition based on their own observations. State v. Kimbrough ---------- 873

Infants.

1. The guardian ad litem of an infant litigant is entitled to an allowance of reasonable compensation for his services to be taxed as costs. Peterson v. Skiles ---------- 470
2. An action by an infant must be brought by his guardian or next friend, who alone is liable for costs. The infant in such an action is not liable for costs. Peterson v. Skiles ---------- 470
3. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future. State v. Gross ---------- 536
4. When jurisdiction is obtained in a proceeding to declare a child dependent stated. State v. Gross -- 536
5. The writ of habeas corpus may be used in controversies regarding the custody of infants. Osterholt v. Osterholt ---------- 683
6. Habeas corpus proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice. Osterholt v. Osterholt ---------- 683
7. Children become wards of the court after filing of petition for habeas corpus seeking their custody, and their welfare lies in the hands of the court. Osterholt v. Osterholt ---------- 683
8. In a controversy for the custody of infants of tender years, the court will always consider the best interests of the children and will make such order for their custody as will be for their welfare without reference to the wishes of the parties. Osterholt v. Osterholt ---------- 683

Injunction.

1. Conditions stated under which a court of equity will enjoin the operation of a lawful business as a nuisance. Prauner v. Battle Creek Coop. Creamery 412
2. A city may properly sue to enjoin carrying on a restaurant or commercial business in violation of a zoning ordinance. City of Omaha v. Cutchall --- 452

Interest.

1. Under statute relating to interest, a cotenant who collects the rents and profits on real estate is required to pay interest at the rate of 6 per-

cent per annum for each year's rent to the other cotenants. Fraser v. Temple ---------- 367
2. In the instant case interest applies for the years of 1956, 1957, 1958, and 1959. Fraser v. Temple --- 367
3. Where a negotiable instrument provides for the payment of interest without specifying the date from which interest is to run, the interest runs from the date of the instrument. Schuett v. Hargens -------- 663

Intoxicating Liquors.

1. Without qualifying as an expert on the subject of intoxication, a witness who has actual knowledge and sufficient observation of an occurrence should be allowed to supplement his description by his opinion. Pierce v. State ---------- 319
2. A witness may give his opinion from observations made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor. Lemmon v. State ---------- 387
3. The revocation of a driver's license upon a conviction for operating a motor vehicle while under the influence of intoxicating liquor is an incidental consequence and is not to be considered as punishment for the offense. State v. Amick ---------- 770

Judgments.

1. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. State v. Kidder ---------- 130
Hall v. Hadley ---------- 675
2. The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-judicial commissions. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. ---------- 151
3. The proper function of a nunc pro tunc order stated. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. 151
4. A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings. Bebee v. Kriewald ---------- 179
5. The courts have the right to decline to treat as res judicata a prior judgment in the case which was the consequence of a consent and not the judgment of the court. Marsh v. Marsh ---------- 282

6. When the railway commission holds a rehearing and at the rehearing vacates and sets aside a former order, the findings in the prior order are of no further effect. Jeffries-Eaves, Inc. v. Gettel, Inc. 337
7. The court examines the evidence on a motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. Knoll v. Knoll ---- 602
Hall v. Hadley ---- 675
8. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. Knoll v. Knoll ---- 602
Hall v. Hadley ---- 675
9. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Knoll v. Knoll ---- 602
Hall v. Hadley ---- 675
10. A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Knoll v. Knoll ---- 602
11. Where the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted. Knoll v. Knoll ---- 602
12. The overruling of a motion for summary judgment is not an adjudication of the substantive rights of a party and is not a final and appealable order. Pressey v. State ---- 652

Juries.

1. The question as to whether or not the failure of a juror to properly answer questions addressed to him on voir dire examination is primarily a matter within the discretion of the trial court with which the Supreme Court will not interfere unless an abuse of such discretion is shown. Peterson v. Skiles ---- 470
2. The question whether there existed in the mind of the defendant an apprehension based upon reasonable grounds of imminent peril and whether the means adopted for his defense were reasonable in view of the circumstances is a question of fact of

which the jurors are the sole judges. State v. Kimbrough ---------- 873

Landlord and Tenant.

1. In the absence of a statute or agreement to the contrary, the removal expenses of a lessee, including injury to personal property, caused by said removal, from a leasehold or fee in land, where there is an entire taking of the whole of the condemnee's estate under the sovereign power of eminent domain, cannot be considered as an element of damage, since such loss is not a taking of property. Ballantyne Co. v. City of Omaha ---------- 229
2. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Ballantyne Co. v. City of Omaha ---------- 229
3. If a leasehold interest is taken or injured, the lessee is entitled to a sum which will restore the money loss consequent to the taking or injury. Ballantyne Co. v. City of Omaha ---------- 229
4. The measure of damages for the taking of a leasehold by eminent domain consists generally of the fair market value of the leasehold or unexpired term of the lease, and is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Ballantyne Co. v. City of Omaha ---------- 229
5. Where the rent reserved equals or exceeds the rental value, the lessee has suffered no loss and cannot recover. Ballantyne Co. v. City of Omaha ---------- 229

Libel and Slander.

1. In order for a publication in a newspaper to be libelous per se, its nature and obvious meaning must be such as to impute to a person the commission of a crime, or subject him to public ridicule, ignominy, or disgrace. Rhodes v. Star Herald Printing Co. --- 496
2. There is no civil liability, in the absence of actual malice, for qualifiedly privileged, defamatory publications. Rhodes v. Star Herald Printing Co. ----- 496
3. Whether or not a newspaper article is libelous per se is a matter of law for the court. Rhodes v. Star Herald Printing Co. ---------- 496
4. A newspaper article not expressing newspaper's opinion, but stating the acts and proceedings of

courts and their officers relating to conduct of the plaintiff, is qualifiedly privileged, and is not actionable in the absence of actual malice. Rhodes v. Star Herald Printing Co. ---------- 496

5. In determining whether publication is libelous per se, language of publication can alone be looked to, without the aid of innuendoes not supported by the language used. Rhodes v. Star Herald Printing Co. 496
6. As a general rule fair and impartial reports of judicial, executive, or legislative official proceedings are considered as qualifiedly privileged, and are not actionable in the absence of actual malice. Rhodes v. Star Herald Printing Co. ---------- 496

Limitations of Actions.

1. An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until 4 years have elapsed from the accruing of such action. Fraser v. Temple ---------- 367
2. The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief. Fraser v. Temple ---------- 367
3. An action for money had and received must be brought within 4 years from receipt of the money. Whitten v. Laflin ---------- 464
4. An action to redeem from the lien of a mortgage accrues to the mortgagor when the mortgagee takes possession of the premises after default in payment and must be brought within 10 years from the date of such possession. Satterfield v. Peterson -------- 618

Malicious Prosecution.

1. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty. Brumbaugh v. Frontier Refining Co. ---------- 375
2. To maintain an action of malicious prosecution the plaintiff must prove malice and want of probable cause. Brumbaugh v. Frontier Refining Co. ------- 375
3. In an action for malicious prosecution where there is sufficient undisputed evidence to show probable

cause, the trial court should direct a verdict for the defendant. This rule applies even though some of the facts supporting probable cause were disputed in the evidence on behalf of the plaintiff. Brumbaugh v. Frontier Refining Co. ---------- 375

4. The test as to whether or not there was probable cause is to be determined in the light of facts and circumstances as they existed and were known at the time the prosecution was commenced and not from the viewpoint of subsequently appearing facts. Brumbaugh v. Frontier Refining Co. ---------- 375

Mortgages.

1. A conveyance of land subject to a mortgage conveys only an equity of redemption, the interest remaining after the mortgage has been paid. Satterfield v. Peterson ---------- 618
2. A mortgagor may not attack the title acquired through void foreclosure proceedings unless he offers to pay the amount of the indebtedness secured by the mortgage. Satterfield v. Peterson ---------- 618
3. An action to redeem from the lien of a mortgage accrues to the mortgagor when the mortgagee takes possession of the premises after default in payment and must be brought within 10 years from the date of such possession. Satterfield v. Peterson -------- 618
4. The recital in a release of a mortgage that it was executed in consideration of the payment of the debt named therein, while prima facie evidence of the fact stated, is not conclusive thereof. Schuett v. Hargens ---------- 663

Motor Carriers.

1. The claim that a holder of a certificate of public convenience and necessity has held himself out as available for the hauling of regulated commodities will not of itself defeat a charge that his certificate is dormant when he has put himself in an unavailable position to transport such commodities. Canning v. McKay ---------- 103
2. Where a holder of a certificate of public convenience and necessity has complied with applicable statutes, regulations, and the terms of his certificate, the question of dormancy becomes one of fact under all the circumstances shown. Canning v. McKay ------ 103
3. Where there is evidence to sustain a finding that a certificate of public convenience and necessity is not

dormant, the finding of the railway commission of nondormancy will not be disturbed by the Supreme Court. Canning v. McKay ---------- 103
4. Jurisdiction of railway commission to suspend, change, or revoke certificate of public convenience and necessity stated. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. ---------- 151
5. An order of revocation of a permit or certificate of public convenience and necessity by the railway commission without compliance with the statute as to notice and hearing is not effective as a revocation. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. ---------- 151
6. Rules for transfer of certificate of public convenience and necessity by railway commission stated. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
7. The question of dormancy, in case where an application is made for transfer of operating rights, should be the same as where an order to show cause had been issued based upon that ground. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
8. Where an application is made for the transfer of operating rights under Motor Carrier Act, the question of whether or not such operating rights are dormant relates to the time the application is made, a hearing is held thereon, and for a reasonable length of time immediately prior thereto. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
9. Rule for determination of issue of public convenience and necessity, where new or extended operating rights are sought, stated. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
10. Where on application to transfer a certificate of public convenience and necessity the dormancy of the certificate may reasonably be inferred from the evidence, the railway commission may approve an application for transfer only upon the basis of proof of and a finding that the transfer of such certificate is or will be required by the present and future public convenience and necessity. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
11. Burden imposed on applicant for certificate of public convenience and necessity stated. Transit Homes, Inc. v. National Trailer Convoy, Inc. ---------- 391
Petroleum Transp. Co. v. All Class I Rail Carriers -- 564
12. Where a certificate of public convenience and necessity is not dormant, it may be transferred on ap-

proval of the railway commission under conditions specified by statute. Transit Homes, Inc. v. National Trailer Convoy, Inc. ---------- 391

13. The statute governing the transfer of certificates of public convenience and necessity is permissive in terms and not mandatory. Action of the railway commission in refusing to transfer will be sustained unless it appears that the refusal was unreasonable and arbitrary. Transit Homes, Inc. v. National Trailer Convoy, Inc. ---------- 391

14. The term public interest which appears in the Motor Carrier Act means that which has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision for the best use of transportation facilities. Transit Homes, Inc. v. National Trailer Convoy, Inc. ---------- 391

15. Although the transfer of a certificate of public convenience and necessity is permissive and not mandatory, a refusal of transfer will be regarded as unreasonable and arbitrary if under the facts a valid basis for denial is not disclosed. Transit Homes, Inc. v. National Trailer Convoy, Inc. ---------- 391

16. Controlling questions to be determined on application by motor carrier for issuance of certificate of public convenience and necessity stated. Petroleum Transp. Co. v. All Class I Rail Carriers ------ 564

17. Purpose of Motor Carrier Act stated. Shanks v. Watson Bros. Van Lines ---------- 829

18. Controlling questions in determining the issue of public convenience and necessity stated. Shanks v. Watson Bros. Van Lines ---------- 829

Municipal Corporations.

1. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. City of Omaha v. Cutchall ---------- 452

2. A city operating under a home rule charter has the power to zone the city in the interest of public health, safety, and morals, but such action must not be unreasonable, discriminatory, and arbitrary. City of Omaha v. Cutchall ---------- 452

3. What is the public good as it relates to zoning ordinances affecting the use of property is, pri-

marily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. City of Omaha v. Cutchall ---------- 452

4. In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation. City of Omaha v. Cutchall ---------- 452
5. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence should be clear and satisfactory. City of Omaha v. Cutchall ---------- 452
6. If an act be an offense against the state and also against a municipality of the state, the same act may constitute an offense against both the state and the municipality, and both may punish it without infringing any constitutional right. State v. Amick 770
7. It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury. This is so even if the ordinance is a reiteration of a statute covering the same offense under which the defendant would be entitled to a jury trial. State v. Amick ---------- 770
8. Certain language quoted from opinion in McLaughlin v. State, 123 Neb. 861, 244 N. W. 799, is disapproved as a rule of law in this state. State v. Amick ------ 770

Negligence.

1. Where the negligence of the driver of an automobile in which a person is riding as a guest is the sole proximate cause of a collision in which the guest is injured, the guest cannot recover for such injury from a third person. Hammon v. Brazda -------- 1
2. Where injuries are the result of the negligent acts of the driver of the plaintiff's automobile and the driver of another automobile involved in the collision, either or both tort-feasors may be held for the entire damages. Hammon v. Brazda ---------- 1
3. A natural gas company transmitting gas to its customers owes a duty to the public to exercise a degree of care commensurate with the danger involved. Daugherty v. Nebraska Nat. Gas Co. ------ 30

4. One under a duty to use care for which knowledge is necessary cannot avoid liability because of voluntary ignorance. Daugherty v. Nebraska Nat. Gas Co. ---------- 30
5. The duty to exercise proper care to maintain a gas distributing system is a continuing one. Daugherty v. Nebraska Nat. Gas Co. ---------- 30
6. Constructive notice under circumstances stated was just as effective as actual notice. Daugherty v. Nebraska Nat. Gas Co. ---------- 30
7. In action based on negligence, burden of proof rests on plaintiff to establish that negligence charged was the proximate cause of the injury. Howell v. Robinson Iron & Metal Co. ---------- 445
8. Negligence is never presumed, and it cannot be inferred from the mere fact that an accident happened. Howell v. Robinson Iron & Metal Co. ------ 445
9. Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, a question for determination by a jury is presented. Howell v. Robinson Iron & Metal Co. ---------- 445
10. A jury may properly be instructed that certain facts are proper to be considered in determining whether or not there has been negligence, but whether or not the facts in evidence establish negligence is solely for the jury. Peterson v. Skiles ---------- 470
11. In a negligence action by a guest in one automobile against the driver of a second automobile, the guest may not recover where the negligence of the host driver is the sole proximate cause of the accident. Peterson v. Skiles ---------- 470
12. If the negligence of the defendant and the host driver combine to produce a single injury, they are jointly and severally liable to a passenger for the injury so proximately caused, irrespective of the degree of negligent participation. Peterson v. Skiles 470
13. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. McCarty v. Morrow ---------- 643
14. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. Ellingson v. Dobson Brothers Constr. Co. -------- 659
15. Where the evidence is in conflict and such that reasonable minds may draw different conclusions there-

from, the questions of negligence and comparative and contributory negligence are for the determination of the jury. Ellingson v. Dobson Brothers Constr. Co. ---------- 659
16. Rule as to travel on highway under construction or repair, where limited use is permitted, stated. Ellingson v. Dobson Brothers Constr. Co. ---------- 659
17. Substance of motor vehicle guest statute stated. Robinson v. Hammes ---------- 692
18. What amounts to gross negligence must be ascertained from the facts and circumstances of each particular case, and not from any fixed definition or rule. Robinson v. Hammes ---------- 692
19. In an action under the motor vehicle guest statute, there must be evidence of negligence in a very high degree to justify submission of the case to a jury. Robinson v. Hammes ---------- 692
20. Gross negligence, within the meaning of the motor vehicle guest statute, is negligence in a very high degree, or the absence of even slight care in the performance of a duty. Robinson v. Hammes ---------- 692
21. When one, being in a place of safety, sees or should 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 in failing to keep a proper lookout constitutes contributory negligence more than slight in degree as a matter of law and precludes a recovery. Johns v. Glidden -- 732
22. Proximate cause is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Cover v. Platte Valley Public Power & Irr. Dist. -- 751
23. To establish a cause of action based on negligence it is not sufficient for the plaintiff to show that negligence existed, but he must also show that the negligence pleaded and proved was the proximate cause of the injury complained of. Cover v. Platte Valley Public Power & Irr. Dist. ---------- 751
24. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. Hammon v. Pedigo ---------- 787
25. Definition of negligence stated. Reed v. Metropolitan Utilities Dist. ---------- 854

26. A gas company is required to exercise the highest degree of care in the distribution of natural gas and in the installation and inspection of its equipment. Reed v. Metropolitan Utilities Dist. ---------- 854

New Trial.

1. Proper procedure on appeal outlined where trial court granted motion for new trial and gave no reason for its decision. Biggs v. Gotsch -------- 15
2. On review in the Supreme Court of an order granting a new trial, there is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented. Biggs v. Gotsch ---------- 15
3. The statute for filing a motion for new trial provides that a motion for new trial must be filed within 10 days after the verdict, report, or decision is rendered. Bebee v. Kriewald ---------- 179
4. A motion for new trial filed out of time is a nullity. Lewis v. Gallemore ---------- 441
5. The granting or refusing of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. Rains v. State --- 586
6. A new trial will not be granted on the ground of newly discovered evidence when the only effect of the evidence is to impeach or discredit a witness. Rains v. State ---------- 586
7. During the pendency of a motion for new trial timely filed, no appealable order is rendered until the motion for new trial is disposed of. Morgan v. Weiner ---------- 715

Nuisances.

1. The storage of petroleum products is not a nuisance per se. Prauner v. Battle Creek Coop. Creamery -- 412
2. Where it is sought to enjoin an anticipatory nuisance, it must be shown: (1) That the proposed construction or the use to be made of the property is a nuisance per se; or (2) that, while it may not amount to a nuisance per se, under the circumstances of the case, a nuisance must necessarily result from the contemplated act. Prauner v. Battle Creek Coop. Creamery ---------- 412
3. Generally, an owner of property has a right to

make any use of it he sees fit. It is only where his use prevents his neighbors from the enjoyment of their property to their damage that an owner's use may be restricted. The burden rests on the one complaining to establish that the use to be made of the property must necessarily create a nuisance. Prauner v. Battle Creek Coop. Creamery 412

4. Conditions stated under which a court of equity will enjoin the operation of a lawful business as a nuisance. Prauner v. Battle Creek Coop. Creamery 412
5. Devoting property to uses which produce destructive vapors and noxious odors, where it results in material injury to property and the comfort or existence of those in the immediate vicinity, is a nuisance which may be enjoined. Prauner v. Battle Creek Coop. Creamery ---------- 412
6. For odors to be a nuisance, they must be such as offend the olfactories of an ordinary man, and not those of an individual with sensitive and delicate nostrils. Prauner v. Battle Creek Coop. Creamery -- 412

Parent and Child.

1. Courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties imposed by the relation or has forfeited that right. Goodman v. Goodman ---------- 330
   State v. Best ---------- 483
2. By statute, a dependent child is defined. State v. Best ---------- 483
3. By statute, a neglected child is defined. State v. Best ---------- 483
4. Procedure upon filing of a complaint under the Juvenile Court Act outlined. State v. Best -------- 483
5. Statutory procedure for retention of custody of neglected or dependent child with parents, subject to visitation of probation officer, outlined. State v. Best ---------- 483
6. An appeal from a finding and adjudication of the district court that a child is neglected or dependent is disposed of in the Supreme Court by trial de novo upon the record. State v. Best ---------- 483
   State v. Gross ---------- 536
7. The Supreme Court has never deprived a parent of the custody of a child merely because, on financial or other grounds, a stranger might better provide. State v. Best ---------- 483

8. A parent may not be deprived of the custody of his child by the court until it is established that the parent is unfit to perform the duties of the relationship of parent and child or has forfeited the right to the custody of the child. State v. Gross ___ 536
9. The right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement. State v. Gross _____ 536
10. A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future. State v. Gross _____ 536
11. When jurisdiction is obtained in a proceeding to declare a child dependent stated. State v. Gross ___ 536
12. The right of parents to the custody of minor children of tender years is not to be lightly set aside. The court may not deprive parents of such custody unless they are shown to be unfit to perform the duties imposed by that relationship, or they have forfeited their right. Osterholt v. Osterholt _____ 683

Parties.

1. The courts will not entertain and render decrees which, for want of necessary parties, cannot fully adjudicate the questions presented. Marsh v. Marsh 282
2. In a case where new parties are made defendants for whom a guardian ad litem is required, appointment prior to service of summons is premature. Marsh v. Marsh _____ 282
3. It is the duty of a guardian ad litem of defendants in an action to deny all material allegations of the petition which are prejudicial to the defendants represented. Marsh v. Marsh _____ 282
4. It is the duty of a guardian ad litem to submit all relevant defenses or legal claims of the persons represented by him. Marsh v. Marsh _____ 282
5. It is the duty of courts to protect the neglected rights of parties represented by a guardian ad litem regardless of the conduct of the guardian. Marsh v. Marsh _____ 282
6. Where a defect of parties is not raised by demurrer or answer, the defect is waived unless such parties are indispensable to the rendering of a final judgment consistent with equity and good conscience. Coker v. Coker _____ 361

7. A representative suit is authorized by statute in this state when the question to be determined is one of common or general interest of many persons, or when the parties are numerous and it is impracticable to bring them all before the court. Hickman v. Loup River Public Power Dist. ---- 428
8. Where a community of interest or a privity of estate exists between an intervener and other plaintiffs, a suit commenced before the expiration of the statutory period inures to the benefit of a person who intervenes therein after the time when an action would be barred. Hickman v. Loup River Public Power Dist. ---- 428

Partnership.

The existence and scope of a partnership may be evidenced by written or oral agreement, or implied by the conduct of the parties and what was done by them. Lewis v. Gallemore ---- 211

Payment.

A debt cannot be extinguished by the payment of less than is actually due, unless based on a new and sufficient consideration. Schuett v. Hargens -- 663

Pleading.

1. A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact. Anschutz v. Central Nat. Bank ---- 60
2. By statute, the district court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any proceeding. Ballantyne Co. v. City of Omaha ---- 229
3. The term "proceeding" as used in the statutes providing for amendment includes filing of an appeal bond, and the right to amend such bond is within the purview of the statute. Ballantyne Co. v. City of Omaha ---- 229
4. By statute, the district court in every state of an action must disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. Ballantyne Co. v. City of Omaha ---- 229

5. The right to amend an appeal bond is within the purview of the statute providing for amendments of proceedings. Ballantyne Co. v. City of Omaha ---- 229
6. A failure to assert a defect or irregularity by a timely and appropriate plea or motion is usually regarded as a waiver. State v. Best ---------- 483
7. A long-established rule in this state is that, when timely objection is not made, pleadings, when possible, will be sustained. State v. Best ---------- 483
8. By statute, when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. Rhodes v. Crites ---------- 501
9. If the allegations are so indefinite or uncertain that the precise meaning is not apparent, the remedy of the other party is an application to the court to have the pleading made more definite and certain. Rhodes v. Crites ---------- 501
10. An order of the district court requiring a petition to be made more definite and certain will be sustained on appeal unless it clearly appears that the court abused its discretion. Rhodes v. Crites ------ 501
11. Where a petition fails to state a cause of action against a party defendant, the plaintiff's alleged cause of action against such party should be dismissed. Koop v. City of Omaha ---------- 633
12. A party may at any and all times invoke the language of his opponent's pleading on which the case is being tried, on a particular issue, as rendering certain facts indisputable. McCarty v. Morrow ---- 643
13. A motion to amend the pleadings, after the pleadings have been made up, rests within the sound discretion of the trial court either to permit the amendment of pleadings in the furtherance of justice or to refuse the right of amendment. McCarty v. Morrow 643
14. When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary. Ehlers v. Church of God in Christ, Inc. ---------- 670

Principal and Agent.

1. A commission cannot be collected by an agent for his services if he has willfully disregarded, in a material respect, an obligation which the law

devolves upon him by reason of his agency. Schepers v. Lautenschlager ---------- 107

2. An agent cannot, either directly or indirectly, have an interest in the subject matter of the agency without the consent of his principal, freely given, after full knowledge of every matter known to the agent which might affect the principal. Schepers v. Lautenschlager ---------- 107

3. In order to exempt an agent from liability upon a negotiable note, executed by him within the scope of his agency, he must not only name his principal but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. Lincoln Equipment Co. v. Eveland ---------- 174

4. A party dealing with an agent must be able to trace the authority on which he relies back to some word or deed of the principal. Plummer v. National Leasing Corp. ---------- 557

5. A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it. Plummer v. National Leasing Corp. 557

6. In the absence of the existence of a relationship from which authority to act for another may be derived, the admission of one person is not binding on another. Plummer v. National Leasing Corp. --- 557

7. A party cannot put the declarations of his own agent in evidence, since such declarations do not bind the other party in the absence of their knowledge and consent. Plummer v. National Leasing Corp. ---------- 557

8. Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. Plummer v. National Leasing Corp. ---------- 557

Process.

Defects in process or service may be waived by defendant's participation in the trial on the merits of plaintiff's cause of action, and also where by stipulation of the parties the defendant is considered to have filed an answer to the plaintiff's petition. State v. Best ---------- 483

Public Lands.

1. The Constitution of this state provides that the general management of all lands and funds set apart for educational purposes, and for the investment of school funds, shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds. State v. Kidder ---------- 130
2. The Board of Educational Lands and Funds has control and management of school lands. State v. Kidder ---------- 130
3. By statute, no individual, partnership, or corporation is entitled to hold under lease a total of more than 640 acres of state educational lands, whether the same be acquired by direct lease or by assignment; provided, that said limitation shall not apply where the land to be leased is bounded entirely on two sides thereof by lands owned or operated by such applicant or assignee. State v. Kidder ---------- 130

Public Service Commissions.

1. A group of people in a rural community having a telephone line affording only local or long distance switcher service by a public service company for a fee is not a common carrier subject to control or supervision of the railway commission. Kopf v. Public Telephone Co. ---------- 96
2. The railway commission is without power to grant an application made by a group of people in a rural community and not a common carrier to attach their area to that of a common carrier whose service area does not include the area occupied by the aplicants. Kopf v. Public Telephone Co. ---------- 96
3. The railway commission is without power to require a telephone company which is a common carrier to extend its service beyond its established service area and into a rural community where it has not previously extended its service. Kopf v. Public Telephone Co. ---------- 96
4. Where there is evidence to sustain a finding that a certificate of public convenience and necessity is not dormant, the finding of the railway commission of nondormancy will not be disturbed by the Supreme Court. Canning v. McKay ---------- 103
5. The rules relating to nunc pro tunc orders are generally applicable to administrative and quasi-

judicial commissions. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. ---------- 151
6. Jurisdiction of railway commission to suspend, change, or revoke certificate of public convenience and necessity stated. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. ---------- 151
7. An order of revocation of a permit or certificate of public convenience and necessity by the railway commission without compliance with the statute as to notice and hearing is not effective as a revocation. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. ---------- 151
8. When the railway commission holds a rehearing and at the rehearing vacates and sets aside a former order, the findings in the prior order are of no further effect. Jeffries-Eaves, Inc. v. Gettel, Inc. -- 337
9. Rules for transfer of certificate of public convenience and necessity by railway commission stated. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
10. The question of dormancy, in case where an application is made for transfer of operating rights, should be the same as where an order to show cause had been issued based upon that ground. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
11. Where an application is made for the transfer of operating rights under Motor Carrier Act, the question of whether or not such operating rights are dormant relates to the time the application is made, a hearing is held thereon, and for a reasonable length of time immediately prior thereto. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
12. Rule for determination of issue of public convenience and necessity, where new or extended operating rights are sought, stated. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
13. Where on application to transfer a certificate of public convenience and necessity the dormancy of the certificate may reasonably be inferred from the evidence, the railway commission may approve an aplication for transfer only upon the basis of proof of and a finding that the transfer of such certificate is or will be required by the present and future public convenience and necessity. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
14. On an appeal to the Supreme Court from an order of the railway commission, administrative or legislative in nature, the only questions to be determined

are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. Jeffries-Eaves, Inc. v. Gettel, Inc. ---------- 337
Petroleum Transp. Co. v. All Class I Rail Carriers -- 564
Shanks v. Watson Bros. Van Lines ---------- 829

15. Burden imposed on applicant for certificate of public convenience and necessity stated. Transit Homes, Inc. v. National Trailer Convoy, Inc. ---------- 391
Petroleum Transp. Co. v. All Class I Rail Carriers -- 564

16. Where a certificate of public convenience and necessity is not dormant, it may be transferred on approval of the railway commission under conditions specified by statute. Transit Homes, Inc. v. National Trailer Convoy, Inc. ---------- 391

17. The statute governing the transfer of certificates of public convenience and necessity is permissive in terms and not mandatory. Action of the railway commission in refusing to transfer will be sustained unless it appears that the refusal was unreasonable and arbitrary. Transit Homes, Inc. v. National Convoy, Inc. ---------- 391

18. Where an order of the railway commission is reversed by the Supreme Court for lack of findings and at the time of receiving the mandate the commission has before it sufficient evidence on which to base findings that will sustain its decision, it may do so without notice or rehearing. Petroleum Transp. Co. v. All Class I Rail Carriers ---------- 564

19. An order of the railway commission making ultimate findings in the language of the statutes is a sufficient compliance with the commission's statutory obligation. Petroleum Transp. Co. v. All Class I Rail Carriers ---------- 564

20. Controlling questions to be determined on application by motor carrier for issuance of certificate of public convenience and necessity stated. Petroleum Transp. Co. v. All Class I Rail Carriers ---------- 564

21. The railway commission has original jurisdiction and sole power to grant, amend, deny, revoke, or transfer common carrier certificates of public convenience and necessity. Shanks v. Watson Bros. Van Lines ---------- 829

22. The grant or denial of a certificate of public convenience and necessity by the railway commission requires the exercise of administrative and legislative

functions and not of judicial powers. Shanks v. Watson Bros. Van Lines ---------- 829
23. Courts should review or interfere with administrative and legislative action of the railway commission only so far as necessary to keep it within its jurisdiction and protect legal and constitutional rights. Shanks v. Watson Bros. Van Lines ------ 829
24. The burden is on the applicant for a certificate of public convenience and necessity to show that the proposed service is required by the present or future public convenience or necessity. Shanks v. Watson Bros. Van Lines ---------- 829
25. Purpose of Motor Carrier Act stated. Shanks v. Watson Bros. Van Lines ---------- 829
26. Controlling questions in determining the issue of public convenience and necessity stated. Shanks v. Watson Bros. Van Lines ---------- 829

Receivers.

1. An order confirming a sale by a receiver is a final order from which an appeal can be taken. Lewis v. Gallemore ---------- 441
2. The power of appointment of a receiver is controlled by statute, which power may not properly be exercised in the absence of the actual commencement of an action and until after at least 5 days' notice to all parties to be affected thereby. Gentsch, Inc. v. Burnett ---------- 820
3. The filing of a petition in and of itself does not, within the meaning of statute, constitute an actual controversy between contending suitors in court, and accordingly furnishes no foundation for the exercise of the jurisdiction of the court to appoint a receiver. Gentsch, Inc. v. Burnett ---------- 820
4. In case of failure to comply with the essential requirements for the valid appointment of a receiver everything done is a nullity. Gentsch, Inc. v. Burnett ---------- 820

Reformation of Instruments.

1. Though the language of a note executed by an authorized agent of a corporation imports a personal obligation, it may be shown by parol evidence on the issue of reformation, except as to a holder in due course, that the intention of both the maker and the payee was to execute an instrument binding the corporation only, and that, though the language was

that which they intended, it did not express their own true purpose. Lincoln Equipment Co. v. Eveland ---------- 174
2. In order to warrant the reformation of a written instrument in any material respect, the evidence must be clear, convincing, and satisfactory, and until overcome by such proof the terms of the instrument must stand as evidencing the intention of the parties. Lincoln Equipment Co. v. Eveland ---------- 174

Sales.

Whether a transaction is a bona fide time sale or the financing of the balance of a cash purchase price is a question of fact. Trailmobile, Inc. v. Hardesty --- 46

Schools and School Districts.

1. Rural high school district was validly created under statute existing when action was taken by county superintendents pursuant to court order. State ex rel. Venango Rural High School Dist. v. Ziegler -- 758
2. The taking of territorial area of a Class VI school district and causing it to become a part of the area of a rural high school district is not inhibited. State ex rel. Venango Rural High School Dist. v. Ziegler -- 758
3. The statutes set forth in the opinion, complained about by the plaintiffs as being unconstitutional, held not to violate the First Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, or Article I, section 4, of the Constitution of the State of Nebraska. Meyerkorth v. State -------- 889

Statutes.

1. Curative statutes, by reason of their remedial and retrospective nature, are applicable not only to past transactions generally, but also to cases pending in the trial court. Hargleroad Bulk Carriers, Inc. v. Ruan Transp. Corp. ---------- 151
2. Though the Supreme Court may question the wisdom of a given enactment as a matter of policy, that gives it no right to strike the enactment down if it violates no provision of the fundamental law. State ex rel. Meyer v. County of Lancaster -------- 195
3. The Constitution does not require that the title of an act be a synopsis of the law. State ex rel. Meyer v. County of Lancaster ---------- 195

4. The provisions of the Constitution relating to title are to be so liberally construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title. State ex rel. Meyer v. County of Lancaster ---------- 195
5. The power to sell, contained in the Industrial Development Act, is comprehended within the objects and purposes of the act as expressed in the title. State ex rel. Meyer v. County of Lancaster ---------- 195
6. Where a legislative act is complete in itself but is repugnant to or in conflict with a prior act which is not referred to nor in express terms repealed by the latter, the earlier act is repealed by implication as to the latter act, but only to the extent of the repugnancy or conflict. State ex rel. Meyer v. County of Lancaster ---------- 195
7. The portion of the Industrial Development Act reading "on both the assessment date and the date the levy is made in any year; but such projects shall not be subject to taxation in any year if they are not leased to or held by private interests on both the assessment date and the date the levy is made in any year" is invalid and void. State ex rel. Meyer v. County of Lancaster ---------- 195
8. The fact that a part of a legislative act is invalid does not always require that the entire act be treated as void. If the part that is bad is independent of and separable from the balance of the act, and was not an inducement to the passage of the act, the balance of the act may be sustained and given effect. State ex rel. Meyer v. County of Lancaster 195
9. A basic rule in the interpretation of a statute is to ascertain the legislative intent and to give effect to it if it is a lawful one. State ex rel. Meyer v. County of Lancaster ---------- 195
10. A declaration of separability in a legislative act is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted. State ex rel. Meyer v. County of Lancaster 195
11. A legislative act will operate only prospectively and not restrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. State ex rel. Venango Rural High School Dist. v. Ziegler ---------- 758

Subrogation.

1. Nature and extent of doctrine of subrogation stated. Rapp v. Rapp ---------- 136
2. The real question in all subrogation cases is whether the payment made by the stranger was a loan to the debtor through a desire to aid him or whether it was made with the expectation of being substituted in place of a creditor. Rapp v. Rapp ---------- 136

Taxation.

1. Provisions for the exemption of property from taxation should be given a fair and reasonable interpretation in order to ascertain the true intent as to their scope, and then should be strictly applied and enforced so that the limits thus defined shall not be unduly enlarged or extended. Doane College v. County of Saline ---------- 8
2. It is the exclusive use of property which determines its exempt character from taxation. Doane College v. County of Saline ---------- 8
3. In determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control. Doane College v. County of Saline ---------- 8
4. It is the use of the property as distinguished from the use of the income from the property that determines whether it is exempt from taxation. Doane College v. County of Saline ---------- 8
5. The use of the income from rental property for an exempt purpose does not create an exemption from taxation for the property. Doane College v. County of Saline ---------- 8
6. Under the Constitution, taxes must be levied by valuation uniformly and proportionately upon all tangible property. State ex rel. Meyer v. Story ---- 741
7. The rule of uniformity in taxation prescribed by the Constitution inhibits the Legislature from discriminating between taxpayers in any manner whatever. State ex rel. Meyer v. Story ---------- 741
8. The Legislature does not have the power to release or discharge a tax, such action being prohibited by the Constitution. State ex rel. Meyer v. Story ---- 741
9. Amendatory act authorizing imposition of ad valorem tax on motor vehicle dealers was unconstitutional. State ex rel. Meyer v. Story ---------- 741

Telecommunications.

1. A group of people in a rural community having a telephone line affording only local or long distance switcher service by a public service company for a fee is not a common carrier subject to control or supervision of the railway commission. Kopf v. Public Telephone Co. ---------- 96
2. The railway commission is without power to grant an application made by a group of people in a rural community and not a common carrier to attach their area to that of a common carrier whose service area does not include the area occupied by the applicants. Kopf v. Public Telephone Co. ---------- 96
3. The railway commission is without power to require a telephone company which is a common carrier to extend its service beyond its established service area and into a rural community where it has not previously extended its service. Kopf v. Public Telephone Co. ---------- 96

Tenancy in Common.

1. An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until 4 years have elapsed from the accruing of such action. Fraser v. Temple ---------- 367
2. Under statute relating to interest, a cotenant who collects the rents and profits on real estate is required to pay interest at the rate of 6 percent per annum for each year's rent to the other cotenants. Fraser v. Temple ---------- 367
3. In the instant case interest applies for the years of 1956, 1957, 1958, and 1959. Fraser v. Temple ---- 367
4. The cotenant who has collected the rents and profits of the real estate and paid the taxes thereon for the years above mentioned is entitled to have credit for the taxes paid on such real estate. Fraser v. Temple ---------- 367

Trial.

1. Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted. Biggs v. Gotsch 15
   Leffelman v. City of Hartington ---------- 259
2. When the evidence is conflicting the verdict of a jury will not be set aside, unless it is shown to be clearly wrong. Biggs v. Gotsch ---------- 15
3. It is the province of the jury to harmonize the testi-

mony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses. Biggs v. Gotsch 15

4. Where there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury. A verdict based thereon will not be disturbed unless clearly wrong. Biggs v. Gotsch ---------- 15

5. Rule as to when physical facts justify refusal to submit case to jury stated. Biggs v. Gotsch ------ 15

6. In determining the sufficiency of evidence to sustain a verdict is must be considered most favorably to the successful party, that is, every controverted fact must be resolved in his favor and he is entitled to have the benefit of every reasonable inference which may be deduced therefrom. Trailmobile, Inc. v. Hardesty ---------- 46

7. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Klentz v. Transamerican Freightlines, Inc. ---------- 53

8. An instruction in a personal injury action that plaintiff should be compensated for the impairment of his capacity to earn money in the future and also for future loss of time permits a double recovery for the period of time lost, and is erroneous. Singles v. Union P. R. R. Co. ---------- 91

9. In an action for damages it is the duty of the trial court to instruct the jury as to the proper measure of recovery. The tendering of a proper instruction is not a condition precedent to the assignment of an instruction as erroneous on the measure of damages. Singles v. Union P. R. R. Co. ---------- 91

10. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial. State v. Kidder ---------- 130
Hall v. Hadley ---------- 675

11. In a case where further and more specific instruction is desired on a point covered by the charge given, such further instruction must be prepared and presented on behalf of the party in whose interest it is claimed to be necessary. Nebraska Bottled Gas & App. Co. v. Aetna Cas. & Sur. Co. -- 146

12. If an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to its meaning and is therefore liable to lead the jury astray in the consideration of the case, it presents ground for a new trial. Nebraska Bottled Gas & App. Co. v. Aetna Cas. & Sur. Co. ---------- 146
13. It is reversible error for the trial court to fail to instruct the jury respecting the law that is applicable to the material issues raised by the pleadings and supported by the evidence. Nebraska Bottled Gas & App. Co. v. Aetna Cas. & Sur. Co. ---------- 146
14. It is the duty of the court in the instructions to fully and fairly inform the jury as to the various items of damage which it should take into consideration in arriving at its verdict, and as to the proper basis upon which the separate items thereof shall be assessed. Nebraska Bottled Gas & App. Co. v. Aetna Cas. & Sur. Co. ---------- 146
15. The trial court has the duty to instruct the jury on the issues presented by the pleadings and evidence, whether requested to do so or not. A failure to do so constitutes prejudicial error. Carlson v. Chambers ---------- 166
16. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby. Carlson v. Chambers ---------- 166
17. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury, and will not be disturbed on appeal unless clearly wrong. Shreve v. Agricultural Products Co. 219
Schuett v. Hargens ---------- 663
18. In considering the sufficiency of the evidence to sustain a judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted facts resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence. Shreve v. Agricultural Products Co. ---------- 219
19. The burden of showing the damages which the landowner will suffer rests upon him while the burden is on condemner to show matters which tend to reduce or mitigate the damages. Leffelman v. City of Hartington ---------- 259
20. Where the trial court has instructed generally as to the issues of a criminal prosecution, error can-

not be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining. Miller v. State ---------- 268

21. In the absence of a request, the trial court is not required to give a cautionary instruction. Miller v. State ---------- 268

22. The correctness of the ruling of a district court in giving or refusing instructions cannot be considered in the Supreme Court unless such ruling is first challenged in the district court by motion for a new trial. Miller v. State ---------- 268

23. When instructions are tendered which correctly state the law upon an issue involved, refusing them is error unless the points are fairly covered by the instructions given by the court on its own motion. Pierce v. State ---------- 319

24. Duty of court on motion for judgment notwithstanding the verdict stated. Brumbaugh v. Frontier Refining Co. ---------- 375

25. An objection made to the argument of opposing counsel after the jury has retired is not timely and will not be reviewed on appeal. Lemmon v. State -- 387

26. Rule for consideration of motion for directed verdict stated. Sterner v. Lehmanowsky ---------- 401
Hammon v. Pedigo ---------- 787

27. Where on the trial of an issue of fact the proof relating to a disputed issue is so clear and conclusive that reasonable minds cannot reach different conclusions, it is the duty of the trial court to dismiss the jury and enter judgment in accordance with the evidence. Swink v. Smith ---------- 423

28. Where a motion to direct a verdict does not state the reasons therefor in accordance with statutory requirements, prejudicial error cannot be predicated thereon where it is not shown that prejudice resulted therefrom. Swink v. Smith ---------- 423

29. Elements necessary to establish a cause of action by circumstantial evidence stated. Howell v. Robinson Iron & Metal Co. ---------- 445

30. A plaintiff, relying on circumstantial evidence to sustain a cause of action, is not required to exclude the possibility that damages flowed from some cause other than the one on which he relies. Howell v. Robinson Iron & Metal Co. ---------- 445

31. If circumstantial evidence is susceptible of any reasonable inference inconsistent with an inference of

negligence on the part of the party charged, it is insufficient to sustain the charge or to require submission of the issue to a jury. Howell v. Robinson Iron & Metal Co. ---------- 445

32. Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, a question for determination by a jury is presented. Howell v. Robinson Iron & Metal Co. ---------- 445

33. A jury may properly be instructed that certain facts are proper to be considered in determining whether or not there has been negligence, but whether or not the facts in evidence establish negligence is solely for the jury. Peterson v. Skiles ---------- 470

34. Where the evidence on the issue of negligence is in conflict, the question is one for the jury. The Supreme Court, on appeal in such a case, will not resolve conflicts in or weigh evidence. Peterson v. Skiles ---------- 470

35. The admission or rejection of photographs in evidence is largely within the discretion of the trial court. Error may not be predicated thereon in the absence of a showing of an abuse of discretion. Peterson v. Skiles ---------- 470

36. If a defendant in an action in equity moves at the close of the plaintiff's evidence for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it. Plummer v. National Leasing Corp. ---------- 557

37. Where evidence that is not properly admissible has been received in evidence but there was nothing in the form of the question to indicate that the evidence would be inadmissible, the aggrieved party cannot complain, unless he moves to strike out the objectionable testimony and withdraw it from the consideration of the jury. Timmons v. School Dist. 574

38. A conviction may rest on the uncorroborated testimony of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. Rains v. State ---------- 586

39. Objection that the prosecuting attorney is guilty of misconduct at the trial prejudicial to defendant must be taken at the time. It is primarily a question for the trial court. Rains v. State ---------- 586

40. Where the charge to the jury considered as a whole correctly states the law, the verdict and judgment will not be reversed merely because a single instruction, when considered separately, is incomplete. Rains v. State ---------- 586
41. Where the trial court has instructed generally as to the issues in a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining. Rains v. State ---------- 586
42. The court examines the evidence on a motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. Knoll v. Knoll ---------- 602
Hall v. Hadley ----------675
43. In considering a motion for summary judgment, the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. Knoll v. Knoll ---------- 602
Hall v. Hadley ---------- 675
44. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Knoll v. Knoll ---------- 602
Hall v. Hadley ---------- 675
45. A motion for summary judgment may be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Knoll v. Knoll ---------- 602
46. Where the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted. Knoll v. Knoll ---------- 602
47. A verdict based on speculation and conjecture will not be permitted to stand. Graceland Park Cemetery Co. v. City of Omaha ---------- 608
48. Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence. McCarty v. Morrow ---------- 643
49. It is the duty of the trial court without request to instruct the jury as to the proper measure of

damages in a personal injury action. McCarty v. Morrow ---------- 643
50. Where an instruction is so framed as to mislead the jury into a duplication of an element of recovery, or into an award of damages twice for the same loss, such instruction is prejudicially erroneous. McCarty v. Morrow ---------- 643
51. It is within the discretion of the trial court to require the parties to appear at a pre-trial conference to consider the matters enumerated in the rule on pre-trial procedure promulgated by the Supreme Court. Pressey v. State ---------- 652
52. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law. Ellingson v. Dobson Brothers Constr. Co. ---------- 659
Johns v. Glidden ---------- 732
53. Where the evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury. Ellingson v. Dobson Brothers Constr. Co. ---------- 659
54. Rule as to sufficiency of evidence to sustain a judgment in a law action where a jury is waived stated. Schuett v. Hargens ---------- 663
55. Where a default has been regularly entered, it is largely within the discretion of the trial court as to whether a defendant shall be permitted to come in afterwards and make his defense. Morgan v. Weiner ---------- 715
56. The discretion of the district court upon a motion to set aside a default judgment is a legal one, and in the absence of a showing of an abuse of discretion the Supreme Court will not interfere. Morgan v. Weiner ---------- 715
57. The facts and circumstances in each case, as shown by the record, determine whether there has been an abuse of discretion. Morgan v. Weiner ---------- 715
58. A conflict in the evidence of expert witnesses will be determined in the same manner as conflicts in the evidence on any material fact. Smith v. Stevens --- 723
59. The determination as to whether evidence as to weather conditions 1 mile away is relevant and material to the issues in a case is largely within

the discretion of the trial court. Cover v. Platte Valley Public Power & Irr. Dist. ---------- 751

60. A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. Cover v. Platte Valley Public Power & Irr. Dist. ---------- 751

61. When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury. Hammon v. Pedigo ---------- 787

62. Ordinarily error is waived if after a party has adduced objectionable evidence the opposing party adduces on direct or cross-examination evidence on the same subject. Johnson v. Airport Authority ---- 801

63. Effect of introduction of further evidence after denial of motion for directed verdict at close of state's evidence stated. State v. Kimbrough ------ 873

Trusts.

All persons who knowingly aid or participate in committing a breach of trust will be held responsible for the resulting loss, and will be held accountable by personal judgment for the value of the property so converted. Schepers v. Lautenschlager -------- 107

Usury.

A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the difference in the two prices may exceed lawful interest for a loan. Trailmobile, Inc. v. Hardesty ---- 46

Vendor and Purchaser.

1. Where a vendee is in default under a contract of sale of real estate making time the essence and providing for a forfeiture in case of default, and where there has been no waiver of the provisions of the agreement or a defense thereto established, the contract will be enforced as made. Industrial Loan & Inv. Co. v. Lowe ---------- 624

2. In the ordinary contract for the sale of real estate, equity will not regard time as of the essence, but

it may be made such where so expressly stipulated or an intention that it shall be such is clearly manifested by the agreement as a whole, construed in the light of the surrounding circumstances. Industrial Loan & Inv. Co. v. Lowe ---------- 624

Waters.

1. Grants of land upon rivers in this state carry with them the exclusive right and title of the grantees to the center of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. Oliver v. Thomas -------- 36
2. The thread or center of the channel of a river, within the meaning of the law, is the line which gives the owners of the land on either side access to the water, whatever its stage, and particularly at its lowest flow. Oliver v. Thomas ---------- 36
3. The common-law doctrine in regard to surface waters is in force and controls in this state. Nichol v. Yocum ---------- 298
4. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence. Nichol v. Yocum ---- 298
5. The common enemy doctrine as to surface waters is not of common-law origin and it is disapproved as a controlling rule of law in this state. Nichol v. Yocum ---------- 298
6. When surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainway, the flow may not be arrested or interfered with to the injury of neighboring proprietors. Nichol v. Yocum 298
7. The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature. Nichol v. Yocum ---------- 298
8. While the flow of surface waters in a natural depression, draw, swale, or other natural drainway

may be temporary and occasional, the course which they uniformly take is the controlling factor. Nichol v. Yocum ---------- 298

9. The fact that there is no natural outlet from the servient estate does not relieve it from receiving such surface waters from the dominant estate. Nichol v. Yocum ---------- 298

10. The Department of Water Resources has original and exclusive jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation, power, or other useful purposes, except as specifically limited by statute. Hickman v. Loup River Public Power Dist. ---------- 428

11. Where the owner of a superior right seeks to acquire water being used for power purposes under an earlier priority, he is limited to the statutory right of condemnation unless the just compensation can be determined by mutual agreement. Hickman v. Loup River Public Power Dist. ---------- 428

12. In a proceeding by a junior appropriator and others similarly situated to cancel and annul the appropriation of a senior appropriator, the Department of Water Resources has no authority to compel the acceptance of an offer of compensation in lieu of condemnation. Hickman v. Loup River Public Power Dist. ---------- 428

13. In a class action to cancel and annul an appropriation of public waters, an unaccepted offer by the respondent to waive its rights as against the petitioner does not make the question of the validity of respondent's appropriation moot. Hickman v. Loup River Public Power Dist. ---------- 428

14. An owner of land may, without liability, drain the same in the general course of natural drainage by constructing and maintaining, in a reasonable and proper manner on his own land, open ditches or tile drains which discharge a reasonable quantity of water into a natural drainway or watercourse. Wells v. Miller ---------- 780

15. Water flowing in a well-defined watercourse may not lawfully be diverted and cast upon the lands of an adjoining landowner where it was not wont to run according to natural drainage. Wells v. Miller 780

16. The owner or proprietor of lands bordering upon either the normal or flood channel of a natural watercourse is entitled to have its water, whether within its banks or its flood plane, run as it was

wont to run according to natural drainage. No one has the lawful right by diversion or obstruction to interfere with its accustomed flow to the damage of another. Wells v. Miller ---------- 780

17. A landowner, through or adjacent to whose lands is constructed and maintained a public road, has a right to such advantage from it by way of drainage as is incidental to its existence and which does not inconvenience the public or individuals, or injure the public work. Wells v. Miller ---------- 780

18. Where the evidence shows that a party made a proper use of a public road ditch as it was laid out and constructed by the county, such party may not be enjoined on the theory that he is diverting water from its natural course of drainage onto the lands of another to the latter's damage. Wells v. Miller -- 780

Wills.

1. When the language used in a will is clear and unambiguous, the court will apply thereto its usual and ordinary meaning and then apply to the construction thereof the applicable rules of law. Carr v. Carr ---------- 189

2. The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder, if the meaning of the testator is obscure in this respect. Carr v. Carr ---- 189
Baldwin v. Colglazier ---------- 775

3. Where the language of the will postpones the vesting of an estate in remainder to the time of the death of the holder of the life estate, and no other intent can be gathered within the four corners of the will, the vesting of the remainder absolutely occurs upon the death of the holder of the life estate. Carr v. Carr ---------- 189

4. Under circumstances stated, the remainder interest existing upon the death of the testator was contingent and not absolute. Carr v. Carr ---------- 189

5. The creation by will of an interest in real estate defeasible upon the occurrence of an expressed contingency is not legally objectionable and is valid and enforcible. Carr v. Carr ---------- 189

6. The words "should either die without lawful issue" refer to the period of time prior to the vesting of the estate involved when the intention of the

testator is not otherwise indicated within the four corners of the will. Carr v. Carr ---------- 189

7. A proponent of a lost will must show what became of the original will, in whose custody it was placed, and account for its nonproduction in the probate proceeding. Hober v. McArdle ---------- 510

8. A will which was left in the custody of the testator, and which cannot be found after his death, is presumed to have been destroyed by him with the intention of revoking it. Hober v. McArdle ---------- 510

9. There is no presumption that a lost will was revoked. A will which was delivered to a third person after its execution, and which cannot be found after the death of the testator, is presumed to have been lost. Hober v. McArdle ---------- 510

10. If a will is traced out of the testator's custody, the burden is on the party alleging revocation to show that the will was returned to the control of the testator or destroyed at his direction. Hober v. McArdle ---------- 510

11. Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is that the testator destroyed it animo revocandi. Muse v. Stewart ---- 520

12. Declarations of a testator may be received in evidence to prove the existence of a will. Muse v. Stewart ---------- 520

13. The presumption of revocation is not conclusive, but may be overcome by proof which is clear, unequivocal, and convincing that the testator did not revoke the will. Muse v. Stewart ---------- 520

14. The burden of proof is on the proponents of a lost will. The determination of the sufficiency of the evidence to overcome the presumption is for the court in the first instance. Muse v. Stewart ------ 520

15. The Supreme Court does not mean to infer that the proof required must establish with absolute certainty that an alleged lost will was not revoked, but it does say that a degree of proof is required which produces conviction in an unprejudiced mind. Muse v. Stewart ---------- 520

16. When the language used in a will is clear and unambiguous the court will apply thereto its usual and ordinary meaning and then apply to the construction thereof the applicable rules of law. Baldwin v. Colglazier ---------- 775

17. In the absence of provisions indicating the contrary a will giving a remainder to the children of a life tenant becomes vested at once in the children, defeasibly, despite the presence of a limitation over in the event of the death of the life tenant leaving no child. Baldwin v. Colglazier ---------- 775

Witnesses.

1. Whether a witness' qualifications to state his opinion are sufficiently established rests largely in the discretion of the trial court. Its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse of discretion. Trailmobile, Inc. v. Hardesty ---------- 46
2. Persons engaged in performing services of the same character as those to be valued and persons who have knowledge of the business in and from which the services have been rendered, and their value, may give their opinion as to the value of the services. Trailmobile, Inc. v. Hardesty ---------- 46
3. A witness may be impeached by extrajudicial statements made by him out of court. Such statements may be explained, rebutted, or contradicted, and will be given such weight as the trier of facts deems them entitled. Chism v. Convair Mobile Homes, Inc. 86
4. In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. Leffelman v. City of Hartington ---------- 259
5. Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony. Marasco v. Fitzpatrick ---------- 272
6. Without qualifying as an expert on the subject of intoxication, a witness who has actual knowledge and sufficient observation of an occurrence should be allowed to supplement his description by his opinion. Pierce v. State ---------- 319
7. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown. Pierce v. State ---------- 319

8. Before a witness, not a party to the suit, can be impeached by proof that he made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he ever made such statements. Pierce v. State ---------- 319
9. A witness may give his opinion from observations made by him, after stating the facts upon which the conclusion is drawn, that a person was or was not under the influence of intoxicating liquor. Lemmon v. State ---------- 387
10. A person having a direct legal interest in the result of a civil action, when the adverse party is the representative of a deceased person, is not competent to testify to any transaction or conversation had between the deceased person and the witness, in the absence of waiver as provided in the statute. Whitten v. Laflin ---------- 464
11. It is against sound principles of professional ethics for one who knows he is to be called as a material witness in a case to appear as attorney therein. Muse v. Stewart ---------- 520
12. Even though an attorney is representing himself in a representative capacity, he should not appear both as an attorney and as a witness. Muse v. Stewart ---------- 520
13. By statute, a person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned; but in all other cases his examination must be by deposition, if a proper showing is made to the trial court for the taking of such deposition. Rains v. State -------- 586
14. A conflict in the evidence of expert witnesses will be determined in the same manner as conflicts in the evidence on any material fact. Smith v. Stevens 723

Workmen's Compensation.

1. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. To entitle the plaintiff to a recovery he must prove by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. Klentz v. Transamerican Freightlines, Inc. ---------- 53
2. A compensation award cannot be based on possibilities or speculation, and if an inference favorable

to a claimant can only be reached on the basis thereof, he cannot recover. Klentz v. Transamerican Freightlines, Inc. ---------- 53

3. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. Klentz v. Transamerican Freightlines, Inc. ---------- 53
Breland v. Ceco Steel Products Corp. ---------- 354

4. Rule respecting trial of workmen's compensation case de novo in Supreme Court stated. Klentz v. Transamerican Freightlines, Inc. ---------- 53
Wengler v. Grosshans Lumber Co. ---------- 839

5. Where an employee working in a grain elevator is subjected to unusual inhalations of wheat dust for an extended period of time which results in a disabling emphysema, such disability is compensable as an occupational disease. Riggs v. Gooch Milling & Elevator Co. ---------- 70

6. Where an employee in a grain elevator is continuously exposed to quantities of wheat dust for an extended period of time, such exposure is a condition which is characteristic of and peculiar to the business of operating a grain elevator. Riggs v. Gooch Milling & Elevator Co. ---------- 70

7. The aggravation of an employee's existing physical condition by occupational hazards which are characteristic of and peculiar to the employment is compensable under the Workmen's Compensation Act where occupational disease results. Riggs v. Gooch Milling & Elevator Co. ---------- 70

8. The fact that an employee's emphysema may be attributable in whole or in part to his own susceptibility or sensitivity to the properties of wheat dust is not ordinarily a defense to a claim for compensation benefits. Riggs v. Gooch Milling & Elevator Co. 70

9. In an action under the Workmen's Compensation Act the burden is on the claimant to establish by a preponderance of the evidence that he sustained a personal injury by an accident arising out of and in the course of his employment. Chism v. Convair Mobile Homes, Inc. ---------- 86
Marasco v. Fitzpatrick ---------- 272
Graber v. Scheer ---------- 552
Hagler v. Jensen ---------- 699
Smith v. Stevens ---------- 723

10. Mere exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident within the meaning of the Workmen's Compensation Act. Chism v. Convair Mobile Homes, Inc. ---------- 86
Green v. Benson Transfer Co. ---------- 226
11. For workmen's compensation purposes, total disability means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. Thinnes v. Kearney Packing Co. ---------- 123
Smith v. Stevens ---------- 723
12. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. Thinnes v. Kearney Packing Co. ---------- 123
13. Disability is not to be measured solely by the occupation in which the workman was engaged at the time of the injury. Disability is not total if the workman who was injured is still capable of obtaining and performing remunerative employment. Thinnes v. Kearney Packing Co. ---------- 123
14. Disability under specified provisions of Workmen's Compensation Act refers to loss of earning power rather than loss of bodily function. Losses in bodily function, so far as these provisions of the statute are concerned, are important only as they relate to earning capacity. Thinnes v. Kearney Packing Co. ---------- 123
15. Under the workmen's compensation law, the plaintiff must prove by a preponderance of the evidence, before compensation can be awarded, that personal injury to an employee was caused by an accident arising out of and in the course of his employment. Breland v. Ceco Steel Products Corp. ---------- 354
16. Facts must be proved by the plaintiff by sufficient legal evidence leading to the direct conclusion, or a legal inference therefrom, that an accidental injury occurred and caused the disability. Breland v. Ceco Steel Products Corp. ---------- 354
17. Where the evidence is conflicting and cannot be reconciled, the Supreme Court, upon a trial de novo

in a workmen's compensation case, will consider the fact that the trial court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. Breland v. Ceco Steel Products Corp. ---- 354
Hagler v. Jensen ---------- 699

18. If, after injury, an employee receives the same or higher wage than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired. Breland v. Ceco Steel Products Corp. ---------- 354

19. An appeal to the Supreme Court in a workmen's compensation case is considered and determined de novo upon the record. Graber v. Scheer ---------- 552
Hagler v. Jensen ---------- 699
Wengler v. Grosshans Lumber Co. ---------- 839
Brewer v. Hilberg ---------- 863

20. An injury arises out of an employment when there is a reasonable causal connection between the conditions under which the work is required to be performed and the injury received. Graber v. Scheer 552

21. An award of compensation in a workmen's compensation case may not be based upon possibilities, probabilities, or speculative evidence. Graber v. Scheer ---------- 552

22. Statutory definition of word "accident" as applied to Workmen's Compensation Act is given. Hagler v. Jensen ---------- 699

23. Facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability. Hagler v. Jensen ---------- 699

24. Symptoms of pain and anguish such as weakness or expressions of pain clearly involuntary or any other symptoms indicating a deleterious change in bodily condition may constitute objective symptoms within the requirements of the Workmen's Compensation Act. Hagler v. Jensen ---------- 699

25. Definition of term "total disability" in workmen's compensation case is given. Hagler v. Jensen ---- 699

26. In a workmen's compensation case, a causal connection must be shown between the accident suffered by the claimant and the cause of his disability. Smith v. Stevens ---------- 723

27. In a workmen's compensation case, it is sufficient to show that the injury and preexisting disease combined to produce disability. Smith v. Stevens 723
28. The Workmen's Compensation Act is to be liberally construed to the end that its beneficent purposes may not be thwarted by technical refinement of interpretation. Wengler v. Grosshans Lumber Co. -- 839
29. The rule of liberal construction, as it relates to the Workmen's Compensation Act, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation. It does not permit a court to award compensation when the required proof is lacking. Wengler v. Grosshans Lumber Co. ---------- 839
30. The Workmen's Compensation Act should be liberally construed to carry out its beneficent purposes, but under the guise of a liberal construction it should not be extended to cases which by plain language are excluded from its scope. Wengler v. Grosshans Lumber Co. ---------- 839
31. Under the Workmen's Compensation Act the rights of the plaintiff and the liabilities of the defendant are fixed by the terms of the statute. Wengler v. Grosshans Lumber Co. ---------- 839
32. The term "disability" as used in the Workmen's Compensation Act is to be measured by the capacity or incapacity of the employee to earn wages he was receiving at the time of injury, and is confined to the loss of ability to earn in the same or any other employment. Wengler v. Grosshans Lumber Co. ---------- 839
33. 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. Wengler v. Grosshans Lumber Co. ---------- 839
34. The compensation provided for the loss of an eye, under schedule providing for permanent injury to specific classes, is exclusive and includes the loss of binocular vision resulting from the loss of an eye. Brewer v. Hilberg ---------- 863
35. Temporary disability under the Workmen's Compensation Act ends when the condition becomes fixed and the employee is restored so far as the permanent character of his injuries will permit. Brewer v. Hilberg ---------- 863

Zoning.

1. Where the provisions of a zoning ordinance are expressed in common words of everyday use, without enlargement, restriction, or definition, they are to be interpreted and enforced according to their generally accepted meaning. City of Omaha v. Cutchall 452
2. A city may properly sue to enjoin carrying on a restaurant or commercial business in violation of a zoning ordinance. City of Omaha v. Cutchall ------ 452
3. A city operating under a home rule charter has the power to zone the city in the interest of public health, safety, and morals, but such action must not be unreasonable, discriminatory, and arbitrary. City of Omaha v. Cutchall ---------- 452
4. What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere. City of Omaha v. Cutchall ---------- 452
5. A court of equity will not enforce a zoning ordinance when its operation and effect will unreasonably and arbitrarily deprive the owner of the substantial use and value of his property and when the purpose of the zoning did not require the hardship to be inflicted. City of Omaha v. Cutchall -------- 452